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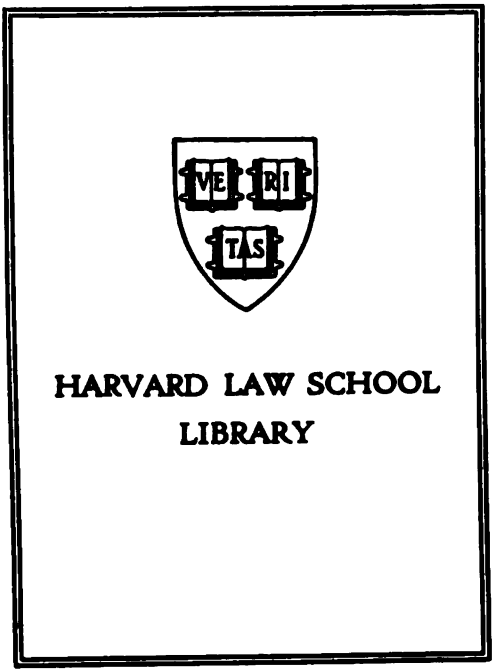

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Boston & Maine Railroad *v.* Montgomery . . . 114
——— *v.* Portland, Saco & Portsmouth Railroad . . . 498
Boston & Sandwich Glass Co. *v.* Moore 435
Bowers (Watkins *v.*) . . . 383
Brady *v.* American Print Works 98
Brainard *v.* Fowler 262
Brigham *v.* Townsend . . . 287
Brookline (Lyons *v.*) . . . 491
——— (Waltham *v.*) . . . 479
Brooks *v.* Cutter 132
Brown *v.* Abington Savings Bank 69
Buell *v.* County of Worcester 372
Builders' Ins. Co. (Thomas *v.*) 121
Butland (Commonwealth *v.*) . 317

Callaghan *v.* Pocasset Manuf. Co. 173
Cambridge (Attorney General *v.*) 518
Cardoze (Commonwealth *v.*) . 210
Carland *v.* Young 150
Carr *v.* Dooley 294
Caton (Day *v.*) 513
Central Ins. Co. (Franklin Savings Institution *v.*) . . 240
Chace *v.* Sherman 387
Chadburne (Curley *v.*) . . . 489
Chase *v.* Aldermen of Springfield 556
Cheshire *v.* Adams & Cheshire Reservoir Co. 356
Cheshire National Bank *v.* Jewett 241
Chipman *v.* Foster 189
Clark (Galligan *v.*) 83

HARVARD LAW LIBRARY

Digitized by Google

Walsh *v.* Macomber 73
Waltham *v.* Brookline . . . 479
Warner (Worthy *v.*) . . . 550
Warren (Porter *v.*) 535
Washburn (Cunningham *v.*) . 224
Watkins *v.* Bowers 383
Weed (Blodgett *v.*) 215
——— (Hinman *v.*) 215
——— (Palmer *v.*) 215
Wentworth (Turner *v.*) . . . 459
Whitcomb *v.* Converse . . . 38
Whitehead *v.* Kitson . . . 484
Whitford *v.* Southbridge . . 564
Wight (Ray *v.*) 426
Williams *v.* Leyden . . . 237
Wilson (Goodrich *v.*) . . . 429
——— *v.* Lynn 174
Worcester (Crompton Carpet Co. *v.*) 375
——— *v.* Kelley 575
Worthy *v.* Warner 550

Young (Carland *v.*) . . . 150
——— *v.* The Orpheus . 179

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Massachusetts

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

OCTOBER 1875 — MARCH 1876

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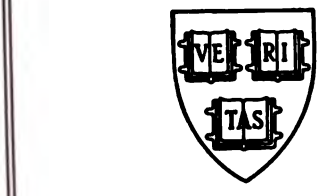

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TABLE

OF THE CASES REPORTED.

Abington Savings Bank (Brown *v.*) 69
Adams (Leonard *v.*) 366
Adams & Cheshire Reservoir Co. (Cheshire *v.*) 356
Aldermen of Springfield (Chase *v.*) 556
Alger *v.* Easton 77
American Linen Co. (Preston *v.*) 400
American Print Works (Brady *v.*) 98
Ames *v.* Bates 397
——— (Freeman *v.*) . . . 397
——— (Gibbs *v.*) 60
Anderson (Eastham *v.*) . . . 526
Attorney General *v.* Cambridge 518
——— *v.* Old South Society 1
Atwood (Danker *v.*) 146

Ball (O'Brien *v.*) 28
Ballou (Barnstable Savings Bank *v.*) 487
Barbour (Laing *v.*) 523
Barker *v.* Taunton 392
Barnstable Savings Bank *v.* Ballou 487
Bates (Ames *v.*) 397
Battersby (Prescott *v.*) . . . 285
Bean (Johnson *v.*) 271
Belcher (Guild *v.*) 257
——— *v.* Loveland 539
Blaney (Holden *v.*) 421
Blodgett *v.* Weed 215
Boardman (Haynes *v.*) . . . 414
——— *v.* Jackson 161
Boston (Fowle *v.*) 126
——— (Lawrence *v.*) . . . 126
——— (Norton *v.*) 194
Boston & Maine Railroad *v.* Montgomery . . . 114
——— *v.* Portland, Saco & Portsmouth Railroad . . . 498
Boston & Sandwich Glass Co. *v.* Moore 435
Bowers (Watkins *v.*) . . . 383
Brady *v.* American Print Works 98
Brainard *v.* Fowler 262
Brigham *v.* Townsend . . . 287
Brookline (Lyons *v.*) . . . 491
——— (Waltham *v.*) . . . 479
Brooks *v.* Cutter 132
Brown *v.* Abington Savings Bank 69
Buell *v.* County of Worcester 372
Builders' Ins. Co. (Thomas *v.*) 121
Butland (Commonwealth *v.*) . 317

Callaghan *v.* Pocasset Manuf. Co. 173
Cambridge (Attorney General *v.*) 518
Cardoze (Commonwealth *v.*) . 210
Carland *v.* Young 150
Carr *v.* Dooley 294
Caton (Day *v.*) 513
Central Ins. Co. (Franklin Savings Institution *v.*) . . 240
Chace *v.* Sherman 387
Chadburne (Curley *v.*) . . . 489
Chase *v.* Aldermen of Springfield 556
Cheshire *v.* Adams & Cheshire Reservoir Co. 356
Cheshire National Bank *v.* Jewett 241
Chipman *v.* Foster 189
Clark (Galligan *v.*) 88

Digitized by Google

Miller v. County Commissioners 485
Miner (Fellows v.) 541
Monies v. Lynn 273
Montgomery (Boston & Maine Railroad v.) 114
Moore (Boston & Sandwich Glass Co. v.) 435
Motley v. Sargent 231
Moylan (Commonwealth v.) . 109
Munroe (Torrey v.) . . . 490

New Bedford Railroad (Ladd v.) 412
New Haven & Northampton Co. v. Hayden 361
Newton (Healey v.) 480
——— (Tufts v.) 476
Norton v. Boston 194

O'Brien v. Ball 28
——— (Commonwealth v.) . 342
Old South Society (Attorney General v.) . . . 1
——— v. Crocker 1
Orpheus, The (Jones v.) . . 179
——— (Lewis v.) 179
——— (Young v.) 179

Paine (Pratt v.) 439
Palmer v. Weed 215
Parker v. Parker 478
Parsons v. Topliff 245
Pease (Rider v.) 492
Peck v. Conway 546
Perry (Swamscott Machine Co. v.) 123
Petersilea v. Stone 465
Pfau (Healy v.) 589
Phenix (Commonwealth v.) . 350
Pickering (Fowler v.) . . . 33
——— v. Reynolds 111
Pierce (Richardson v.) . . . 165
Pocasset Manuf. Co. (Callaghan v.) 173
Porter v. Warren 535
Portland, Saco & Portsmouth Railroad (Boston & Maine Railroad v.) 498
Pratt (Harding v.) 188
——— v. Paine 439
Prescott v. Battersby . . . 285
Preston v. American Linen Co. 400
Providence & Worcester Railroad (Hawkins v.) . . . 596

Randall (Commonwealth v.) . 107
Ratigan (Hamblen v.) . . . 153
Ray v. Wight 426
Reynolds (Pickering v.) . . 111
Rice v. Enwright 187
Richardson v. Pierce . . . 165
Rider v. Pease 492
Ripley (Hall v.) 135
——— v. Hall 135
Rockett (Gifford v.) 71
Rose v. Taunton 99
Russell v. Lathrop 531

Sabins v. Jones 167
Sargent (Motley v.) 231
Schofield v. McConnell . . . 368
Scituate (Damon v.) 66
Sears (Stuart v.) 143
Seekonk (Hill v.) 85
Sessions (Hewett v.) . . . 221
Shaw v. Hitchcock 254
Shepard (Hamilburgh v.) . . 80
Sherman (Chace v.) 387
Silva (Stults v.) 137
Simpson v. Davis 269
Sinnott (Homer v.) 191
Smith (Commonwealth v.) . . 305
——— v. McCarty 519
Snow v. Foley 102
——— v. Union Ins. Co. . . 592
Southbridge (Whitford v.) . 564
Springfield Ins. Co. (Foote v.) 259
Stanton (Judson v.) 521
Stetson v. Curtis 266
Stone (Petersilea v.) . . . 465
Stuart v. Sears 143
Stults v. Silva 137
Swamscott Machine Co. v. Perry 123

Tapley (Martin v.) 116
Taunton (Barker v.) . . . 392
——— (Rose v.) 99
——— (Tobey v.) 404
Taunton Street Railway (Wallace v.) 91
Thomas v. Builders' Ins. Co. . 121
——— (Henry v.) 583

Digitized by Google

TABLE OF CASES

CITED BY THE COURT.

bbot v. Hermon, 7 Greenl. 118 515
dams v. Perry, 43 N. Y. 487 544
—— v. Waggoner, 33 Ind. 531 353
lbro v. Agawam Canal, 6 Cush. 75 421
len v. Leonard, 16 Gray, 202 251
mherst v. Shelburne, 11 Gray, 107 480
ndover v. County Commissioners, 5 Gray, 398 178
—— v. Easthampton, 5 Gray, 390 480
—— v. Sutton, 12 Met. 182 357
nglesea Colliery Co. In re, L. R. 2 Eq. 379 43
—— v. ——, L. R. 1 Ch. 555 43
ntarctic, The, 1 Sprague, 206 184
sop v. Yates, 2 H. & N. 768 414
cherley v. Vernon, 10 Mod. 518 57
torney General v. Federal Street Meeting-house, 3 Gray, 1 23
—— v. Justices of the Municipal Court, 103 Mass. 456 339
—— v. London, 3 Bro. Ch. 171 545
—— v. —— 1 Ves. Jr. 243 545
—— v. Merrimack Manuf. Co. 14 Gray, 586 23
—— v. Sturge, 19 Beav. 597 545
—— v. Trinity Church, 9 Allen, 422 25
ustin v. Walsh, 2 Mass. 401 500
bson v. Rockport, 101 Mass. 93 573
dger v. Boardman, 16 Gray, 559 549
ker v. Allen, 21 Pick. 382 78
—— v. Clarke Institution, 110 Mass. 88 545
—— v. Jewell, 6 Mass. 460 500
—— v. Smith, 13 Met. 34 546
ldwin v. Soule, 6 Gray, 321 390
nnon v. Angier, 2 Allen, 128 269
rdwell v. Conway Ins. Co. 118 Mass. 465 123
rfield v. Loughborough, L. R. 8 Ch. 1 43
rry v. Adams, 3 Allen, 493 273
rstow v. Marsh, 4 Gray, 165 209, 477
—— v. Robinson, 2 Allen, 605 184
rtlet v. King, 12 Mass. 536 24, 544
scom v. Albertson, 34 N. Y. 584 544
ssett v. Brown, 100 Mass. 355 163
tes v. Ray, 102 Mass. 458 375
Bates v. Tappan, 99 Mass. 376 467
—— v. Weymouth Iron Co. 8 Cush. 548 359
Baxter v. Knowles, 12 Allen, 114 599
Belknap v. Gibbens, 13 Met. 471 143
Bell v. Hansley, 3 Jones (N. C.) 131 353
Bemis v. Arlington, 114 Mass. 507 573
Bennett v. Hood, 1 Allen, 47 474
—— v. New Bedford, 110 Mass. 433 294
Bent v. Hartshorn, 1 Met. 24 438
Bentley v. Ward, 116 Mass. 333 153
Bixby v. Brundige, 2 Gray, 129 68
Blackie v. Hudson, 117 Mass. 181 295
Blanchard v. Blackstone, 102 Mass. 343 387
—— v. Young, 11 Cush. 341 249
Bliss v. American Bible Society, 2 Allen, 334 24
—— v. Ropes, 9 Allen, 339 37
Blodgett v. Boston, 8 Allen, 237 473
Bloss v. Tobey, 2 Pick. 320 391
Bond v. Ward, 7 Mass. 123 244
Bornstein v. Lans, 104 Mass. 214 387
Boston v. Richardson, 13 Allen, 146 235, 367
Boston & Maine Railroad v. Babcock, 3 Cush. 228 483
Boston & Worcester Railroad v. Sparhawk, 5 Met. 469 272
Boston Diatite Co. v. Florence Manuf. Co. 114 Mass. 69 484
Bosworth v. Pomeroy, 112 Mass. 293 428
—— v. Swansey, 10 Met. 363 278
Boulter v. Clark, Bull. N. P. 16 353
Boylen v. Young, 6 Allen, 582 72
Boynton v. Warren, 99 Mass. 172 537
Bradbury v. Smith, 21 Maine, 117 43
Bradford v. Rice, 102 Mass. 472 428
—— v. Tinkham, 6 Gray, 494 188
Bradstreet, Ex parte, 4 Pet. 102 209
Brainard v. Boston & New York Central Railroad, 12 Gray, 407 235
Braintree v. Hingham, 17 Mass. 432 411
Braley v. Boomer, 116 Mass. 527 159
Brattle Square Church v. Grant 3 Gray, 142 25
Brettun v. Anthony, 103 Mass. 37 391

Digitized by Google

Knapp v. Abell, 10 Allen, 485 265
Knight v. Low, 15 Ind. 374 121
Knowlton v. Plantation No. 4, 14 Maine, 28 515
Kutzmeyer v. Ennis, 3 Dutcher, 371 251

Lamb v. Runce, 4 M. & S. 275 516
Lamson v. Clarkson, 113 Mass. 348 30
Leach v. Wilbur, 9 Allen, 212 99
Lee v. Kane, 6 Gray, 495 390
Leland v. Adams, 9 Gray, 171 172
Leonard v. Allen, 11 Cush. 241 346
——— v. Leonard, 7 Allen, 277 415
Lethbridge v. Mytton, 2 B. & Ad. 772 507
Lewiston v. County Commissioners, 60 Maine, 19 178
Libby v. Downey, 5 Allen, 299 287
Lincoln v. Lincoln, 12 Gray, 45 381
——— v. ———, 107 Mass. 590 172
——— v. Taunton Copper Co. 9 Allen, 181 94
Little v. Little, 13 Pick. 426 506
Logan v. Austin, 1 Stew. (Ala.) 476 358
Lombard v. Boyden, 5 Allen, 249 512
Loosemore v. Radford, 9 M. & W. 657 507
Loring v. Manufacturers' Ins. Co. 8 Gray, 28 241
——— v. Sumner, 23 Pick. 98 258
——— v. Thorndike, 5 Allen, 257 511
Lothrop v. King, 8 Cush. 382 284
Loud v. Charlestown, 99 Mass. 208 78, 195
Lowell v. Boston, 111 Mass. 454 359, 584
——— v. Boston & Lowell Railroad, 23 Pick. 24 358
Lynch v. Cronan, 6 Gray, 531 184
Lynde v. McGregor, 13 Allen, 188 435

Maine v. Harper, 4 Allen, 115 153
Makepeace v. Coates, 8 Mass. 451 398
Marble v. Keyes, 9 Gray, 221 474
Marshall v. Knox, 16 Wall. 551 434
Martin v. Bayley, 1 Allen, 381 538
——— v. Court, 2 T. R. 640 507
——— v. Hilton, 9 Met. 371 185
Matteson v. Scofield, 27 Wis. 671 58
Matthew v. Ollerton, Comb. 218 353
Mayne's case, 5 Rep. 20 b 458
Mayor of Lyons v. East India Co. 1 Moore P. C. 175 545
McGrath v. Conway, 116 Mass. 360 229
McGregory v. McGregory, 107 Mass. 543 81
M'Hugh, petitioner, 3 Cush. 452 60
Melvin v. Proprietors of Locks & Canals, 5 Met. 15 415
Merchants' National Bank v. National Eagle Bank, 101 Mass. 281 145
Metcalf v. Cady, 8 Allen, 587 168
Miles v. Williams, 9 Q. B. 47 120
Millbury v. Blackstone Canal Co. 8 Pick. 473 357
Miller v. Post, 1 Allen, 434 287
Montague v. Boston & Fairhaven Iron Works, 97 Mass. 502 391
Morris v. Bowman, 12 Gray, 467 271
Morrison v. McDermott, 6 Allen, 112 76
Mulligan v. Newton, 16 Gray, 211 244
Munns v. Dupont, 1 Am. Lead. Cas. 215 66

National Bank of Clinton v. Taylor, 117 Mass. 283 n. 78
Naylor v. Fall River Iron Works, 118 Mass. 317 88
Nestor, The, 1 Sumner, 73 184
New Bedford v. County Commissioners, 9 Gray, 346 101
——— v. Hingham, 117 Mass. 445 480
New Braintree v. Southworth, 4 Gray, 304 500
Newcomb v. Brackett, 16 Mass. 161 458
Newhall v. Ireson, 8 Cush. 595 235, 367
New Haven & Northampton Co. v. Northampton, 102 Mass. 116 486
New South Meeting House in Boston, In re, 13 Allen, 497 27
Nichols v. Allen, 112 Mass. 23 81
Noble v. Boston, 111 Mass. 485 585
Noon v. Salisbury Mills, 3 Allen, 349 83, 403
Northampton Bridge Case, 116 Mass. 442 360
North Bridgewater Bank v. Copeland, 7 Allen, 139 160
Norton v. Babcock, 2 Met. 510 506
——— v. Wilbur, 5 Gray, 7 90
Nottingham Hide Co. v. Bottrill, L. R. 8 C. P. 694 438
Nowell v. Nowell, L. R. 7 Eq. 538 46
Noyes v. City Council of Springfield, 116 Mass. 87 568

Oakham v. Rutland, 4 Cush. 172 505
O'Brien v. Barry, 106 Mass. 300 33, 66
Odell v. Odell, 10 Allen, 1 544
Otis v. Hadley, 112 Mass. 100 434

Paige v. Sherman, 6 Gray, 511 100, 145
Parish v. Stone, 14 Pick. 198 258
Parker v. Boston & Maine Railroad, 3 Cush. 107 486
——— v. Dudley, 118 Mass. 602 170
——— v. Framingham, 8 Met. 260 102
——— v. Kett, 1 Ld. Raym. 658 466
——— v. May, 5 Cush. 336 23
——— v. Nightingale, 6 Allen, 341 549
——— v. Proprietors of Locks & Canals, 3 Met. 91 272
Partridge v. Messer, 14 Gray, 180 284
Patapsco, The, 13 Wall. 329 184
Patterson v. Pittsburg & Connellsville Railroad, 76 Penn. St. 389 414
Paull v. Padelford, 16 Gray, 263 170
Payson v. Macomber, 3 Allen, 69 390
Peck v. Jenness, 7 How. 612 487
——— v. Stratton, 118 Mass. 406 78
Peele v. Merchants' Ins. Co. 3 Mason, 27 595

Digitized by Google

Peabody v. Dwight, 7 Mass. 34 244
Penny v. Foy, 8 B. & C. 11 507
People v. Collins, 7 Johns. 549 468
—— v. Wright, 9 Wend. 193 198
Perkins v. Lockwood, 109 Mass. 249 457
Perley v. Chandler, 6 Mass. 453 357
Peruvian, The, 3 Ware, 154 194
Peterson v. Morgan, 116 Mass. 350 345
Phelps v. Pond, 23 N. Y. 69 544
Philbrook v. New England Ins. Co 37 Maine, 137 128
Phillips v. Soule, 6 Allen, 150 209
Pierce v. Parker, 4 Met. 80 156
Pike v. Walley, 15 Gray, 345 104
Pinkerton v. Boston & Albany Railroad, 109 Mass. 527 176
Plympton v. Woburn, 11 Gray, 415 378
Polley v. Lenox Iron Works, 4 Allen, 329 245
Potter v. Cain, 117 Mass. 238 403
Powers v. City Council of Springfield, 116 Mass. 84 487, 564
—— v. Russell, 13 Pick. 69 271
Pratt v. Harlow, 16 Gray, 379 231
—— v. Pond, 5 Allen, 59 163
Pray v. Clark, 118 Mass. 283 483
Preble v. Baldwin, 6 Cush. 549 297
Preston v. American Linen Co. 119 Mass. 400 516
Prew v. Donahue, 118 Mass. 438 153
Priest v. Groton, 103 Mass. 530 355, 417
Priestly v. Fowler, 3 M. & W. 1 413
Prince v. Boston, 111 Mass. 226 295
Prior v. Hembrow, 8 M. & W. 873 365
Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142 484
Puckett v. Bates, 4 Ala. 390 251

Quincy v. Rogers, 9 Cush. 291 425

Ramsdell v. Edgarton, 8 Met. 227 283
Ramsey's Appeal, 2 Watts, 228 399
Randall v. Eastern Railroad, 108 Mass. 276 274
Readhead v. Midland Railway, L. R. 2 Q. B. 412 413
—— v. ——, L. R. 4 Q. B. 379 413
Read v. Haskins, 116 Mass. 198 169
Regina v. Dossett, 2 C. & K. 306 355
—— v. Lewis, 1 C. & K. 419 353
—— v. Prince, L. R. 2 C. C. 154 350
—— v. Rowton, Leigh & Cave C. C. 520 346
—— v. ——, 10 Cox C. C. 25 346
Rex v. Eldridge, Russ. & Ry. 440 312
—— v. Martin, 6 C. & P. 562 346
—— v. Perkins, 4 C. & P. 537 353
—— v. Row, Russ. & Ry. 153 311
Richardson v. Burleigh, 3 Allen, 479 169
Riggs v. Rawley, 116 Mass. 596 145
Robbins v. Fletcher, 101 Mass. 115 390
Rodgers v. Parker, 9 Gray, 445 411
Rogers v. Currier, 13 Gray, 129 184
Rose v. Taunton, 119 Mass. 99 376
Rosenberg, In re, 3 Bened. 14 428
Rourke v. McLaughlin, 38 Cal. 196 58

Rowbotham v. Wilson, 8 H. L. Cas. 348 268
Russell v. Annable, 109 Mass. 72 148
—— v. Dickson, 1 Con. & Laws. 284 104
—— v. ——, 2 Drn. & War. 133 104

Safford v. Knight, 117 Mass. 281 72
169, 376
Salisbury v. Andrews, 19 Pick. 250 268
Saltonstall v. Sanders, 11 Allen, 446 23, 544
Sampson v. Shaw, 101 Mass. 145 365
Samuels v. Borrowscale, 104 Mass. 207 272
Sanderson v. White, 18 Pick. 328 545
Sawyer v. Smith, 109 Mass. 220 287
—— v. Steele, 4 Wash. C. C. 227 500
—— v. Yale Iron Works, 116 Mass. 424 419, 477
Sears v. Dennis, 105 Mass. 310 239
Seaver v. Boston & Maine Railroad, 14 Gray, 466 421
Second Congregational Society v. Waring, 24 Pick. 304 26
Sexton v. North Bridgewater, 116 Mass. 200 94
Seymour v. Maddox, 16 Q. B. 326 414
Shaw v. Hearsey, 5 Mass. 521 218
Shea v. Lawrence, 1 Allen, 167 99
Shephard v. Butterfield, 4 Cush. 425 245
Sherwood v. American Bible Society, 4 Abbott (N. Y.) 227 544
—— v. ——, 1 Keyes, 561 544
Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co. 97 Mass. 361 418
Sinclair v. Richardson, 12 Vt. 33 251
Skipp v. Eastern Counties Railway, 9 Exch. 223 414
Smalley v. Wight, 44 Maine, 442 81
Smith v. Crooker, 5 Mass. 538 147
—— v. Faulkner, 12 Gray, 251 227
—— v. Gardner, 11 Gray, 418 68
—— v. Mason, 14 Wall. 419 434
Snow v. Housatonic Railroad, 8 Allen, 441 414
Sohier v. Loring, 6 Cush. 537 166
Somers v. Wright, 114 Mass. 171 152
Sparhawk v. Sparhawk, 116 Mass. 315 91
Spaulding v. Knight, 116 Mass. 148 100
Spencer's case, Smith's Lead. Cas. (7th Am. ed.) 137 268
Spofford v. Harlow, 3 Allen, 176 68
Springfield v. Worcester, 2 Cush. 52 120
Spurr v. Scoville, 3 Cush. 578 56
Stanley v. Colt, 5 Wall. 119 96
Stark v. Coffin, 105 Mass. 328 236
State v. Beck, 1 Hill (S. C.) 363 354
—— v. Carroll, 38 Conn. 449 466
—— v. Carver, 49 Maine, 588 332
—— v. Grant, 22 Maine, 171 311
—— v. Merrill, 44 N. H. 624 199
—— v. Nelson, 8 N. H. 163 198
—— v. Symonds, 36 Maine, 128 332

Digitized by Google

Stearns v. Henderson, 9 Cush. 497 273
——— v. Mullen, 4 Gray, 151 549
——— v. Stearns, 16 Mass. 167 487
Stee'e v. Burkhardt, 104 Mass. 59 68
Stetson v. Dow, 16 Gray, 372 367, 410
——— v. Medford, 109 Mass. 242 99
Stickney v. Wilt, 23 Wall. 434
Stimpson v. Malden, 109 Mass. 313 143
Stockwell v. Silloway, 113 Mass. 382 72, 427
Stone v. Cambridge, 6 Cush. 270 178
——— v. Charlestown, 114 Mass. 214 195
——— v. Hubbardston, 100 Mass. 49 278
——— v. Russell, 11 Gray, 226 193
——— v. Wilson, 4 McCord, 203 148
Story v. Buffum, 8 Allen, 35 185
Stout v. Wren, 1 Hawks (N. C.) 420 353
Sullivan v. India Manuf. Co. 113 Mass. 396 414
Suter v. Matthews, 115 Mass. 253 163
Sutton v. Dana, 1 Met. 383 189
Swampscott Machine Co. v. Perry, 119 Mass. 123 163
Sweet v. Brown, 12 Met. 175 367
Swift v. Pierce, 13 Allen, 136 251

Taft v. Dickinson, 6 Allen, 553 515
Tapley v. Martin, 116 Mass. 275 120
Tebbetts v. Goding, 9 Gray, 254 391
Tewksbury v. County Commissioners, 117 Mass. 563 562
Thomas v. Allen, 1 Hill (N. Y.) 145 507
——— v. Poole, 7 Gray, 83 411
Thompson v. Kenyon, 100 Mass. 108 505
Thomson v. O'Sullivan, 6 Allen, 303 599
Thurston v. Lynn, 116 Mass. 544 397
Tighe v. Lowell, 119 Mass. 472 492
Tobey v. Ellis, 114 Mass. 120 166
Tomlinson v. Monmouth Ins. Co. 47 Maine, 232 261
Toof v. Martin, 13 Wall. 40 249
Torrey v. Cook, 116 Mass. 163 76
Toussaint v. Martinnant, 2 T. R. 100 507
Tower v. Appleton Bank, 3 Allen, 387 81
Townsend Bank v. Whitney, 3 Allen, 454 153
Tracy v. Kilborn, 3 Cush. 557 172
——— v. Maloney, 105 Mass. 90 266
Trask v. Hartford & New Haven Railroad, 2 Allen, 331 474
Tripp v. County Commissioners, 2 Allen, 556 99
Trustees of Smith Charities v. Northampton, 10 Allen, 498 546
Tucker v. Massachusetts Central Railroad, 116 Mass. 124 102
——— v. Seaman's Aid Society, 7 Met. 188 24
Tufts v. Adams, 8 Pick. 547 505
Turns v. Commonwealth, 6 Met. 224 295, 831

Union Bank v. Bank of United States, 3 Mass. 74 145
United States v. Breitling, 20 How. 252 209
——— v. Nelson, 2 Brock. 64 148

Verry v. Small, 16 Gray, 121 381

Waddington v. Banks, 1 Brock. 97 57
Wager v. Hall, 16 Wall. 584 249
Walker v. Boston & Maine Railroad, 3 Cush. 1 102
Wall v. Robinson, 115 Mass. 429 464
Wallace v. Taunton Street Railway, 119 Mass. 91 114
Walsh v. Walsh, 116 Mass. 377 58
Ward v. Arredondo, Hopk. Ch. 213 58
——— v. Jenkins, 10 Met. 583 434
Warnick v. Groshols, 3 Grant, 234 251
Warren v. French, 6 Allen, 317 220
Warwick v. Hawkins, 5 De G. & Sm. 481 104
Washburn v. Sewall, 9 Met. 280 24, 544
Watertown v. White, 13 Mass. 477 530
Way v. Smith, 111 Mass. 523 139
Weare v. Fitchburg, 110 Mass. 334 574
Webb v. Neal, 5 Allen, 575 544
Webster v. Campbell, 1 Allen, 313 520
——— v. Coffin, 14 Mass. 196 458
Wells v. Banister, 4 Mass. 514 515
——— v. Heath, 10 Gray, 17 25
West Roxbury v. Stoddard, 7 Allen, 158 303
Wheeler v. Wheeler, 116 Mass. 297 114
White v. Whitney, 3 Met. 81 505
Whiting v. Johnson, 6 Gray, 246 66
——— v. Mayor & Aldermen of Boston, 106 Mass. 89 195, 563
Whitman v. Porter, 107 Mass. 522 44
Whitney v. Union Railway, 11 Gray, 359 549
Wilcox v. Smith, 5 Wend. 231 468
Wilde v. Armsby, 6 Cush. 314 271
Wilder v. Cowles, 100 Mass. 487 249
Wilson v. Hildreth, 118 Mass. 578 235
——— v. Lewis, 2 Man. & G. 197 259
Wintle v. Crowther, 1 Cromp. & J. 316 259
Worcester v. Essex Merrimac Bridge, 7 Gray, 457 278
Worcester & Nashua Railroad v. Railroad Commissioners, 118 Mass. 561 562
Worcester Medical Institution v. Harding, 11 Cush. 285 227
Worthley v. Emerson, 116 Mass. 374 464
Wright v. Malden & Melrose Railroad, 4 Allen, 283 278

York v. Johnson, 116 Mass. 482 391

Zogbaum v. Parker, 75 N. Y. 120 399

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

OLD SOUTH SOCIETY IN BOSTON *vs.* URIEL CROCKER & others. ATTORNEY GENERAL *vs.* OLD SOUTH SOCIETY IN BOSTON.

Suffolk. June 22. — Oct. 23, 1875. GRAY, C. J., did not sit. AMES, J., absent.

A gift for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. But when there is a body, or a definite number of persons, ascertained or ascertainable clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone.

In 1669, land was conveyed to certain persons named "and to such as they shall associate to themselves, their heirs and successors forever, for the erection of a house for their assembling themselves together publicly to worship God, as also the erection of a dwelling-house for such minister or ministers as shall be by them and their successors from time to time orderly and regularly admitted, for the pastor or teacher to the said church or assembly, and for the accommodation of the said dwelling-house for the use of the minister or ministers as shall from time to time be chosen as aforesaid, and for the accommodation of the meeting-house, with convenient passages of ingress, egress and regress for the people, that shall there from time to time assemble as aforesaid, and for no other intent, use or purpose whatsoever." In 1677, the same grantor, by a deed reciting the preceding conveyance and the building of a meeting-house on the land by the grantees, conveyed an adjoining piece of land to the six survivors of the persons named in the preceding deed, "and to such as they shall have associated unto them in church fellowship, or shall be associated to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed is fully and amply declared," "with the house already erected thereon for the use of their ministers

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or ministry orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time and at all times forever." Both of these deeds were for a voluntary consideration. Subsequently, the grantor by her will gave to the "Third Church of Christ in Boston" her dwelling-house which adjoined the land before conveyed, "for the use of the ministry in the said church successively forever." The deeds and other writings concerning said house were by the will bequeathed to two of the persons named in the preceding deeds, as trustees for the said church, "for the end and use before declared." In 1845, the proprietors of pews in the church and their successors were made a corporation and authorized to take and hold, to the use of the corporation and its successors and assigns in fee simple, the property held by the church, "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation." *Held*, that neither the deeds nor the will created a public charity. *Held, also*, that the declaration of uses in the statute did not define a public charity, and that it was not the intention of the Legislature to so merge the interests of the trustees and the *cestuis que trust* as to discharge the estate from the trusts. *Held, also*, that lands so held might be sold by authority of the Legislature or of this court as a court of equity. *Held, also*, on a bill in equity praying for the sale of the property, and the application of the proceeds to the same trusts in another part of the city, that the vote of a majority of pewholders or members of the society was not of itself a sufficient authority to enable the corporation to make a sale, nor a sufficient reason to justify this court in authorizing it to be made; and that it was incumbent upon those who sought to make the change to satisfy the court that it was reasonably required for the accommodation of the society as a whole, and that the proposed change would not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them.

THE FIRST CASE was a bill in equity by the Old South Society against Uriel Crocker, Osmyn Brewster, David Buck, Jacob Dresser, Joseph Ballard, Simon G. Cheever, E. C. Milliken, Harriet Gray, Ellen Gray, Elizabeth Coverly, Mercy Jellison and Abigail Armstrong, members of said society, alleging as follows:

On or before April 1, 1669, Captain Thomas Savage, William Davis and others joined themselves together and formed a "church of Christ," for the purpose of the public religious worship of God in the town of Boston, with the purpose to erect a meeting-house, wherein the said church might assemble themselves together publicly to worship God.

For the purpose of aiding in the establishment of and maintaining such church, Mary Norton, widow of John Norton, did, on April 1, 1669, "for divers good causes and considerations, mee thereunto mooving, and more especially for and in consideration of that indeared affection that my late dear husband in his life time

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did beare, and my selfe doe beare unto his and my assured friends, Captaine Thomas Savage, Capt. William Davis, Mr. Hezekiah Usher, Mr. Edward Rawson, Mr. John Hull, Mr. Peter Olliver, Mr. Josiah Scottow, Mr. Edward Raynsford, Mr. Richard Trewsdall, and Mr. Jacob Elliot, all of the said Boston, and in confidence of their faithfulness to performe that trust which I shall repose in them," make a deed of conveyance or trust, wherein she conveyed a certain portion or strip of land, the same being a part of her homestead lot or garden, and being situated on the corner of what is now called Milk and Washington Streets, in Boston, and being the land substantially now occupied by the old meeting-house and the block of stores on Milk Street, to the persons above named, "and to such as they shall associate to themselves, their heires and successors forever, for the erecting of a house for their assembling themselves together publiquely to worship God, as also the erecting of a dwelling house for such Minister or Ministers as shall be by them and their successors from time to time orderly and regularly admitted for the Pastor or Teacher to the said Church or Assembly, and for the accommodation of the said dwelling house for the Minister or Ministers as shall from time to time bee chosen as aforesaid, and for the accommodation of the Meeting House with convenient passages of ingress, egress and regress for the people, that shall there from time to time assemble as aforesaid, and for noe other intent use or purpose whatsoever."

Thereupon the said Thomas Savage and others proceeded to erect a meeting-house, and a dwelling-house for their minister, and said church of Christ was duly organized, and adopted the name of "The Third Church in Boston."

The said church and its minister entered upon and took possession of the land so given, and occupied the same for a long time for a church, and dwelling-house for the minister of the church.

On June 30, 1677, the said Mary Norton by a deed, reciting the conveyance in the preceding deed, the building of a meeting-house by Savage and others, and their repairing the grantor's house and building an addition to it for a habitation for a minister at her desire, and her promise to give them the land on which they built, conveyed to said Savage and five others, the survivors of those before mentioned, "and to such as they have

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associated unto them in church fellowship, or shall be associated, to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed of April the first, 1669, is fully and amply declared," a certain additional piece of land upon which they had before built an addition to the minister's house, being the land under said addition, "for the use of their Ministers or Ministry orderly chosen by the said Society being the Third Church of Christ in Boston from time to time and at all times forever."

The will of Mary Norton, dated August 20, 1677, contained the following, among other clauses:

"*Item.* I give and bequeath unto the Third Church of Christ in Boston, my now dwelling house, with all the land belonging to the same, as it is situate near the Third Meeting House in Boston aforesaid, with all profits, privileges, rights, and appurtenances whatsoever to the same belonging or appertaining, for the use of the Ministry in the said Church successively forever. And my will further is, that the said Third Church, or some person or persons in their behalf, shall be possessed of the said House and Land, with the rights and appurtenances, at and immediately after my decease, for the reasons following: First, Because many of the particular members of the said Third Church have been large contributors to that Meeting House and Church treasure, from whom they issued. Secondly, Because of the great charge that the brethren of the said Third Church have been at in building their meeting house. Thirdly, Because I conceive it will prove inconvenient for a minister to live so near a meeting house where he doth not preach: Provided, alway, that the said Third Church, or some person or persons in their name and behalf, pay or cause to be paid unto the first Church of Christ in Boston, the full and just sum of one hundred pounds of lawful money of New England within the space of one year next after my decease; and my will is that the payment of the said sum and tender thereof, be made at or in my now dwelling house.

"*Item.* I give and make over by these presents all my deeds and other writings that concern my said house and land in said Boston, unto Capt. John Hull and Mr. Jacob Elliot, all of Boston aforesaid, as Trustees for the said Third Church of Christ in Boston, for the end and use before declared."

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Savage and others from time to time associated unto themselves various persons as composing the Third Church, and in that capacity took possession of and occupied said lands, and were and became seised in fee simple thereof, and were the managers of all the property of said church.

In 1729 the said church proceeded to remove the old meeting-house and erect a new one; and in the new meeting-house those who had associated themselves together as the successors of Thomas Savage and others purchased pews, and the same were conveyed to them by the officers of the church, and the pew proprietors in the meeting-house, which at this time was called the Old South Meeting-house, were and became the associates and successors of Thomas Savage and others, to whom the said estates had been conveyed and devised.

At about that time the church, which had formerly been called and named the Third Church in Boston, and afterwards by reason of its situation the South Church, now began to be called the Old South Church, and the house where the church and congregation assembled together for public worship was called the Old South Meeting-house, and has been so called ever since, and the plaintiff claims and believes that the name was legally changed from the Third Church to the Old South Church, and that the Old South Church is the legal successor of the Third Church, and that the pew proprietors, as constituted at the time of the building of the church in 1729, were the regular and duly constituted successors of Thomas Savage and others, and that the lands described in said deeds and will were duly and properly vested in the pew proprietors in the Old South Meeting-house until the year 1845.

By the St. of 1845, *c.* 229, the proprietors of pews in the Old South Meeting-house were made a corporation by the name of the Old South Church in Boston, (which name was subsequently, by the St. of 1859, *c.* 88, changed to the Old South Society in Boston,) with all the powers and privileges, and subject to all the duties and liabilities contained in the Rev. Sts. *cc.* 20, 44; and by said act said corporation was authorized to take and hold to the use of said corporation and its successors and assigns in fee simple, all and singular that parcel of real estate situate on Milk, Washington and Spring streets, with authority to demise and lease all or any of its real estate, except the meeting-house and land under the same.

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In 1800, the then pew proprietors caused the ancient house of Mary Norton to be removed, and in the place thereof erected a block of stores on Washington Street, which ever since have been let, and the income thereof applied to the paying the debts and expenses of the society and to the support of the public worship of God in the city of Boston and for charitable and parochial purposes; and afterwards, in the year 1845, the society removed the pastor's house on Milk Street, and in the place thereof erected a block of stores, which have been leased, and the income thereof applied for the purposes aforesaid; and afterwards the society let for business purposes the chapel owned by them, situated on Spring Lane and upon land, a part of which was originally given by Mary Norton, and a part acquired by purchase. So that at the annual meeting of the corporation in the year 1869, the entire land owned by the society, nearly all of which had been given by Mary Norton, was, with the exception of the land and yard occupied by the meeting-house, entirely occupied by stores, &c., for business purposes, and the income arising therefrom was entirely used for paying the debts and expenses of the society, and for parochial and charitable purposes.

At the meeting of the pew proprietors held in April, 1869, after due consideration, and for reasons that seemed good to the members of the corporation, a vote was passed looking towards the procurement of a piece of land upon which to build at some time a new meeting-house, which vote was followed by a series of votes and acts of the corporation, which resulted in the purchase of a lot of land and the erection thereon of a chapel and dwelling-house for the minister.

By reason of the great fire in November, 1872, the society abandoned the old meeting-house as a place of worship, and regularly worshipped in the chapel occupied by the said Old South Society; and about that time it was applied to by the United States Government to lease the meeting-house for a post-office. The corporation voted so to do, provided their charter should be so amended that it could be done. And, upon application to the Legislature, by the St. of 1872, *c.* 368, the charter was amended so that the corporation could so lease the meeting-house, provided the pew proprietors should vote so to do On December 20

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1872, the pew proprietors, being called together for the purpose, voted so to lease the meeting-house, and at the same time voted to proceed at once to erect a new meeting-house, and the treasurer was authorized to borrow large sums of money to pay for the building of the same.

At a subsequent meeting held in April, 1873, at the regular annual meeting, it was voted to abandon the old meeting-house as a place of worship, and the new chapel and meeting-house were declared to be the regular place of worship. And since the last Sunday in April, 1873, the Old South Society and the Church have occupied and exclusively used the new chapel, as their regular place of meeting for the public worship of God.

In the construction of the buildings above described, upon the corner of Dartmouth and Boylston streets, the society has incurred large expenses, and has been compelled to borrow large sums of money, and is now indebted for money borrowed for said purpose, and for contracts made for the building and completion of the meeting-house, to an amount not far from $450,000; and by repeated votes of the society and church it has been determined, after due deliberation and for good reasons, that the new chapel, and meeting-house when it should be finished, should be the future and permanent place of worship of the Old South Society and Church; and in accordance with this purpose and intention, they have had the pews in the old meeting-house duly appraised, have voted to sell, and have directed and ordered the standing committee to proceed at once and sell the meeting-house and land under and adjacent to the same, and to use the proceeds to pay the debt and liabilities already incurred, and for parochial and charitable purposes.

All these votes, acts and doings have been done after full and public notice in accordance with the by-laws, and with the full consent and advice of the ministers of the church and the deacons and officers thereof, and, as the plaintiff believes, of a large majority of the members and regular attendants of the Old South Church. These acts and votes have extended over a long period, and it has ever been claimed by the corporation, and, before its organization, by the pew proprietors of the Old South Meeting-house, that the land above mentioned was held by them in fee simple, without condition or limitation, and they have ever used

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and employed the same for the purpose of accomplishing the evident and manifest purpose of the gift, namely, the public worship of God, and the extending and increasing the usefulness and influence of the Third Church, now the Old South Church in the city of Boston. To that end the houses of the ministers, at their request and with their consent, have been removed from the business street to the streets where the citizens are accustomed to dwell, and now the old meeting-house being situated at a great distance from the dwellings of most of the pew proprietors, and in that part of the city unoccupied by any dwellings, in order to carry out the principal purpose of Madame Norton, after due deliberation the plaintiff has decided and voted that the best interests of the church and society require that the place of worship should be removed to the land recently purchased on the corner of Dartmouth and Boylston streets, and that the old meeting-house and the land adjacent thereto should be sold and the proceeds used as before stated.

In 1874, the plaintiff petitioned the Legislature for such an amendment of its charter that the meeting-house might be leased to others besides the United States Government, and that all restrictions in that regard should be removed; and the Legislature passed an act, a copy of which is printed in the margin.*

The pew proprietors above named, a small minority of the members of the corporation, thereupon contended that the land above described could, under the said deeds and will, be only used for a meeting-house and the ministers' houses; that, should the land on which the meeting-house stands be leased, demised or used for business purposes or sold, the same would be forfeited, and revert to the heirs of Madame Norton; that the aforesaid deeds and

* The St. of 1874, *c.* 270, is as follows: "In any suit in equity brought before the Supreme Judicial Court to obtain the sanction of the said court to a sale or lease or other transfer or disposition of the Old South Meeting-house and the land under and adjacent to the same, the said court shall possess and exercise the same powers and be governed by the same principles of equity law as if the said land had not been the subject of any special legislation concerning power to lease the same.

"The meeting-house shall not be leased or sold or in any way disturbed until authority therefor shall be obtained from said court; but this shall not prevent the restoration of the pews and other changes by the United States according to the terms of the existing lease."

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will created a trust, and that the corporation was the trustee, and that the use and improvement of the land aforesaid for any other purpose than for ministers' houses and a meeting-house would be contrary to the purpose, intent and letter of the trust created; and that any sale or other use of the property would be a violation of the trust; and any lease or deed of such land would pass no title and be of no effect.

The plaintiff contended that there was no condition or limitation annexed to the gift, and that any action it proposed would not work a forfeiture; that, if there was a trust created by the gift, the society as the trustee, with the church and the ministers as the *cestuis que trust*, after long and faithful trial, examination and deliberation, had decided that the Third Church, now called the Old South Church in Boston, could only preserve its power and influence, and even its existence, by removing its place of worship; that as in the lapse of time the church lot had become located in a business centre, and if used for business purposes would yield a large income or revenue, it was the proper duty of the corporation so to use the land, and expend the proceeds in that portion of the city where the citizens dwell; that by such use of the property the intent and purpose of Mary Norton would be accomplished; that such had always been the policy of the corporation and the pew proprietors, and in pursuance thereof they had erected stores upon a portion of the land, and had used the income arising therefrom for the purposes aforesaid; and that the defendants, having for so long a time allowed the corporation, of which they were a part, to so proceed, without any attempt to restrain it before any judicial or competent tribunal, and the corporation, having been at large expense and incurred very heavy liabilities, relying upon the business capabilities of this estate to defray them, they could not now in equity and good conscience complain.

The plaintiff is informed that the meeting-house will shortly be abandoned by the United States Government, and avers that the proper time has arrived to sell the meeting-house in accordance with the votes of the corporation to that end. But the defendants still claim and aver that the corporation has no power or authority to so dispose of the property, and that such sale is in violation of the trust, and contrary to the conditions of the gift.

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The plaintiff further alleged that the proposed sale was in accordance with the manifest intention and purpose of the donor, and that the defendants, by reason of their laches and acquiescence in all these acts for so long a time, and by reason of their being members of the corporation, could not now object; that the corporation has but one object, and that is to carry out and accomplish the purpose of the donor in her gifts and bequests; and that in order to accomplish the same, it was absolutely necessary to sell the land as aforesaid. And that the trust reposed in them could only be faithfully and properly executed by removing the meeting-house to some other place than the site of the old meeting-house on the corner of Milk and Washington streets, and that it could best be accomplished by selling the old building and the land under the same, and using the proceeds thereof to erect a church in the new locality.

The prayer of the bill was for a decree declaring: 1st. That the Old South Society has full power and authority to sell and convey the meeting-house and land under and adjacent thereto on the corner of Washington and Milk streets in the said city of Boston, and to give a valid title to the same. 2d. That under the deeds and will of Mary Norton there are no conditions, restrictions, limitations or trusts that will prevent the said society from giving a good and valid title to the whole or any part of the real estate given by her. 3d. That this religious society has a right to sell its meeting-house and land for the purpose of building a new meeting-house. The bill also prayed that the court would authorize and order the said meeting-house and land to be sold in accordance with the vote of the corporation, such sale to be made, and the proceeds arising therefrom to be applied to the purpose of building or paying for the building of a new meeting-house, chapel and minister's house, in the city of Boston, for paying the debts and betterments, taxes of said society, and for charitable and parochial purposes in the city of Boston, and for no other purpose; the purchaser of said property not to be responsible for the application of the purchase money; and for further relief.

Annexed to the bill were copies of the by-laws of the plaintiff corporation, and of the votes and records, referred to in the bill. These, being immaterial under the decision of the court, are omitted.

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The answer alleged that by the St. of 1845, *c.* 229, by which the plaintiff was incorporated, and by the terms of which it was authorized to take and hold the Old South Meeting-house, and the lands under the same, and the deeds and devise of said land set forth in the bill, the plaintiff has been constituted trustee of a public charity, and the estates described in said bill and held by the plaintiff are held by it subject to said trusts; that the plaintiff's bill prays the instructions of this court as to the sale of a portion of said trust estate and the application of the proceeds; that the duty of maintaining the rights of the people of the Commonwealth, and of such persons as may be interested in said charity, is vested in the Commonwealth, and that the attorney general should have been made a party to this suit; that the sale proposed in the bill and the application of the proceeds in said bill proposed are in violation of the provisions of the plaintiff's charter and of the trusts thereby created; and that this court is without authority to divert the said estate to the erection of the buildings referred to in the bill, or to modify a trust established by legislative enactment, by limiting the application of any surplus remaining after paying for such building to parochial and charitable purposes within the city of Boston.

The answer further alleged that no vote has been passed by said corporation authorizing an application to this court for the right to sell its meeting-house and land, or for instructions relating to its trusts; and that the filing of said bill and the affixing the name of said corporation thereto was unauthorized, and that the defendants ought not to be holden to answer to said bill, and that the same should be dismissed.

The answer then admitted the organization of a church by Savage and others, and the conveyances and devise by Mary Norton, but alleged that the land on which the church now stands was conveyed by said Norton to said Savage and others and their associates and successors, to build a church upon for their assembling themselves together publicly to worship God, and for the accommodation of such church, with convenient passages for the people that shall there from time to time assemble, and for the erection and accommodation of a dwelling-house for the pastor or teacher of said church, and for no other intent, use or purpose whatever.

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The answer also admitted that said Savage and others occupied said land and became seised thereof upon the conditions, and for the uses, and upon the trusts in said conveyances and devise set forth; that Savage and others built a church on said land, and the removal of the same and the building of the present church on the same site in 1729; and the incorporation of the plaintiff by the St. of 1845, *c.* 229; but alleged the ignorance of the defendants as to whether the proprietors of pews in said house in 1729 and subsequently were the associates and successors of said Savage and others, and whether the lands in said deeds and will described were vested in them; but averred that the premises conveyed and devised by Mary Norton were held by the successors of said Savage and others only upon the conditions and trusts in said conveyances and devise set forth.

The answer further alleged that the St. of 1845, *c.* 229, provided that the plaintiff should take and hold in fee simple the land before mentioned for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation; but that said act prohibited the conveyance or lease of said meeting-house and land under the same.

The answer, after admitting the passage of the St. of 1872, *c.* 368, and the St. of 1874, *c.* 270, proceeded as follows:

"And the defendants say that the several alleged votes of the plaintiff subsequent to April, 1869, for the purchase of land and the erection of a chapel and meeting-house and other buildings, and the borrowing of money therefor, and the removal from its place of worship and the sale of its meeting-house, if passed, were in violation of the trusts on which the estate of the corporation is held, and of its charter; and the defendants deny that due notice of the objects of the meetings, at which action was had on said alleged votes, was given in accordance with the by-laws of said corporation; and they deny that said votes were passed by said corporation and after due deliberation, and allege that certain members of said corporation were unlawfully prevented from voting on said measures, and that votes of persons not members of said corporation were received and counted in favor of the several measures above named.

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"And they admit that large debts have been incurred in the name of said society, and that the amount of said debts and liabilities incurred in the purchase of the land and the erection of the buildings mentioned in the plaintiff's bill is not far from $450,000; and they further say that the expenditures made and liabilities incurred as aforesaid have been unreasonable and extravagant, and have been made and incurred in violation of the plaintiff's trust and of its charter, and have tended to the waste and destruction of said trust estate.

"And the defendants deny that the interests of said society have required or now require a removal from said meeting-house erected on the estate given therefor by said Norton, and allege that said meeting-house is situated in a central portion of the city and in the midst of a large population, and is well situated for the maintaining of public worship and carrying on the work of the church and society, and for fulfilling the trusts created by the donor and by the charter of the plaintiff and the several acts in amendment thereof.

"And the defendants say that all rights of pews in said Old South Meeting-house, and of membership in said corporation, have been acquired subject to the by-laws contained in the exhibits annexed to said bill and under the form of deed therein contained; and the defendants say that by reason of the several votes and acts set forth in the plaintiff's bill, and by the abandonment of said house as a place of public worship without complying with the conditions of said deeds, all rights to pews in said house, and to membership in said corporation of others than these defendants and certain other pewholders opposed to the sale of said house, who have not been made defendants to this bill, have been forfeited to said corporation.

"And these defendants say that they and the pewholders last above mentioned are the only members of said corporation, and are entitled to the sole control of its estate, subject to the conditions and trusts upon which the same is held.

"And the defendants deny that they have been guilty of any laches or acquiescence in any of the acts and votes of the plaintiff corporation as in said bill alleged, without this, that any other matter in said bill contained, material or necessary for these defendants to make answer unto, and not herein and hereby

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well and sufficiently answered, confessed and avoided, traversed or denied, is true to the knowledge or belief of these defendants."

The case was reserved by *Endicott*, J., for the consideration of the full court upon the pleadings, the deeds and will of Mary Norton, the several acts of the Legislature relating to the Old South Church and the Old South Society, the by-laws of the corporation, and the form of deed of pews under which all pews and rights of membership in the corporation have been held, and a report in substance as follows:

It appeared at the hearing that the authority for bringing the suit, if any, was the votes set forth in the exhibits, especially the vote of June 12, 1874, and passed by a vote of twenty-seven to thirteen, and the sanction of the standing committee of the society. It was contended by the defendants that on the above facts the bill should be dismissed for want of authority to file the same.

In January, 1873, the majority, against the protest of the defendants, leased the property to the United States Government, under authority of an act of the Legislature, and in April, at the annual meeting of the society, the new chapel on Boylston Street was declared the meeting-house, according to the vote set forth in the exhibit, against the protest of the defendants.

It further appeared that many persons voting with the majority have, under the above arrangement, attended regularly at the new place of worship at the chapel on Boylston Street, and have not offered their pews to the treasurer as provided in their deeds, which said deeds were in the form above referred to, and the defendants contended that they were thereby disqualified from voting after the annual meeting in 1873; and it appeared that if their votes had not been counted, a majority would have been opposed to the sale and to the several alleged votes subsequent to said annual meeting. It appeared that, except as above stated, the several votes set forth in the exhibits to the plaintiff's bill were passed by a majority of the persons present and voting at meetings of the corporation. There was no evidence, unless such alleged several votes of the society and the sanction of the standing committee to the bringing of this bill be so considered, that the sale of the meeting-house and the land thereunder was necessary or expedient, nor was there any other evidence offered that

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the society or the public would in any way be the gainer by the removal.

The defendants offered testimony to show that the old meeting-house is conveniently situated for public worship, and there is a large population in its immediate vicinity, and that it is easily accessible to a large number of persons beyond its vicinity; that the new meeting-house in process of erection is in a portion of the city where there are many other churches, and that the welfare of the society and the purposes of the trust require that the meeting-house should not be sold or removed. The question whether this evidence was admissible is reserved.

It also appeared that without the sale of the Old South Meeting-house the society would have money enough to pay five hundred thousand dollars, the full cost of the new meeting-house, chapel and parsonage, and have in addition an income of from ten to thirteen thousand dollars, which is as much as is usually appropriated for the support of public worship in similar churches in the city of Boston. The defendants offered evidence to show that the society had a sufficient fund to maintain public worship in the new meeting-house, without the sale of the old meeting-house, and that it is proper and expedient that the old meeting-house should be retained, in order that public worship may be maintained therein by the said society or the defendants and their associates; and the defendants offered evidence that they were ready, willing and able to maintain worship in said house, and desire so to do. The question whether this evidence was admissible is reserved.

The question whether the attorney general should have been made a party is also reserved, and all other questions of law raised by the answer, or upon the face of the plaintiff's bill, or upon this report.

If under the several deeds and acts of the Legislature the society should be authorized to make said sale under and in pursuance of said votes, without any other evidence of its necessity or expediency, or otherwise, and if none of the evidence offered by the defendants was admissible, and if this bill was properly brought and can be properly maintained without the attorney general, then a decree is to be entered accordingly. If on the other hand the court are of opinion that the suit cannot be main-

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tained without making the attorney general a party, the bill is to be dismissed, unless an amendment should be allowed by the court.

If the court are of opinion that any of the evidence offered by the defendants is competent, then the case is to be sent to a master. If, upon the case stated in the bill and exhibits and report, no sale can be legally made, the bill is to be dismissed.

THE SECOND CASE was an information filed by the attorney general on December 4, 1874, at the relation of the parties defendant in the first case, alleging that the Old South Society held the land conveyed and devised to it by Mary Norton as trustee of a public charity; that by the acts done by the defendant, all of which were set forth at length and were the same appearing in the first case, the defendant had violated its trust, and praying that it be restrained from selling its land, that it should be removed from its said trust and that other trustees be appointed in its stead.

An answer was filed, and the case was reserved by *Endicott*, J., for the consideration of the full court on the pleadings and a report similar to that in the first case.

B. F. Thomas & L. M. Child, for the Old South Society.

E. R. Hoar & G. O. Shattuck (*R. Gray* with them), for the defendants in the first case, and the attorney general in the second case. 1. The property sought to be sold is held to charitable uses. The object is charitable. Trusts for the support of public worship and religious instruction, either under a liberal construction of the words "repair of churches" in the St. 43 Eliz. *c.* 4, or by virtue of original equity jurisdiction, have always been held to be charities. *Earle* v. *Wood*, 8 Cush. 430. *Jackson* v. *Phillips*, 14 Allen, 539, 552. *Attorney General* v. *Pearson*, 3 Mer. 353. The object of the three gifts of Mary Norton, all of which were gratuitous, was the advancement of religion through the erection of a meeting-house for the public worship of God and supplying a dwelling-place for the minister thereof. Gifts to build a church are held charitable. *Dutch Church* v. *Mott*, 7 Paige, 77. *Beaver* v. *Filson*, 8 Barr, 327. *Schnorr's Appeal*, 67 Penn. St. 138. *Potter* v. *Thornton*, 7 R. I. 252. *Meeting St. Baptist Society* v. *Hail*, 8 R. I. 234. *Goode* v. *McPherson*,

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61 Misso. 126; *Johnson* v. *Mayne*, 4 Iowa, 180. *Scott* v. *Stipe*, 12 Ind. 74. *Hopkins* v. *Upshur*, 20 Tex. 89. *Davis* v. *Jenkins*, 3 Ves. & B. 151. So also are gifts to build a parsonage. *Sewell* v. *Crewe-Read*, L. R. 3 Eq. 60. *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69. The gifts are to Thomas Savage and others "and to such as they shall associate to themselves, their heirs and successors forever." Any persons of the same religious views might become members of the society by buying pews in the church. The society could be no source of pecuniary profit to its members; and the fact that the members paid for their pews can be no objection to its being a charity. *Gooch* v. *Association for Aged Females*, 109 Mass. 558. *Gass* v. *Wilhite*, 2 Dana, 170.

The beneficiaries are sufficiently indefinite. It is only necessary that they should take by virtue of their position and not as individuals. A gift otherwise a charity will be none the less so because its benefits are confined to a class of persons who are represented at the time of the gift by certain definite individuals. Thus the following gifts are held to be charities, though there is no uncertainty as to the persons to be immediately benefited: A gift to a priest or minister, by virtue of his office. *Attorney General* v. *Cock*, 2 Ves. Sen. 273. *Thornber* v. *Wilson*, 3 Drew. 245; 4 Drew. 350. *Attorney General* v. *Dublin*, 38 N. H. 459. A gift to a lodge of Freemasons. *King* v. *Parker*, 9 Cush. 71. *Vander Volgen* v. *Yates*, 3 Barb. Ch. 242. *Duke* v. *Fuller*, 9 N. H. 536. *Indianapolis* v. *Grand Master*, 25 Ind. 518. A gift to a particular religious society. *Earle* v. *Wood*, 8 Cush. 430. *Dexter* v. *Gardner*, 7 Allen, 243. *Beatty* v. *Kurtz*, 2 Pet. 566. *Magil'* v. *Brown*, Brightly, 346, note. *Williams* v. *Williams*, 4 Seld. 525. *Cammeyer* v. *United German Lutheran Churches*, 2 Sandf. Ch. 186, 237. *Banks* v. *Phelan*, 4 Barb. 80. *Wright* v. *Methodist Church*, Hoffm. Ch. 202. *Price* v. *Maxwell*, 28 Penn. St. 23. *Attorney General* v. *Dublin*, 38 N. H. 459. *Gass* v. *Wilhite*, 2 Dana, 170. *Curd* v. *Wallace*, 7 Dana, 190, 192. *Attorney General* v. *Jolly*, 2 Strob. Eq. 379. *White* v. *University*, 4 Ired. Eq. 19, 20. *Bridges* v. *Pleasants*, 4 Ired. Eq. 26, 31. *Johnson* v. *Mayne*, 4 Iowa, 180. *Ward* v. *Hipwell*, 3 Giff. 547. *Attorney General* v. *Gould*, 28 Beav. 485. A gift of land for the purpose, as in this case, of building a particular church. *Dutch Church* v. *Mott*, 7 Paige, 77, and other cases before cited. In

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the following recent English cases, legacies for the purpose of building a chapel or parsonage were assumed to be charitable, the only question being whether they came within the Mortmain Act, 9 Geo. II. *c.* 36. *Sewell* v. *Crewe-Read*, L. R. 3 Eq. 60. *Booth* v. *Carter*, L. R. 3 Eq. 757. *Cresswell* v. *Cresswell*, L. R. 6 Eq. 69. *In re Watmough*, L. R. 8 Eq. 272. *Sinnett* v. *Herbert*, L. R. 12 Eq. 201; *S. C.* L. R. 7 Ch. 232. *Pratt* v. *Harvey*, L. R. 12 Eq. 544. *In re Lee*, 21 W. R. 168; 27 L. T. (N. S.) 808.

Anonymous, 3 Atk. 277, and *Swift* v. *Easton Beneficial Society*, 73 Penn. St. 362, are sometimes cited as holding certain trusts not to be charities for want of indefiniteness, but they proceeded on other grounds. They are cases of societies in the nature of mutual insurance companies, where each member pays a regular assessment in consideration of relief in case of necessity or illness. They are no more charities than annuity offices or accident insurance companies. They are pecuniary enterprises, and the members make a pecuniary investment expecting to get their money's worth. Such societies may be and often are run at a profit and declare dividends. The legal objection is that their objects are not charitable within the St. 43 Eliz. *c.* 4. The same objection applies to a gift to a private school, (*i. e.*, not free,) as such schools are pecuniary enterprises, and intended to be run at a profit. *Attorney General* v. *Hewer*, 2 Vern. 387. *Attorney General* v. *Newcombe*, 14 Ves. 1. But it is no objection that a school exists for the benefit of a restricted class of persons. *Meeting St. Baptist Society* v. *Hail*, 8 R. I. 234. In *Carne* v. *Long*, 2 De G., F. & J. 75, the gift was to a body substantially a private library association, and hence not a charity. In *Thomson* v. *Shakespear*, 1 De G., F. & J. 399, the court declared that a museum to be established at Shakespeare's house in Stratford could not be brought under any of the classes of charities enumerated in the 43 Eliz. *c.* 4. In *Attorney General* v. *Haberdashers' Co.* 1 Myl. & K. 420, the Haberdashers' Company was held to be a trading company and not a charity. In all the foregoing cases the objection was that the object was not charitable, and not any lack of indefiniteness in the beneficiaries. *Thomas* v. *Howell*, L. R. 18 Eq. 198, is an example of a gift which fails as a charity for want of indefiniteness. The gift was to ten poor clergymen of the Church of England, to be selected by A. B.

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and was held not a charity, because it was a gift to individuals, and not a perpetuity. The ten clergymen, once selected, would take as individuals, and not by virtue of their office or position.

Every trust is either a charity or else a private trust, which must be limited within a life or lives in being and twenty-one years. So that gifts for the founding and support of Congregational churches in this Commonwealth, if not charities, would be void as perpetuities. *Jackson* v. *Phillips*, 14 Allen, 539, 550. *Odell* v. *Odell*, 10 Allen, 1, 6. *Dexter* v. *Gardner*, 7 Allen, 243. *Carne* v. *Long*, 2 De G., F. & J. 75. *Thomson* v. *Shakespear*, 1 De G., F. & J. 399. It seems that such gifts are perpetual trusts of some sort. *In re New South Meeting-house*, 13 Allen, 497. *Second Congregational Society* v. *Waring*, 24 Pick. 304. *Wheaton* v. *Gates*, 18 N. Y. 395. There appears to be no reason why a Congregational religious society should not be "technically charitable," that does not apply equally well to a lodge of Freemasons or a society of Friends. *King* v. *Parker*, 9 Cush. 71. *Earle* v. *Wood*, 8 Cush. 430. *Dexter* v. *Gardner*, 7 Allen, 243.

When the other requisites of a charity exist, the test is not in the definiteness or indefiniteness of the persons actually receiving a benefit at any one time, but in the intent of the gift. If the intent is to confer a benefit upon the public, or upon a large and indefinite portion of the public, such as a certain denomination of Christians, the fact that the fund is not large enough to benefit all at any one time will not prevent the gift being charitable.

The decision *In re New South Meeting-house*, 13 Allen, 497, is made clearer by calling the corporation a charity. The suggestion of Bigelow, C. J., in that case, that religious corporations form a third class of trusts which are neither private trusts nor public charities, but *quasi* public, has no foundation in authority. There is no case in this Commonwealth which decides that a gift to a Congregational church is not a charity. In *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, the decision is put distinctly on the ground that there was no gift, the grantor selling his land and receiving a pecuniary consideration from the society. *Attorney General* v. *Heelis*, 2 Sim. & Stu. 67, 77. The intimation that the beneficiaries of the trust were not sufficiently indefinite for a charity, is wholly immaterial to the decision.

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Religious corporations have been recognized as charities by the Legislature of this Commonwealth. Sts. 1809, *c.* 91, § 4; 1815, *c.* 12.

The Old South Society, so far as the deed is concerned, must stand upon the same ground as other religious societies in this Commonwealth which were founded by gift. And if it is for the public good that the worship of God should be maintained, public policy requires that such bodies should be charities. For, if not charities, there is nothing to prevent them from changing themselves by a unanimous vote into trading corporations, from declaring dividends or dividing up their entire property among their members. If any of these things were done, supposing churches not to be charities, the Commonwealth could not interfere through the attorney general, nor could any private person call them to account, as all interested, both trustees and *cestuis que trust*, would have consented to the act. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 60, 61. *Wheaton* v. *Gates*, 18 N. Y. 395, 403. Such an absolute power over the church property by the members of a religious society would be greatly to be deplored. For if it was once understood that churches were irresponsible bodies, a congregation whose property was large and whose enthusiasm had declined from the loss of a favorite pastor or some other cause, might find it expedient to divide up its property and for the members to join other congregations. Or, being unrestricted in the use of its funds, a congregation might choose to declare a dividend from its surplus income, so that pews would become a profitable investment and the society be reduced to the level of a trading corporation. In this way there would be danger that the number of churches would be diminished, and that many of those that remained might lose their distinctive character. The only safeguard would be the good faith of the congregations, when tempted by a pecuniary gain to which they would have a legal right.

2. Assuming that the deeds and will of Mary Norton created a charity, the act of incorporation, St. 1845, *c.* 229, continued the original trust. *French* v. *Old South Society*, 106 Mass. 479, 487. In general, when a charter is granted to a charity already created by private gift, it is presumed that the charter is granted with the intent of carrying out the original trust. *Attorney Gen-*

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eral v. *Dedham School*, 23 Beav. 350. *Miller* v. *English*, 1 Zab. 317.

The charter of the Old South Society expressly declares that "said corporation shall be deemed and taken to be the successors of said proprietors." The provision that the corporate funds shall be held "for parochial and charitable purposes" shows that the Legislature intended to incorporate a charity. The effect of the charter is, then, to incorporate the proprietors of pews, and one becoming a pewholder under the by-laws of the society thereby becomes a member of the corporation, which holds the legal estate as trustee. The pewholders are also beneficiaries of the charity for the time being. *Second Congregational Society in North Bridgewater* v. *Waring*, 24 Pick. 304. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 60, 61. The same persons are therefore at the same time trustees and *cestuis que trust*. But this does not prevent the corporation from being a charity. The same was true in *Thornber* v. *Wilson*, 3 Drew. 245; *S. C.* 4 Drew. 350.

The present pewholders are only a part of the beneficiaries. For the trust is a perpetuity and their successors have an interest in it; and each pew is occupied by many persons besides the owner, his family, friends, lessees or the public, who use it by his license. It is matter of common knowledge that there is rarely more than one owner to each pew, which is nevertheless made to hold five or six persons. So that the original foundation of a church contemplates that the benefits of it shall be enjoyed by a large number of indefinite persons, other than those who have specific legal rights in the property. These two classes of persons have no present representative of their interests, and it is for this reason that the attorney general must be made a party, as in all suits concerning the revenues of charities. The injustice of allowing a few proprietors to settle this question for all the present worshippers and for all future generations is clear. It is the common case of a *cestui que trust* being trustee for himself and others, as in *Belknap* v. *Belknap*, 5 Allen, 468.

But, whatever may be the general principle as to a gift of land to a religious society, it is clear, that under this charter the property, or the excess after paying the expenses of the society, is held for a public charity. If, by the terms of the gift of Mary

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Norton, it was made a public charity, there is nothing in the charter changing that trust. If, on the other hand, the society, existing prior to the acceptance of the charter, did not hold the property in trust for a public charity, and could by unanimous consent have disposed of it as they pleased, the transfer of it by unanimous consent to the new corporation, to be used in accordance with the charter for charitable purposes in this Commonwealth, created a public charity. If the surplus above what is necessary for the purposes of the society is held for charitable uses, then the public must be represented in any dealing with the property, otherwise the society could decide how much should be devoted to charitable uses, and the public would have no control.

The expression "and for paying the debts of said corporation" applies only to such debts as are not *ultra vires*, and may lawfully be contracted by the corporation. This does not affect the question of what the nature of the corporation is.

WELLS, J. We find no public charity created by either of the three instruments under which title to the premises in question was derived from Mary Norton.

By her deed of April 1, 1669, the legal estate in the land therein described passed to and became vested in the ten persons named as grantees. A trust was declared, however, the beneficiaries of which were the grantees themselves with "such as they should associate to themselves." The further limitation to "their heirs and successors" indicates that the grantor contemplated a permanence of association of the *cestuis que trust*, and intended to convey the fee in the land.

The purposes of the trust, as set forth in the deed, were, 1st, "for the erecting of a house for their assembling themselves together publiquely to worship God;" 2d, "the erecting of a dwelling-house for such Minister or Ministers as shall be by them and their successors from time to time orderly and regularly admitted for the Pastor or Teacher to the said Church or Assembly;" and they are further guarded by the restriction "and for noe other intent, use or purpose whatsoever."

Gifts for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding and using it in the manner intended. To give

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it the character of a public charity there must appear to be some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons. *Going* v. *Emery*, 16 Pick. 107, 119. Perry on Trusts, § 710. *Saltonstall* v. *Sanders*, 11 Allen, 446. But when there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out by the terms of the gift to receive, control and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone. *Attorney General* v. *Federal Street Meeting-house*, 3 Gray, 1, 49. *Parker* v. *May*, 5 Cush. 336.

The deed of Mary Norton clearly contemplated that the grantees and their associates then formed, or were about to form, a voluntary religious society; and it was for the use and benefit of such society, in the promotion and convenience of the religious exercises and public worship to be maintained and conducted by and for themselves, that her gift was made to aid in providing a house for those religious exercises, and also a house for the residence of such person as should at any time serve them as their minister. *Attorney General* v. *Merrimack Manuf. Co.* 14 Gray, 586, 602.

The *cestuis que trust* were indeed an indefinite number of persons, in the sense that there was no fixed number to whom the designation of "associates" would apply; and they were doubtless intended to include all who should, in accordance with what might be adopted as the rules of association or organization, at any future time become members of the society; and thus the enjoyment would be continued perpetually. A trust so constituted is capable of serving these shifting interests in the beneficiaries; *Second Congregational Society in North Bridgewater* v. *Waring*, 24 Pick. 304; *King* v. *Parker*, 9 Cush. 71, 82; and is not obnoxious to the rule of law against perpetuities which prevent alienation; because the entire interest at any time is represented by known persons living; to wit, the legal estate by the trustees, there being always power in the court, in case of necessity, to supply trustees in whom the estate will vest; the equitable interest by those persons who then constitute the body of the associates or the society, who may be ascertained according to its rules governing membership.

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The character and purposes of the association named as *cestui que trust*, and the designation of the religious uses for which the property was given, do not necessarily indicate an intent to create a public charity. Such an implication sometimes arises from the character of the body to which the gift is made, or from the publicly avowed purposes of its organization and action; as in the case of *Tucker* v. *Seaman's Aid Society*, 7 Met. 188; Concord Female Charitable Society in New Hampshire, *Washburn* v. *Sewall*, 9 Met. 280; American Board of Commissioners for Foreign Missions, *Bartlet* v. *King*, 12 Mass. 536; American Education Society and American Bible Society, *Burbank* v. *Whitney*, 24 Pick. 146; *Bliss* v. *American Bible Society*, 2 Allen, 334.

Property held in trust for a Monthly Meeting of Friends seems to have been regarded as a public charity in *Earle* v. *Wood*, 8 Cush. 430, and in *Dexter* v. *Gardner*, 7 Allen, 243; and for a lodge of Freemasons, in *King* v. *Parker*, 9 Cush. 71. But neither of those cases was a proceeding which concerned the administration of a charity, as such. They were suits in equity relating to trusts, in which the rights of private parties alone were represented. There was no public charity declared in either case, and no adjudication which necessarily involved or was based upon the existence of a charitable trust.

A fund, to be dispensed exclusively by way of mutual benefit or aid among the members of an association, is a private and not a public charity. 3 Gray, 50. 11 Allen, 464. It may well be questioned, therefore, whether all the conditions requisite for a technical public charity were present in the case of *King* v. *Parker*, cited above.

Conceding that "monthly meetings," embracing as they do the entire community of people called "Friends," are so indefinite and general, and the purposes of their organization such that gifts in trust for their use will constitute strictly a public charity, still there is a marked distinction between such bodies and a congregational poll parish or society of defined, regulated, and, therefore, limited membership.

Property devoted to the support and maintenance of public worship, which is public only in the sense that it is open to the public by courtesy, in accordance with the usual practice of all churches in this Commonwealth, does not thereby become a

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public charity. 8 Gray, 50. 14 Gray, 602. *Attorney General* v. *Trinity Church*, 9 Allen, 422. Perry on Trusts, § 732. The deed of Mrs. Norton undoubtedly contemplated public worship of that character, but she entrusted its administration and limited the legal right of enjoyment to those who should become associated with her grantees, and their successors, and thus constitute a poll parish or religious society.

The fact that it is carefully restricted to religious uses, as already suggested, does not alone give it the character of a public charity. *Wells* v. *Heath*, 10 Gray, 17. As a trust, the whole estate passed from the grantor. There is reserved no right of defeasance and reverter or limitation over in case of a disregard of the restriction; and if there were, it would not avail to transfer the use or to convert it from a private to a public charity. *Brattle Square Church* v. *Grant*, 3 Gray, 142. *Wells* v. *Heath*, 10 Gray, 17. *Drury* v. *Natick*, 10 Allen, 169, 183.

The deed of June 30, 1677, does not give rise to any materially different question. It conveys an adjoining estate to the six survivors of the trustees named in the previous deed, and to such as have been "or shall be associated, to them and to their heirs and successors forever, for the ends and purposes in the first above mentioned deed of April the first, 1669, is fully and amply declared," with the house already erected thereon, "for the use of their ministers or ministry orderly chosen by the said society, being the Third Church of Christ in Boston, from time to time and at all times forever." This is not a provision for a ministry at large, or a ministry independent of the society; but is for the benefit of the society by enabling them to provide for the support and convenient residence of such persons as they might employ to serve them as their minister. *Wells* v. *Heath*, 10 Gray, 17, 23.

The will devises her own house to the "Third Church of Christ in Boston," naming, as trustees, two only of the persons who were trustees under her previous deeds. The devise is manifestly intended to be in furtherance of the same objects as the conveyances by deed, and for the use of the same beneficiaries, although differently designated. It is declared to be "for the use of the ministry in the said church successively forever." The reasons for making the gift, assigned by her, especially in connection with the previous deeds, show that it was intended, like the convey-

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ances, for the benefit of the religious society formed by her trustees, their associates and successors, and exclude the idea of a more general public charity.

By the St. of 1845, *c.* 229, the proprietors of pews in the "Old South Meeting-house" and their successors were made a corporation, and authorized to take and hold, to the use of said corporation, in fee simple, the property then "known as the estate belonging to the Old South Church and Society." It is not disputed that these corporators were the proper successors of Mary Norton's grantees and devisees and their associates who constituted the "Church or Assembly" designated by her as the "Third Church of Christ in Boston." They therefore represented the *cestuis que trust*, and were entitled to the beneficial interest in the estate. Precaution not having been taken to preserve a succession in the trustees for the transmission of the legal title, that remained nominally in the heirs of the survivor of the original trustees named by Mary Norton. By the act of incorporation, that title also was made to vest in the corporate body. It was manifestly not the intention of the Legislature that an absolute merger of the two interests should result so as to discharge the estate from the trusts with which it had been impressed. It was accordingly declared that it should continue to be held "for the support of public worship, for parochial and charitable purposes in this Commonwealth, and for paying the debts of said corporation." But this declaration of uses does not define a public charity, even if it were competent for the Legislature to constitute or declare one out of a trust where it did not exist before. Perry on Trusts, § 711.

We cannot doubt that lands so held may be sold by authority of the Legislature; *Stanley* v. *Colt*, 5 Wallace, 119, 169; or of this court as a court of equity, charged with the supervision and enforcement of trusts, under the Gen. Sts. *c.* 100, § 16. We do not find, in the special circumstances and character of the authority conferred by the charter to hold this particular real estate, any inhibition of the usual power of sale by leave of the court, which attaches to trust estates generally. And the special authority to apply to this court, contained in the St. of 1874, *c.* 270 would seem to remove any inhibition which might otherwise be implied from the character of the original act or charter. But

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we think it is equally clear that the vote of a majority of the pewholders or members of the society is not of itself a sufficient authority to enable the corporation to make the sale, nor a sufficient reason to justify this court in authorizing it to be made. The trust is one in which each individual member of the society has an interest as an intended beneficiary, and a right to be heard upon the question of the proper administration of the trust in reference to its original character and purpose, and the effect of the proposed change upon all the members, the minority as well as the majority. It is incumbent upon those who seek to make the change to satisfy the court that it is reasonably required for the accommodation of the society as a whole, and that the proposed change will not subject the minority to an unreasonable sacrifice of interest or convenience, or in any way work injustice to them. The respective rights of the corporation and of its individual members in respect of such property are so fully set forth in the case *In re New South Meeting-house in Boston*, 13 Allen, 437, as to require no further discussion here, in advance of the hearing which must be had to devolop the grounds that may exist for or against the proposed sale.

Upon that hearing, the alleged abuse by the corporation, or by the majority, in using the trust funds to build a meeting-house elsewhere, and in resorting to that house for the meetings of the society for public religious worship, will have such weight as it is entitled to have. If, as the minority contend, it deprived the majority of all standing as members of the society and beneficiaries of the trust, so that those who desire to remain and continue the maintenance of public worship in the house upon the original site may be regarded as constituting the body of the society, entitled both to the corporate franchise and the beneficial enjoyment of the trust estate; or if it warrants and requires that the court should remove the trustee and place the estate in the charge of new trustees, to secure the accomplishment of the original purpose of the donor, neither of these results can be reached by either of the present suits: not by the information by the attorney general, because that is based exclusively upon the supposed character of the trust as a public charity, which is not sustained; not by the bill in equity, because no decree in favor of the minority can be made in that, except to refuse to authorize the sale or declare a right to sell.

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The objection that no right was shown to institute the bill in equity in the name and behalf of the corporation was not urged at the argument, and we regard it as waived. That to the non-joinder of the attorney general fails, of course, with the information itself.

The result is that the information by the attorney general must be dismissed, and the bill in equity must stand for hearing before a single justice. *Ordered accordingly.*

HUGH O'BRIEN *vs.* W. T. W. BALL.

Suffolk. March 10, 1874. — Oct. 21, 1875. COLT & ENDICOTT, JJ., absent.

If land is taken under the St. of 1868, c. 277, which authorizes the city of Boston to take lands in a certain district, for the purpose of abating a nuisance, and provides that "the title to all lands so taken shall vest in the city," the liability of a lessee of such land to pay rent to his lessor ceases on such taking, without any eviction by, or attornment to, the city.

Land in Boston was leased for a term of years, and, while the lease remained in force, the land was taken by the city to abate a nuisance, under the St. of 1868, c. 277, which provides that "the title to all lands so taken shall vest in the city;" the lessee continued in possession, and for some time paid rent to his lessor, both parties acting in the belief that the lease continued in force. Afterwards, the lessee being told that he was liable to be held to pay rent to the city, refused to pay rent under the lease. *Held*, in an action by the lessor on the Gen. Sts. c. 137, § 5, to recover possession of the premises, that the judge, who tried the case on the above facts, was warranted in finding that no new tenancy, between the lessor and lessee, was created, and in rendering judgment for the defendant. *Held, also*, that the fact that after the action was begun the city reconveyed the land to the lessor did not affect the case.

ACTION on the Gen. Sts. *c.* 137, § 5, to recover possession of a house on Kirkland Street in Boston, alleged to be held by the defendant unlawfully and against the right of the plaintiff. Writ dated May 23, 1872. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts in substance as follows:

On April 1, 1869, the plaintiff executed to the defendant a written lease of the said premises for a term of five years. The defendant entered into possession under the lease, and has contin-

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ued in possession up to the present time. On March 1, 1872, one month's rent was in arrear and unpaid; the defendant declined to pay the same to the plaintiff, who on March 8 gave him a notice, in due form, to quit in fourteen days, for non-payment of rent.

On July 13, 1870, the city of Boston, in pursuance of the St. of 1868, *c.* 277,* passed an order in due form of law to take possession of said premises, and duly recorded the same in accordance with the act, in the Suffolk Registry of Deeds. Since the commencement of this action, the title to the premises has been reconveyed by the city to the plaintiff.

Some time in the fall of 1871, the city, by its contractors and workmen, entered upon the premises for the purpose of raising the building, as contemplated by the act. The defendant continued to occupy the premises as his dwelling, subject to the disturbance created by such raising, which was considerable; and he continued to pay rent to his lessor during and for some months succeeding the completion of the work done by the city, both parties acting in the belief that the lease continued in full force and effect. The city gave notice to the defendant that it would commence the work of raising prior to so doing, but the defendant paid no attention thereto.

In February, 1872, the defendant was informed, but not by the city or any of its agents, that he was liable to the city for the use and occupation of the premises, and in consequence declined to pay the rent in arrear March 1, as before stated.

A. Russ, for the plaintiff.

R. I. Burbank & R. Lund, for the defendant.

DEVENS, J. The defendant entered upon and occupied the premises, possession of which is sought by this proceeding, by virtue of a lease from the plaintiff which was for the term of five years. During this term the city of Boston, acting by authority of the St. of 1868, *c.* 277, for the purpose of making certain im-

* This statute, entitled "An act for the abatement of a nuisance in the city of Boston, and for the preservation of the public health in said city," authorizes the city to "purchase or otherwise take" certain lands in Boston, and to raise the grade thereof, "so as to abate the present nuisance and to preserve the health of the city," and provides that "the title to all lands so taken shall vest in the city of Boston."

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provements of a public character, took the estate in accordance with the provisions of that statute, and the title thereof was then vested in the city, that of the plaintiff being divested. *Dingley* v. *Boston*, 100 Mass. 544. The plaintiff brings this proceeding for the possession of the premises, upon the ground that the defendant has failed to pay him one month's rent which has accrued since this taking by the city, the defendant still continuing in possession, although disturbed therein by the work which the city has been carrying on, and the plaintiff's right to recover depends upon the question whether any rent was due to him from the defendant. But, even without eviction by, or attornment to, the holder of the new title, the liability to pay the rent reserved ceased with the termination of the plaintiff's estate during the term subsequent to the making of the lease and the entry of the defendant under it. *Lamson* v. *Clarkson*, 113 Mass. 348, and cases cited.

It was for the plaintiff, then, to show that, subsequently to the expiration of his title, a new tenancy had been created; and upon the facts stated, the court below was warranted in finding that no agreement for such new tenancy was shown, and in rendering judgment for the defendant.

Since this proceeding was commenced, the city of Boston has reconveyed to the plaintiff the title to these premises; but this cannot affect the case, which is to be determined by the condition of things which then existed. *Judgment affirmed.*

LOUIS HAMILBURGH *vs.* LORENZO H. D. SHEPARD.

Suffolk. March 4. — Oct. 21, 1875. MORTON & ENDICOTT, JJ., absent,

The declaration in an action for malicious prosecution contained a count for the abuse of the process of the court in suing out the writ, and a count for an assault and battery in causing the officer to make an arrest of the present plaintiff under said writ. At the trial it appeared that the writ upon which the plaintiff was arrested was in due form and issued from a court of competent jurisdiction, and that the arrest was made by the officer within the scope of his authority; that after the present action was brought, and before the entry of that action, it was agreed to enter 'neither party," in that action, and the writ was never returned into

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court. *Held*, that the cause of action, however stated in the declaration, was in substance and legal effect for malicious prosecution; and that the action was prematurely begun.

TORT. Writ dated June 11, 1873. The first count of the declaration alleged that the defendant maliciously and without probable cause procured the arrest of the plaintiff, on a writ in a civil action, and caused to be extorted from him the sum of $162.

The second count alleged the suing out of a writ by the defendant, "for a private and unlawful purpose of his own, to wit, for the purpose of obtaining from the plaintiff a certain large sum of money," under the color of a legal claim; the arrest of the plaintiff under said writ, and his imprisonment for the space of three hours, "whereby the defendant did make an unlawful use and an abuse of the legal process" of said court, "and by said abuse of legal process did subject the plaintiff to great loss and damage in his business and reputation, and oblige him to deliver to the defendant a large sum of money, to wit, the sum of $162."

The third count was as follows: "And the plaintiff further says that the defendant by himself, his agents and servants, and with force and arms at Boston aforesaid, assaulted the plaintiff and caused him to be illegally arrested, imprisoned and detained for a long time, to wit, for three hours, until to gain his liberty he was compelled by the defendant, his agents and servants aforesaid, to deliver to him, the defendant, his agents and servants aforesaid, a large sum of money, to wit, $162; and the plaintiff says that the defendant had no cause of complaint against him, criminal or civil, whereupon he could lawfully predicate any such arrest, imprisonment and detention and extortion of money; and the plaintiff further says that by such arrest, imprisonment and detention, and by the extortion aforesaid, his business was greatly impeded, he was subjected to great inconvenience and expense, his reputation was much injured, and he suffered great vexation, grief and oppression. All which is to the special damage of the said plaintiff as he says the sum of three thousand dollars."

At the trial in the Superior Court, before *Bacon*, J., the evidence was that the plaintiff hired of the defendant a store, the rent of which was payable monthly; that the plaintiff having sold out his stock, and being about to go to Europe, the defend-

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ant, on June 9, 1873, by advice of counsel, caused the plaintiff to be arrested on a writ of the same date, although the rent was not due till June 14, 1873; that the officer arrested the plaintiff and detained him for about two hours, and then released him upon his furnishing a sum of money, which the officer took and held, as he claimed in his return, by attachment.

There was no claim made that the officer in any way abused his authority under said writ, or was guilty of any misconduct in the service thereof, but only that the defendant knew he had no cause of action, and sued out said writ with such knowledge, and directed the service made thereon. So far as the form of the writ was concerned, the officer was justified in the arrest.

The plaintiff paid the defendant his rent when due, June 14, 1873, and on June 16, 1873, the officer returned to the plaintiff the money of the latter, and it was then agreed between the plaintiff and the defendant that the suit on which the plaintiff had been arrested should be entered "neither party." The writ in that suit was returnable June 28, 1873, and was never entered in court.

The presiding judge ruled that the action could be maintained, if at all, only for a malicious prosecution, and that the evidence showed that it was prematurely begun, and instructed the jury to find for the defendant. The plaintiff alleged exceptions.

M. Fischacher, for the plaintiff. 1. The first count is for a malicious prosecution. The second for an abuse of legal process to extort money. The third for an assault and battery. The testimony was introduced without the plaintiff being required to elect as to either count, and proved an assault and battery at least. The defendant was liable for such assault and battery, unless he could justify. The action was not premature as to the third count at least. See *Leland* v. *Marsh*, 16 Mass. 389.

2. There being evidence tending to establish the allegations of either count, the court erred in ordering a verdict for the defendant. The case should have been submitted to the jury upon all the evidence, with proper instructions as to its application to the different counts.

3. The second and third counts containing allegations of causes of action, and there being evidence establishing or tending to

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establish the same, the court erred in limiting the plaintiff to the first count and instructing the jury to find for the defendant on that account. In this case the court did not recognize the fact that one series of acts gives rise to different causes of action; and the rule that would apply to malicious prosecutions alone does not apply to other causes of action arising therefrom. *Emery* v. *Hapgood*, 7 Gray, 55.

J. D. Long, for the defendant.

GRAY, C. J. The writ upon which the plaintiff was arrested being in due form and issued from a court of competent jurisdiction, and the arrest having been made by the officer within the scope of the authority thereby conferred upon him, the plaintiff's cause of action, however stated in his declaration, is in substance and legal effect for malicious prosecution, and cannot be sustained without proof that the prosecution had been determined, which it had not been when this action was commenced. *Cardival* v. *Smith*, 109 Mass. 158. *O'Brien* v. *Barry*, 106 Mass. 300.

Exceptions overruled.

WILLIAM C. FOWLER *vs.* MCLAREN F. PICKERING.

Suffolk. March 12. — October 22, 1875. AMES & ENDICOTT, JJ., absent.

The owner of a vessel chartered it, retaining the necessary room for the crew, to A. to bring a cargo to the port of B. or the port of G., the port to be named before clearing. A. named B. as the port and the vessel sailed on said voyage. Subsequently an agreement was made between the owner and A. by which A. was to pay all extra charges incurred if he should elect to have the destination of the vessel changed from B. to G. Before the vessel arrived at G., a letter was sent by A. without the knowledge of the owner of the vessel, to the office of the pilots in B., directed to the master of the vessel, requesting him to go to G. This letter was delivered at sea to the master by a pilot, and an agreement was made by which the pilot was to receive for taking the vessel to G. as much as he would have been entitled to as pilotage, if he had taken the vessel to B. This was paid. The pilot then brought an action against the owner of the vessel to recover compensation for taking the letter to the master, and at the trial put in evidence of a local usage in the port of B. for pilots to charge and receive a pilotage fee for delivering such a letter to the master of a vessel. The judge instructed the jury that in order to charge the defendant they must find that either the owner or master had knowledge of the usage, and that if they should find that either had such knowledge and

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should find the usage to be proven they must find for the plaintiff. *Held*, on exceptions taken by the defendant, that the contract relied on, if proved, was within the scope of the master's authority and would bind the owner; and that the contract between the owner and the charterer in respect to paying for extra charges, in case of a change of port, did not affect the defendant's liability to the plaintiff. *Held, also*, that knowledge of the usage, on the part of the master, must be shown, and that it was not enough to show that the defendant had knowledge of the usage. *Held, also*, on the issue whether an implied contract was to be inferred from the act of the master in going to G., that the contract made between him and the pilot, about taking the vessel in, might have a material bearing.

CONTRACT to recover $90 for services rendered by a branch pilot of Boston, in delivering to the master of the ship Anna Decatur the following letter directed to the captain, dated New York, May 29, 1873, and signed "Woodruff & Robinson:" "Dear Sir,—You will please proceed to Gloucester with your vessel and there report to Messrs. John Pew & Son, who will receive your cargo salt."

At the trial in the Superior Court, before *Pitman*, J., the plaintiff proved that the defendant was at the times here mentioned a part owner of the ship Anna Decatur; and that the plaintiff was and still is a branch pilot for the port and harbor of Boston, and received the above letter late in May or early in June, 1873; that he carried the letter in his pilot boat and delivered it to the master of the ship off the Highlands of Cape Cod, and thereupon under a special oral agreement, hereafter named, piloted the ship into the harbor of Gloucester, and claimed to recover a fee of $90 for delivering said letter. The plaintiff called several branch pilots of the harbor and port of Boston, who had been such for many years; all of whom testified that there is and long has been a custom and usage among the branch pilots of the harbor and port of Boston, to charge and receive a pilotage fee for delivering a letter such as the above to the master of a vessel bound to Boston, which pilotage fee is equal in amount to the regular fee provided by law for piloting such vessel into the harbor of Boston. These witnesses testified that they never inquired from whom the letter came, and that they always looked to the master or owners of the vessel for this fee whenever the port was changed in consequence of the letter. There was no other evidence offered upon this point except that two of the witnesses testified that they understood or had heard that a corresponding custom exists among the

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pilots of the port of New York; and except that each witness admitted that he knew of no case where this fee had been charged to and paid by the master or owner of the ship, where the letter came from the consignee or owner of the cargo or charterer, they, the pilots, not caring whom the letter was written by, provided that the captain recognized and acted upon it. It was admitted that the plaintiff and the master of the ship made an agreement, when the plaintiff boarded the ship and delivered the letter, that if the plaintiff would undertake to try to pilot the ship into Gloucester he should receive therefor the regular fee for piloting the ship into Boston; and it was admitted that the master gave to the plaintiff the order following, dated Gloucester, June 2, 1873, directed to the defendant:

"Please pay to bearer the customary Boston pilotage for bringing the Anna Decatur from sea to this port. The boat No. 6 gave orders off Cape Cod;" and that, upon that order, this latter fee had been paid the plaintiff by the defendant.

One Hayden, a witness for the defendant, testified, on cross-examination, that the words, "The boat No. 6 gave orders off Cape Cod," was the usual and customary authority from a master to an owner to pay letter pilotage, for the last fifteen years, which was uncontradicted.

The plaintiff did not rely upon any agreement upon which to recover this additional fee of $90 now sued for, but relied solely upon the said custom or usage.

It was further proved that the ship was chartered, with the exception of the cabin and necessary room for the crew, and storage of provisions, sails and cables, by Messrs. Woodruff & Robinson, of New York, to proceed to Cadiz, Spain, and there to load a cargo of salt, and to proceed therefrom "to Gloucester or Boston, Mass., U. S. A., port to be named before clearing;" and that said ship at the times here mentioned was proceeding from Cadiz, with the said cargo on board, bound to Boston, which port had been named by the charterers before clearing; that the charterers, after the vessel had departed from Cadiz, sent the foregoing letter to their agent in Boston, one Byrnes, who forwarded it to the pilots' office, where it was received by the plaintiff; that this was done without the knowledge or consent of the owners of the ship, the defendant being absent from the country; and that the

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plaintiff, when he received and delivered the letter, did not know and did not inquire from whom the letter came.

The master of the ship testified that he resided at Saco, Maine, that he had been master of a ship for a little over ten years; that during that time he had been once, before this passage, into the port of Boston, and that previously to his taking command he had been several times into the port of Boston; that he did not know of any usage or custom such as the plaintiff relied on, or any other usage or custom relating to charging for putting a letter on board a vessel; and that by receiving the letter he changed his port of destination from Boston to Gloucester. A letter written by the defendant was introduced, in which he stated that he recognized a custom in the port of Boston for the pilot putting a letter on board a vessel to charge and receive a fee therefor from the master or owner of the ship, but that he was not aware, and did not understand, that there was any custom or usage to charge such fee to the shipowner or master when the letter was sent by the owner of or representative of the cargo, and not by the owner or agent of the ship.

The defendant also testified that he made an agreement with the charterers that they should pay all extra charges incurred, provided they should elect to have the ship change her port of destination from Boston to Gloucester. There was no other evidence bearing upon the question of knowledge of the defendant or other owner or master of a custom or usage. The defendant testified, without contradiction, that it was of no service or benefit to the ship or her owners for her destination to be changed; and that it would have been of pecuniary benefit to them if she had been allowed to proceed to Boston, whither she was bound. There was no other material evidence in the case bearing upon these questions.

The defendant asked the judge to rule that the plaintiff could not maintain this action: "1st. Because upon the evidence the jury would not be warranted in finding a custom or usage under which the defendant could be charged, as the letter was sent by the owner of, or agent for, the cargo, and without the knowledge and consent of the master, owner or owners of the ship. 2d. That if such a finding would be warranted upon the evidence, such a usage or custom would be unreasonable, and that such a

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usage or custom would be void in law. 3d. That the usage relied upon is a local usage, and that there was no evidence that it was or is brought home to the knowledge of the defendant or the master or other agent or owner of the ship." But the judge declined so to rule, and instructed the jury that the usage claimed is a local usage, and that in order to charge the defendant they must be satisfied that either the defendant or the master had knowledge thereof; and that if they should find that either of them had such knowledge, then it was for the jury to say whether a usage to charge the shipowner in case the letter is sent by the charterer or other agent for or owner of the cargo, was proven; and that if they found such a usage to be proven, they must find for the plaintiff. The jury found for the plaintiff for $90; and the defendant alleged exceptions to the rulings and refusals to rule as requested.

F. Goodwin, for the defendant.

No counsel appeared for the plaintiff.

WELLS, J. The defendant is liable in this action, if at all, by reason of some contract, express or implied, between the plaintiff and the master of the vessel acting within his authority, as master, to bind the owners. The contract relied on in this case, if otherwise established, was within the scope of the master's authority, and would be binding upon the owners. *Grant* v. *Norway*, 10 C. B. 665. *Bliss* v. *Ropes*, 9 Allen, 339. Story on Agency, § 116. The agreement between the defendant and the charterers, that the latter "should pay all extra charges incurred, provided they should elect to have the ship change her port of destination from Boston to Gloucester," would not affect the question of the defendant's liability in the first instance to the parties dealing with the master in matters affecting the navigation of the ship.

Upon the question whether there was an implied promise to remunerate the plaintiff for the service rendered by him in delivering to the master a communication relative to the voyage, by reason of which he was led to change his port of destination, the alleged custom or usage of the port was competent as evidence; not because the usage alone would impose or prove a liability, but as affording ground for the inference that by receiving and availing himself of the communication, and acting in accordance

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with its directions or request, the master accepted the service as rendered to the vessel. The alleged usage being a local one, it was rightly ruled that knowledge of its existence must be shown. But, in determining whether a promise is to be implied from the conduct of the master, it is his knowledge of the local usage relied on that is important, and not the knowledge of his principal who took no part in the transaction. The ruling at the trial was erroneous in allowing knowledge of the local usage by the owner on shore to affect the inferences to be drawn from the conduct of the master at sea. The ruling was also erroneous in directing the jury "that if they found such a usage to be proven they must find for the plaintiff." It was still a question of fact whether, in view of such a usage, known to the master, a promise to pay for delivering the letter, as a distinct service, is to be inferred from the conduct of the parties. And upon this question the express agreement made between the master and the plaintiff when the latter boarded the ship and delivered the letter, "that if the plaintiff would undertake to try to pilot the ship into Gloucester he should receive therefor the regular fee for piloting the ship into Boston" might have a material bearing.

Exceptions sustained.

JOSHUA M. WHITCOMB *vs.* JAMES C. CONVERSE & others.

Suffolk. March 15. — Oct. 22, 1875. AMES & ENDICOTT, JJ., absent.

Articles of copartnership between C., W., B. and S., for the transaction of a commission business, provided that C. and W. should contribute the whole capital in unequal proportions; that C. should contribute "such time as he may be able to give;" that W., B. and S. should each contribute all their time to the business; that each partner should receive one fourth of the net profits; and that C. and W. should receive interest on the capital contributed by them. The partnership was afterwards dissolved by mutual consent, the business of the firm closed by W., and it resulted in a loss. *Held*, on a bill in equity by W. against the other partners, that the capital constituted a debt of the partnership to which all the partners were bound to contribute equally, and that, one of them being insolvent, the loss was to be borne equally by the other three.

BILL IN EQUITY, filed July 3, 1873, by a partner in the late firm of Converse, Whitcomb & Co. against the other partners,

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James C. Converse, Walter Stanton and Edwin R. Blagden, to compel contribution to the losses incurred by the partnership. The articles of partnership were as follows:

"Terms of agreement of copartnership for the transaction of a dry-goods commission business in New York and Boston between the undersigned, to commence the second of January, 1871, and continue one year, under the firm name of Converse, Whitcomb & Co.

"J. C. Converse to contribute twenty-five thousand dollars; to receive interest on the same at 7 per cent., and devote such time as he may be able to give; to receive 25 per cent. of net profits.

"J. M. Whitcomb to contribute fifty thousand dollars, receive 7 per cent. interest on the same; to give all his time to the business, and receive 25 per cent. of the net profits.

"E. R. Blagden to contribute all his time to the business, and receive 25 per cent. of the net profits.

"Walter Stanton to contribute all his time to the business, and receive 25 per cent. of the net profits.

"J. C. Converse and E. R. Blagden to attend to the business in Boston. J. M. Whitcomb and Walter Stanton to attend to the business in New York. Each partner shall be allowed to draw only $500 per month for personal expenses."

Hearing before *Colt*, J., who reported the case for the consideration of the full court in substance as follows:

The plaintiff contributed $25,000 of the amount mentioned in the agreement to be contributed by him.

The partnership was dissolved by mutual consent on March 9, 1871, and the plaintiff was authorized in the agreement of dissolution to settle up the affairs of the firm. He did so, and there resulted therefrom a loss, as he contended, of $25,000, more or less, being less than the amount of the capital to be put in by the plaintiff; but whether the loss in question was a partnership or individual loss, is one of the questions reserved as hereinafter stated. The defendant Blagden, at the time of the dissolution, was, ever since has been, and now is, insolvent and unable to pay any part of said loss. Whitcomb, Converse and Stanton have each paid back to the firm all sums drawn out by them, respectively, for personal expenses, under provision therefor in the memorandum, and Stanton, when he entered the firm, had the

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control of the business of certain woollen mills, and brought this into the firm; and he testified, without contradiction, that he brought the bulk of the business to the firm.

The defendant Stanton contended, that he was not liable to make good any portion of the capital contributed to the business by the plaintiff, and expended in paying partnership debts, and that, if liable, he was not liable to make good the share which Blagden would have contributed, but for his insolvency, or any part of said share.

The cause was reserved upon the foregoing facts and evidence. If the court shall be of opinion that the plaintiff is entitled to any contribution to said loss from either of the defendants, the cause is to be referred to a master to ascertain the amount thereof. If he is not entitled to recover from either of the defendants, the bill is to be dismissed as to such defendant.

C. T. Russell, for the plaintiff.

G. O. Shattuck & O. W. Holmes, Jr., for the defendant Stanton. 1. The plaintiff cannot recover of his former partners, for a loss of the capital stock contributed by him. In *Barfield* v. *Loughborough*, L. R. 8 Ch. 1, where attorneys had contributed to the firm capital in certain proportions, the question was whether interest should be allowed on their respective shares in the capital, after dissolution. The Lord Chancellor, while admitting that advances beyond the stipulated amount of capital might be treated as debts, laid it down distinctly as fundamental doctrine that "Neither partner has a personal demand upon the other for the repayment of his share of the capital employed in the business." He said that "in most of such cases there is either an express written agreement, or practice and usage equivalent thereto, that during the continuance of the partnership, interest shall, before each division of profits, be credited to both parties on the amount of capital standing to the credit of their respective accounts." This is so because the capital has been employed for the profit of the firm. But there is no such claim after dissolution, notwithstanding the shares of the partners in the capital were unequal, for the very reason that it is capital, and not a debt of the concern. Interest was allowed in the particular case only on the footing of a written agreement expressly making the capital a firm debt, equally with further advances. See also *Everly* v

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Darborne, 1 Leg. Gaz. Rep. 127, *per* Sharswood, J.; *Cameron v. Watson*, 10 Rich. Eq. 64, 101, 102, 103; *Heran* v. *Hall*, 1 B. Mon. 159; Lindl. Part. (2d ed.) 790, 791; Story Part. § 26, note, citing and approving Rutherforth Inst. Bk. 1, c. 13, §§ 82, 85; Watson Part. 57; Parsons Part. 51.

On principle it is submitted that the defendant cannot be liable. If A. and B. agree to labor together a year for their joint advantage, and to share profits, and they make no profits, each loses his labor. If A. and B. are partners in shoemaking for a year, A. to furnish leather or money to purchase leather, and B. to make it into shoes, A. and B. to divide the profits, and they make no profits, B. loses his labor as before. But B. cannot be held to insure A.'s contribution on any principle which would not equally make A. insure B. Even the seeming difference in the nature of the respective contributions is not a true one. Before the goods are sold and the question of profit or loss settled, B.'s labor has been converted into capital, in the strictest sense of the word, by the change in form and increased value which it has given to the leather. The same is true when the labor of B. consists in selling instead of changing the form of goods. He increases their value for A.'s purposes by helping them to a market, and his labor is an element in the price which they fetch. The principle is not affected by an agreement to allow interest on the capital put in while it is being used for the joint advantage, which is said to be the usual thing in *Barfield* v. *Loughborough*, *ubi supra*.

A wholly different case is presented when a partner advances money to his firm, which he is not required by the articles to contribute to the partnership stock, for such an advance is not a contribution to the firm capital. So, perhaps, when one partner advances all the money for a single venture, and the other is to take half the profits and contributes neither labor nor funds, it may be inferred that sharing the risk is the consideration of being permitted to share the gain. These considerations explain the decision in *Nowell* v. *Nowell*, L. R. 7 Eq. 538, the language of which induced Mr. Lindley to change his text, contrary to his own previously expressed opinion.

The only question in any case is, whether the money is a contribution to firm capital or not. The money put in by the plain

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tiff in this case was put in under an agreement requiring him to "contribute" it, just as it required Stanton to "contribute" his time, and as he, in fact, also contributed the firm business. The two stand on the same footing as to the risk of their respective contributions. "Contribute" is the apt word always used to signify bringing in to the capital stock. See *Morris* v. *Allen*, 1 McCarter, 44, 45; *Everly* v. *Durborow*, *ubi supra*; *Cameron* v. *Watson*, *ubi supra*.

This agreement of course was made in the confident expectation of gain. Losses were not expected. The risk was considered as practically nothing and not to be taken into account, or they would not have gone into the venture. The parties show this by their contract, and set their own valuation on their respective contributions. The contract shows that Stanton's skill (together with the business which he brought in) was considered as valuable as what the plaintiff contributed, above the ordinary value of the safe use of money, which was separately paid for. It is to be presumed from the contract that if the plaintiff had not put in money he would not have got a quarter of the profits, and that he was willing to employ his money in this way because he was confident of making gains by the aid of the talents, energy and business contributed by younger men. Such partnerships as this are formed every day between capitalists and young men who have ability, but want money; and it is manifest that this is not done in reliance upon getting indemnity for losses from the penniless, but upon so strong an expectation that they will turn the money to better account than the owner could without them, as to induce the owners to disregard the possibility of loss, and run the risk. Each party puts what he has against what he wants; the poor man not supposing that he is assuming the burden of a debt, and the rich man not warranting a return for the poor man's labor.

2. If the defendant is liable, he is not to make good any part of what another partner cannot pay. Parsons Part. 477. *Ex parte Watson*, Buck, 449.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. 3 Kent Com. 28, 29.

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Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story Part. §§ 27, 29. *Heran* v. *Hall*, 1 B. Mon. 159.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter; a corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it; such payment cannot indeed be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. *Julio* v. *Ingalls*, 1 Allen, 41. *Bradbury* v. *Smith*, 21 Maine, 117. *Barfield* v. *Loughborough*, L. R. 8 Ch. 1. *In re Anglesea Colliery Co.* L. R. 2 Eq. 379, 387; *S. C.* L. R. 1 Ch. 555. *Nowell* v. *Nowell*, L. R. 7 Eq. 538. *In re Hodges' Distillery Co.* L. R. 6 Ch. 51, 56. 1 Lindl. Part. (3d ed.) 696, 827, 828.

Only two cases were cited in the learned argument for the defendant Stanton, in which opinions inconsistent with this view have been expressed.

The one is *Everly* v. *Durborow*, 1 Leg. Gaz. Rep. 127, a *nisi prius* decision, with no reference to authorities, except an early edition of Lindley on Partnership, which has been corrected by the learned author, *ubi supra*, conformably to the adjudged cases.

The other is *Cameron* v. *Watson*, 10 Rich. Eq. 64. That was a bill in equity to settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The mas-

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ter, to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon. pp. 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exception of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution. pp. 88–90, 95, 96. The Court of Appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular. pp. 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar, the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give;" and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse respectively for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. *Whitman* v. *Porter*, 107 Mass. 522. 1 Lindl. Part. 789, 790.

Decree for the plaintiff accordingly.

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COMMONWEALTH, by Insurance Commissioner, *vs.* MASSACHUSETTS MUTUAL FIRE INSURANCE COMPANY. George W. Taylor, petitioner.

SAME vs. SAME. William Minot & others, Receivers petitioners.

Suffolk. June 23. — Oct. 27, 1875. — COLT & AMES, JJ., absent.

A policy, issued by a mutual fire insurance company, insured the holder against loss or damage by fire under the conditions and limitations expressed in the rules of the company, and stated the undertaking of the company to be "to satisfy and make good, from the absolute and conditional funds of the company, unto the said insured, all the damage by fire which may happen to said real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided, nevertheless, that if the whole of the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage." One rule required notice of a loss to be given in a prescribed manner, and provided that "payment shall be made in thirty days after receiving notice of the loss as above." Another rule provided that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid by way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then collect the said assessment without delay; and in thirty days after such notice shall have been given, they shall actually proceed in due form of law against each delinquent, and thereby be completely exonerated. In case of neglect, they may be subjected to the penalty expressed in the act of incorporation. In case of neglect to pay said assessment, such delinquent's policy or policies shall cease and determine until payment is made, with interest, and such reasons given for the delay as shall be satisfactory to the president and directors." *Held*, that after losses which absorbed the absolute funds of the company and required an assessment upon the contingent liability of the members, the insured who had sustained losses were not entitled to interest thereon out of the surplus remaining from the assessments after the payment of the losses.

A mutual fire insurance company is not liable for any loss which occurs after the appointment of receivers and the judicial sequestration of all its property; and where, upon the happening of losses which absorb the absolute fund of the company and require an assessment upon the contingent liability of the members, the fund accruing from the assessment is more than enough to pay for the losses, the receivers are not entitled to retain any part of the surplus for the purpose of meeting future losses.

Where the losses upon policies issued by a mutual fire insurance company are so large as to exhaust the absolute fund of the company, and an assessment is made in accordance with the rules of the company, upon the contingent liability of the members, which proves to be more than sufficient to pay the amount required, the surplus is, in the absence of any requirement in the rules of the company that it shall be devoted to other uses, to be repaid to the members by whom the assessment was paid.

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THE FIRST PETITION was by George W. Taylor, filed September 29, 1873, alleging that on July 1, 1866, the defendant company insured him against loss by fire on his house and ware-room, in Boston, for the term of seven years; that on June 18, 1873, the said buildings were partially destroyed by fire; that the amount of the loss was $997, and that proof thereof was duly made.

The prayer of the petition was that William Minot, Charles B. Cumings and Lemuel Shaw, who had been appointed receivers of the defendant company, be ordered to appear and show cause why the dividends on the amount due the petitioner under said policy of insurance, on account of said loss, should not be paid to him. Annexed to the petition was a copy of the policy, on which were printed the rules of the defendant company. So far as these are material, they appear in the opinion.

The answer of the receivers admitted the facts stated in the petition; and alleged that on November 27, 1872, on application of the insurance commissioner to this court, the company was restrained by injunction from further proceeding with its business; that on December 7, 1872, it appearing to the court that the company was insolvent, said receivers were appointed, with authority to take possession of the property and effects of the corporation, and to collect the debts, to pay all debts due from said corporation, if the funds in their hands should be sufficient, and, if not, to distribute the said funds ratably among the creditors, and to distribute the residue, after payment of said debts, to and among the persons legally entitled thereto; and the injunction previously issued was made perpetual; that on the sixth day of December, 1872, the directors made an assessment for the payment of losses accruing prior to said date, by vote, as follows: "Whereas, members of this corporation did, during the month of November last, and on and after the ninth day thereof, sustain damage by fire over and above the existing funds of the corporation by an amount exceeding the whole liabilities of the members subject to assessment, it is therefore voted: First, that an assessment of an amount equal to two dollars for each and every dollar advanced as premium and deposit be made upon each person and company that was a member of this corporation at twelve o'clock at noon on the ninth day of November last, and that is liable for

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losses occurring during said November and after said twelve o'clock at noon. Second, that the president give notice of the above vote to each member of the corporation, and also publish notice of this assessment in two or more newspapers in Boston. Third, that the president be authorized to collect said assessments without delay, and to cancel outstanding policies on the payment of said assessments."

The answer further alleged that on April 7, 1873, the assessment above mentioned was duly ratified, confirmed and established by this court; that nearly all said policies have been formally cancelled on payment of the assessments due thereon, that notices of the assessment due on his policy were sent to and received by the petitioner on December 6, 1872, and on April 16 and July 1, 1873, and said assessment has not been paid, and that his policy has not been cancelled, unless by the acts, omissions and proceedings hereinbefore set forth; that said receivers have been ordered to pay dividends to the amount of one hundred per cent. on all claims heretofore proved and allowed against said company, and that nearly all said dividends have been paid, but no interest has been hitherto allowed or paid on said claims; that the assets in the hands of the receivers will probably be sufficient to pay said claim of said Taylor, after making all payments heretofore ordered by this court, and after paying the expenses of winding up the affairs of the company; but that there are certain other policies, the terms of which have not expired, on which assessments have not been paid, and which are not known to have been forfeited or cancelled unless by the neglect to pay said assessment and by the proceedings hereinbefore set forth.

At the hearing before *Endicott*, J., the facts alleged in the petition and answer were admitted, and the question was reserved for the full court whether on these facts the petitioner was entitled to any, and, if any, what payment on account of the claim set forth in his petition.

THE SECOND PETITION was by the receivers of the defendant company filed May 12, 1875, alleging that an assessment was levied by the directors of the company upon the members thereof, and approved by this court, to pay claims for fire losses occurring prior to December 6, 1872; that, in levying the assessment, an allowance of fifteen per cent. was made for probable bad

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debts and expenses of collection; that the receivers have collected upwards of ninety-eight per cent. of the assessment, and believe that still further collections can be made; that they have paid from time to time, in accordance with the decrees of this court, one hundred per cent. on all said claims for fire losses, but have paid no interest on said claims; that there will remain in their hands after the aforesaid payments, and after paying expenses and charges of collection, upwards of eighty thousand dollars, that, by the rules of the company, all claims for fire losses were payable thirty days after notice thereof; that notice of the claims above mentioned was given (or notice thereof waived by the company,) before December 6, 1872; that in accordance with the vote of the directors of the company on levying the assessment, and under the authority of this court, the president of the company has cancelled policies outstanding at the date of the assessment, on payment thereof; that by the by-laws of the company it is provided that policies shall cease and determine in case of neglect to pay any assessment on the same; that there are about fifty policies which have not been formally cancelled, and which were issued for a term of years which has not yet elapsed, but on which the assessment remains unpaid.

The prayer of the petition was for the direction of the court on the following points:

1. Whether interest shall be paid on claims for the fire losses first above mentioned.

2. Whether any of said uncancelled policies above mentioned are to be treated as subsisting policies, and whether any moneys shall be reserved for the payment of losses which may hereafter occur thereon.

3. Whether any surplus remaining after making such payments and reservations as the court may decree, shall be repaid to persons who shall have paid in full the sums assessed upon them, in proportion to the amount of the assessment so paid, or shall be paid to holders of policies which were in force at the date of said assessment on account of claims for the value of the unexpired terms of said policies, or for unearned premiums and deposit money.

The case was heard and reserved by *Gray*, C. J., for the consideration of the full court upon the three questions stated in the prayer of the petition.

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J. Q. A. Brackett, for Taylor.

J. C. Davis, for a creditor contending that interest should be paid on his claim.

G. O. Shattuck, for the receivers.

MORTON, J. 1. The directors, by their vote of December 6, 1872, made an assessment of an amount equal to two dollars for each and every dollar advanced as premium and deposit. This was the whole amount to which the members of the corporation were liable to be assessed under the charter and by-laws. So much of this amount has been collected by the receivers, that they have paid in full the principal of all the losses by fire which occurred prior to the date of the vote, and there remains in their hands a large surplus. The first question presented by their petition is whether they shall pay interest upon such losses.

The solution of this question depends upon the construction of the peculiar contract into which each member of the corporation enters with the other members.

The holder of a policy is "insured against loss or damage by fire under the conditions and limitations expressed in the rules" of the company. In each policy, the undertaking of the company is "to satisfy and make good, from the absolute and conditional funds of the company, unto the said assured, all the damage by fire which may happen to said real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided nevertheless, that if the whole of the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage."

The twenty-first rule requires notice of a loss to be given in a prescribed manner, and provides that "payment shall be made in thirty days after receiving notice of the loss as above."

The twenty-sixth rule provides that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid by way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then

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collect the said assessment without delay; and in thirty days after such notice shall have been given, they shall actually proceed in due form of law against each delinquent, and thereby be completely exonerated. In case of neglect, they may be subjected to the penalty expressed in the act of incorporation. In the case of neglect to pay said assessment, such delinquent's policy or policies shall cease and determine until payment is made, with interest, and such reasons given for the delay as shall be satisfactory to the president and directors."

The contract between each policy holder and the other members of the corporation, contained in the policy and the rules, is not an absolute contract of indemnity such as is usual in a policy issued by companies having specific capitals. It contemplates that losses are to be paid in thirty days after notice, if the absolute funds are sufficient for that purpose; but if they are insufficient, it only requires that the insurers shall make an assessment according to the twenty-sixth rule, for the purpose of paying them in full, or in part, if the whole funds are not sufficient to pay in full. If the corporation, through its officers, proceeds to make an assessment in accordance with the twenty-sixth rule, and pays the losses sustained, it does all that the contract with the insured requires of it. There is no laches or neglect to perform the contract which renders it liable to pay interest as damages for the detention of the money of the insured beyond the time when it is payable by the contract.

The provision of the twenty-first rule, that payment of losses shall be made in thirty days after notice, cannot apply to losses which make it necessary to resort to the contingent fund, because it is clear that it is not contemplated by the twenty-sixth rule that assessments can be made and collected within the thirty days. We are of opinion, therefore, that, upon the fair construction of the contract contained in the policy and rules of the company, where losses occur which absorb the absolute funds and require an assessment upon the contingent liability of the members, the insured who have sustained losses are not entitled to interest thereon. It follows that the receivers cannot pay interest upon the losses which occurred before the assessment was laid.

2. It appears that there are about fifty policies which have not been formally cancelled, and which were issued for a term of

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years which has not yet elapsed, but on which the assessment remains unpaid; and the second question presented by the petition of the receivers is, "Whether any of said uncancelled policies are to be treated as subsisting policies, and whether any money shall be reserved for the payment of losses which may hereafter occur thereon.

The proceedings under the statute are in the nature of proceedings in insolvency, the object of which is to close up the affairs of the corporation as speedily as possible. This object would be defeated if the fund in the hands of the receivers is liable for future losses, for the fund could not be distributed until the longest policy had expired by lapse of time. The decrees of the court perpetually enjoining the corporation from further proceeding with its business, and sequestering all its property, deprive the corporation and its officers of the power to provide for any future losses. Each holder of a policy is a member of the corporation, and as such has notice of and is affected by the injunction. It is an incident of the peculiar contract and relation which each member of a mutual insurance company enters into with the other members, that the injunction and judicial sequestration of all the property of the corporation terminates its liability for future losses.

For these reasons, without considering other grounds of objection, we are of opinion that the funds in the hands of the receivers are not liable to pay any losses which might occur after the judicial sequestration of the property of the company, and therefore that no part of the fund should be retained for the purpose of meeting such losses.

3. The third question is, whether the surplus in the hands of the receivers should be repaid to persons who have paid in full the sums assessed upon them, or shall be paid to holders of unexpired policies on account of claims for the value of unexpired terms or unearned premiums.

The twenty-fifth article of the rules provides that "the absolute fund of the company shall be and hereby is appropriated to the payment, 1st, of expenses; 2d, of losses by fire; 3d, of returns of premiums and deposits, and of dividends on policies expired." The twenty-sixth article, above quoted, provides that, in case losses should happen so as to absorb the absolute fund,

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an assessment shall be made upon the members. Under this provision, the liability to assessment is measured by the amount of the just claims for losses for which the company is then responsible. Neither this nor any other provision of the rules or of the contract authorizes an assessment for the purpose of paying the value of unexpired policies or unearned premiums. *Commonwealth* v. *Massachusetts Ins. Co.* 112 Mass. 116. *Commonwealth* v. *Mechanics' Ins. Co.* 112 Mass. 192.

The surplus in question results from the fact that the directors made an assessment larger than was necessary for the purposes for which an assessment was authorized. The payments of the excess were required and made under a mistake of fact, and we are of opinion that such surplus should be repaid to the members who have thus paid more than they were required by law to pay.

A decree is to be entered accordingly upon the petition of the receivers for instructions, and the petition of George W. Taylor is to be dismissed. *Decrees accordingly.*

MARK C. FELCH *vs.* DAVID HOOPER & another.

Middlesex. Jan. 12. — Oct. 23, 1875. AMES & ENDICOTT, JJ., absent.

Where a person, who has entered into a written contract for the purchase of land, has paid or tendered the consideration, and by the owner's permission has entered upon the land and made improvements thereon, the land is charged with an implied trust in his favor; and a court of equity may, if the owner has never been a resident of this state, and no service is made upon him here, appoint a trustee, under the Gen. Sts. c. 100, § 15, to convey the same in such manner as it may require.

BILL IN EQUITY filed December 2, 1873, against David Hooper and Matilda H. Hooper, of Portland, in the State of Maine, alleging the following facts:

On August 16, 1873, David Hooper executed and delivered to the plaintiff a bond, a copy of which was annexed to the bill, and was as follows:

"Know all men by these presents that I, David Hooper, of Portland, county of Cumberland and State of Maine, am holden and stand firmly bound unto Mark C. Felch, of Somerville, county

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of Middlesex and State of Massachusetts, in the sum of five thousand dollars, to the payment of which to the said obligee or his executors, administrators or assigns, I do hereby bind myself, my heirs, executors and administrators.

"The condition of this obligation is such that whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated on Wallace Street, in Somerville, aforesaid, and bounded as follows, [describing it.]

"The same to be conveyed by a good and sufficient warranty deed of the said obligor, conveying a good and clear title to the same, free from all incumbrances.

"And whereas for such deed and conveyance it is agreed that the said obligee shall pay the sum of eighteen hundred dollars, of which one hundred and fifty dollars are to be paid in cash upon the delivery of this bond, and the remainder, bearing interest after sixty days at the rate of eight per cent. per annum.

"Now therefore if the said obligor shall, upon tender by the said obligee of the aforesaid cash at any time within ninety days from this date, deliver unto the said obligee a good and sufficient deed as aforesaid, then this obligation shall be void, otherwise it shall be and remain in full force and virtue."

On the delivery of the bond the plaintiff paid to David Hooper the sum of $150, as required by the terms of the bond.

In view of the sale made to him as aforesaid and soon after the execution and delivery of the bond, David Hooper verbally authorized the plaintiff to enter upon the land and erect dwelling-houses thereon in such manner as the plaintiff might deem fit and proper, and thereupon the plaintiff proceeded to erect such buildings and has almost completed one house on one of said lots, and has laid the foundation of another house on the other lot, and has laid out and invested therein a large sum of money, in the whole, nearly $2,500.

At and before the expiration of the ninety days mentioned in the bond, which expired on November 14, 1873, the plaintiff was ready to pay the balance of the purchase money, as therein provided; but as Hooper had not paid the annual taxes assessed upon the land by the city of Somerville on May 1, 1873, which constituted an incumbrance thereon, and did not pay the same until November 21, he could not before said last named day have given

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a deed of conveyance in accordance with the terms of the bond. On that day, immediately after the payment of the taxes by David Hooper, the plaintiff offered and tendered to him the whole balance of the purchase money for the land then remaining due to him according to the terms of the bond, and demanded from him a conveyance of the land which David Hooper refused.

The bill then averred on information and belief that afterwards on the same day, Hooper caused a deed to be recorded in the registry of deeds, purporting to be a conveyance of the land from him to the defendant Matilda H. Hooper, his mother; that this conveyance was merely colorable and without consideration, and made with the fraudulent intention of compelling the plaintiff to pay an increased price for the land or to lose the buildings which he has erected thereon.

The prayer of the bill was that the defendants be ordered by a decree of the court to execute, acknowledge and deliver to the plaintiff a deed of conveyance in conformity with the terms of the bond, on payment of the balance of the purchase money; and for further relief.

On December 6, 1873, an attested copy of the bill was served on the defendants at Portland, in the State of Maine.

On February 2, 1874, the defendants demurred to the bill on the ground that the court had no jurisdiction over them.

On February 17, 1874, the plaintiff filed an amendment to the bill, alleging that the contract by which David Hooper sold the land in question to the plaintiff, was entered into and concluded between the latter and an agent of David Hooper in Somerville, and was intended to be carried out in this Commonwealth; that David Hooper was at Somerville in person at the time when the taxes were paid by him and when the offer and tender of the balance of the purchase money were made to him by the plaintiff; that on the same day, David Hooper acknowledged the deed to Matilda H. Hooper, before a justice of the peace in said county of Middlesex, and caused the same to be placed on record while Matilda H. Hooper was at her home in Portland; that since that time the defendants have pretended that David Hooper had actually sold the land to Matilda H. Hooper, but David Hooper has proposed and offered that if the plaintiff would pay a sum much larger than the price stipulated for in the bond, he would

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procure a conveyance of the land from Matilda H. Hooper to him; that after the execution and delivery and recording of said bond and a payment of a part of the purchase money as therein provided, and especially after the said tender of the remainder of the purchase money, which he is and has been ready to pay, the said David Hooper held and the said Matilda H. Hooper now holds the title to said land, and is seised thereof upon a trust for the benefit of the plaintiff; that the defendants have constantly and fraudulently refused to make a conveyance thereof to him, though often requested so to do, unless he would pay a large sum in addition to the price agreed upon; and now, in pursuance of a fraudulent scheme by them conceived to compel the plaintiff to pay an increased price for the land or lose the improvements he had made thereon by consent of David Hooper, before the time when he should have conveyed the same to the plaintiff, and also lose that portion of the purchase money paid on delivery of the bond, the defendants, though duly notified of this suit, refuse to answer the plaintiff's bill and refuse to submit themselves to the jurisdiction of this court, and remain obstinately without the Commonwealth.

The prayer of the amended bill was that the said land may be decreed to belong beneficially to the plaintiff, and that some proper person may be appointed and authorized to convey to him the legal title thereof, and that the balance of the purchase money now remaining in his hands, after deducting therefrom the costs of this suit, may be safely deposited or invested under the direction of this court, to be paid over or transferred to the defendants, only upon the execution and delivery by them of a proper deed or deeds to convey or confirm the title of said land to the plaintiff, and for further relief.

The defendants thereupon demurred to the amended bill, assigning as ground of demurrer "that it appears by the plaintiff's own showing that this court has no jurisdiction of the parties defendant in this bill or either of them, and that there has been no legal and sufficient service of the same on said defendants or either of them to authorize this court to take jurisdiction therein."

The case was reserved by *Colt*, J., for the consideration of the full court, upon the bill as amended and the demurrer.

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A. C. Buzzell, for the defendants. Neither of the defendants is, or ever has been, an inhabitant of this state, nor, at the time this bill was filed, was either within this state, nor was any service made on either of them within the jurisdiction of this court. Under such circumstances, this court has decided that a bill for the specific performance of a contract to convey land within the state, cannot be maintained. *Spurr* v. *Scoville*, 3 Cush. 578. *Moody* v. *Gay*, 15 Gray, 457.

The bill does not show the existence, at any time, of such a trust as is contemplated by the Gen. Sts. *c.* 100. That statute was intended to apply only to trusts formally created by deed, or raised by necessary intendment in wills, and has no reference whatever to contracts like this, or to constructive or resulting trusts, the existence of which is in doubt or disputed, as in the case at bar. It was not intended to apply where issues of fact are to be tried, but only where the trust relation is conceded. Where such issues are to be tried, the court must have jurisdiction of the person. The "sale" and "conveyance" referred to in the statute, relate to sales for reinvestment and conveyance for that purpose, or to trustees not under the disabilities named in § 15. The Legislature practically adopted this view in giving Probate Courts original jurisdiction "over all matters relating to the sale of trust estates, of which the Supreme Judicial Court now has exclusive jurisdiction." St. 1869, *c.* 331. *Dana* v. *Petersham*, 107 Mass. 598, 602. Perry on Trusts, §§ 25–27.

G. W. Park & G. F. Piper, for the plaintiff.

COLT, J. The question raised by this demurrer is not whether a contract for the conveyance of land in this Commonwealth can be specifically enforced against a defendant upon whom no service is made within this state, and who is not and never has been a resident. That question was decided in the case of *Spurr* v. *Scoville*, 3 Cush. 578.

The question here is whether under such a contract in writing the plaintiff who has paid or tendered the consideration, and has by the defendant's permission entered upon the land and made improvements thereon, can under our statutes, upon the allegations of this bill, enforce his equitable title to the land in any form.

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In *Spurr* v. *Scoville*, it was said that the only effectual decree, which could be rendered upon the allegations in that case, would require a conveyance of the land in question by the defendant personally; and that courts of equity would not proceed in a cause, where the decree asked for required an absent defendant, not subject to their jurisdiction, to be active in its performance, but could deal only with persons who could be compelled by process to obey their orders. The decision is placed expressly on the ground that the suit was a proceeding *in personam* merely, in which no decree was sought against the property, and no allusion is made to statutory provisions which upon proper allegations might perhaps have afforded relief.

The case at bar differs in this respect, and the plaintiff seeks to enforce an equitable right in the land itself. The bill, as amended, avers that the contract relied on and the payment and other facts alleged were sufficient to charge the land with a trust in the plaintiff's favor, which the defendants refused to perform by refusing to make the required conveyance. And a prayer is added that the land may be decreed to belong beneficially to the plaintiff, and may be conveyed to him by some person duly appointed by the court. To the bill as amended there is a special demurrer on the ground that the court has no jurisdiction of the parties.

The doctrine is well established in equity that from the time a valid contract for the sale of land is made, that which ought to have been done is treated, as between the parties, as already done; and the seller and his representatives, and subsequent purchasers from him with notice, will be held to be trustees for the purchaser, for the purpose of affording the latter a remedy against the estate. *Atcherley* v. *Vernon*, 10 Mod. 518, 527. *Daniels* v. *Davison*, 16 Ves. 249, 255. *Waddington* v. *Banks*, 1 Brock. 97. Lewin on Trusts, (3d ed.) 174, 175.

Our statutes give this court power to enforce the performance of a contract for the sale of land, made by a deceased person, and to order the executor or administrator to make a conveyance, which it is declared shall have the same force and effect as if made by the person who made the agreement to convey, thus giving effect to the deed of the legal representative although the legal title is in the heirs at law, and treating the subject matter

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of the contract as personal or real, according to the character which has been given to it by its terms. Gen. Sts. *c.* 117, §§ 5, 6.

Upon the facts stated in this bill, the land in question is charged with an implied trust in the plaintiff's favor; and the court is not powerless to enforce that trust, merely because the parties holding the legal title are beyond its reach. It is said that courts of equity will never allow a trust to fail for want of a trustee. Such a trustee this court is now authorized to appoint, by a statute which provides that when a person, seised of an estate upon a trust express or implied, is out of the Commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the objects of the trust, and may appoint some suitable person in the place of the trustee to convey the same in such manner as it may require. Gen. Sts. *c.* 100, § 15.

This statute expressly includes implied trusts, and cannot be confined in its application to trusts which are created by deed or will and do not depend upon the proof of facts which may be open to dispute. *Walsh* v. *Walsh*, 116 Mass. 377. Most implied trusts are of the latter description. The statute gives the court power to render an effectual decree, and that is enough to sustain the jurisdiction when the parties or the subject matter are within its reach. *Ward* v. *Arredondo*, Hopk. Ch. 213. The decree will be binding on absent parties to the extent of its effect on the land only, even though all parties interested have been notified in accordance with the rules of court. In other states, under similar statutes, similar relief is granted. *Matteson* v. *Scofield*, 27 Wis. 671. *Rourke* v. *McLaughlin*, 38 Cal. 196.

Upon this demurrer the existence of the trust must be assumed, and the entry must be *Demurrer overruled.*

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WILLIAM HANLAN'S CASE.

Plymouth. October 19. — 20, 1875. AMES & MORTON, JJ., absent.

If the sureties, on a bond given by the respondent on a complaint under the bastardy act for his appearance in the Superior Court, and to abide the order of the court thereon, surrender their principal in the Superior Court, that court has no authority under the Gen. Sts. c. 72, §§ 4, 5, to order the respondent to be committed to abide the further order of the court, but only to order him to give a new bond and to stand committed until he complies with that order.

HABEAS CORPUS. The petitioner, who was arrested November 9, 1874, upon a warrant issued by the Second District Court of Plymouth, upon the complaint of Mary McQueeney under the bastardy act, was brought before that court and there gave bond with surety for his appearance to answer the complaint in the Superior Court, and abide the order of the court thereon. At the return term of the Superior Court, the surety in the bond surrendered his principal in open court, and he was committed to the Plymouth County Jail under an order of the Superior Court "to abide the further order of the court," and was there held in custody under this order until July 22, 1875, when he made application to *Wells*, J., for a writ of *habeas corpus*, and the writ issued accordingly to the keeper of the jail.

Upon these facts the judge reported the case to the full court, such order to be made therein as law and justice might require.

C. A. Williams, for the petitioner.

J. F. Simmons, *contra*.

DEVENS, J. The bond which may be required by the court or justice in a process of this character under the Gen. Sts. *c.* 72, § 4, for the appearance of the respondent at the Superior Court, is to remain in force until final judgment. Gen. Sts. *c.* 72, § 5. But it is further provided by § 5, "that if the sureties in the bond at any term of said court object to being longer held liable, or if the court for any cause deems it proper, the court may order a new bond to be taken; and the defendant shall stand committed until he gives such new bond."

This provision does not enable the sureties in such a bond to discharge themselves, as the sureties in a bail bond at common law may, by a surrender of their principal in open court, or as

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the sureties may in a bond taken for the appearance of the defendant before the court or magistrate by whom the preliminary examination in a complaint of this character is made. St. of 1863, *c.* 127, §§ 1–3. It contemplates an action by the court upon the objection by the sureties to being longer held liable, and an order thereupon for a new bond, and for the principal to stand committed until he gives such new bond. Until this action is taken by the court, the bond originally given continues in force.

In the present case no new bond was ordered. The petitioner was not committed for failing to furnish such new bond, but simply to abide the further order of the court. For such a commitment no authority is found in the statute. The authority of the court to act is derived solely from the statute; the provisions for a bond and for the action which may be taken in reference to it being entirely statutory in their character. To warrant the commitment there should first have been an order to give a new bond, and the commitment should have been made for non-compliance with such order. *M'Hugh, petitioner*, 3 Cush. 452.

Petitioner discharged.

NATHAN S. GIBBS & wife *vs.* NATHANIEL F. AMES.

Plymouth. October 19. — 22, 1875. AMES & MORTON, JJ., absent.

In an action of tort by a husband and his wife for a malicious prosecution of the wife, it appeared that the defendant made a complaint on oath before a trial justice, accusing the wife of larceny, and the husband of inciting and commanding the wife to the crime, and praying for the arrest of the husband; that the warrant was for the arrest of the husband only; that both were brought from another state on a requisition from the governor of this Commonwealth, and were arrested and brought before the justice; that the wife was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety for her appearance for that purpose, and in default of bail was committed to jail, and on the day fixed for the trial was discharged, being found by the magistrate to be not guilty. The jury were instructed that the making of the complaint did not of itself render the defendant liable for the subsequent arrest and imprisonment of the wife; but that if he intended and participated in her arrest and imprisonment upon the complaint, the requisition or the warrant, he was, if and so far as her arrest and imprisonment were caused by such acts of his, done with malice and without probable cause, liable in damages therefor in this action. *Held*, that the action could be maintained as for malicious prosecution, and that the instructions were correct.

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TORT. The declaration alleged that the defendant falsely, maliciously, wilfully and wrongfully prosecuted the female plaintiff, and falsely charged her with the crime of larceny of bonds, to the value of six thousand dollars, and of other personal property, the property of the defendant; and wrongfully and maliciously removed her by force from the State of Maine, and caused her to be removed, she being at the time about to be confined in childbed, and wrongfully imprisoned, and caused her to be imprisoned for more than ten days, expecting every moment to be confined in childbirth, and the defendant well knowing that said charge was false; whereby the female plaintiff suffered great damage in anxiety of mind, in helplessness and destitution, and was otherwise greatly wronged and damaged.

The answer contained a general denial, and alleged that whatever the plaintiffs may show that the defendant did in the premises, he did acting in good faith, upon probable cause that the female plaintiff had done and was guilty of all she was charged by him with doing, and acting under the advice of counsel learned in the law; and that the plaintiffs have no cause of action against him in the premises.

Trial in this court before *Gray*, C. J., who, after verdict, reported the case for the determination of the full court in substance as follows:

The plaintiffs' counsel contended that this action could be maintained not only as an action for malicious prosecution, but also, under the present declaration, as an action for false imprisonment; but it was ruled that the plaintiffs could not recover under this declaration without proving that the defendant had prosecuted the female plaintiff maliciously and without probable cause.

The evidence introduced tended to prove the following facts: The defendant, with his wife, resided at Mattapoisett. The female plaintiff was their daughter, and resided with her husband at New Bedford. On October 27, 1873, in the absence of the defendant, the daughter came to his house, and, while she was there, the defendant's wife took from the house $6000 of bonds belonging to him, and some furniture, part of which belonged to him and part to her, went with her daughter to the house of the latter in New Bedford, there left the furniture, thence went with

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her daughter, and carrying the bonds with them, to New York, and afterwards joined the daughter's husband at Augusta, in the State of Maine, where he had been from before the time of said taking, and they then took up their residence together there. The defendant, upon discovering this, went to Augusta, and after some conversation with his wife and son in law returned to Massachusetts to get a requisition from the governor against the daughter and her husband for larceny of the bonds and furniture; took advice of counsel here, with a view to arrest both; applied to Jonas R. Perkins, a trial justice of this county, for a warrant against both; signed a complaint drawn up by the justice, (a copy of which, together with the warrant issued thereon, and the record of the trial justice, was made part of the report, and the substance of which is printed in the margin;*) took the com-

* The complaint, dated February 25, 1874, alleged that Sophia E. Gibbs on October 27, 1873, feloniously took and carried away in the daytime certain personal property of the complainant of the value of $6000; and that Nathan S. Gibbs, before the felony and larceny were committed, incited, moved, procured, counseled, hired and commanded said Sophia to commit the said felony and larceny. The complaint concluded as follows: "He therefore prays that the said Nathan S. Gibbs may be apprehended and held to answer to said complaint, and dealt with relative to the same as law and justice may require." The warrant issued on this complaint directed the arrest of Nathan S. Gibbs. The record of the trial justice was as follows:

"On complaint of Nathaniel F. Ames *vs.* Nathan S. Gibbs. Plymouth, ss. March 3, 1874. By virtue of the within warrant, the respondents this day brought before me, a trial justice for said county, and the within complaint is read to them; and being asked whether they are guilty or not guilty of the offence therein charged against them, they say that they are not guilty. Continued to March 11th, Plymouth, in said county, at eleven o'clock, A. M. Ordered to give surety in $6000; in default, were committed. And on said eleventh day of March, after due and full consideration, it is considered by me that they are not guilty of said charge. It is therefore ordered that they be discharged."

The mittimus was as follows:

"Commonwealth of Massachusetts. Plymouth, ss. To the Keeper of the Commonwealth's Jail, in Plymouth, in the County of Plymouth. Greeting: You are hereby required to receive into your custody, for safe keeping, the bodies of Sophia E. Gibbs and Nathan S. Gibbs, who stand before me, charged by Nathaniel F. Ames with the crime of larceny, and who are remanded for further examination, to be had before me, at office in Plymouth, in said county of Plymouth, on Wednesday, the eleventh day of March, instant, at eleven

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plaint and warrant to the office of the state police in Boston; there signed an affidavit, setting forth substantially the facts which now appear by the evidence, and also that he had made a complaint before a trial justice, charging both Nathan S. and Sophia E. Gibbs with stealing said furniture and bonds, and had obtained a warrant for their arrest; went to the attorney general and stated his case to him, and obtained from him a letter to the governor, advising that on this complaint and affidavit a requisition might issue for both plaintiffs; had an interview with the governor, and obtained from him a requisition for both; delivered it to two officers of the state police; told them that his object was to arrest both plaintiffs; went with the officers to Augusta and there, acting in concert with them, obtained a warrant from the governor of Maine to the city marshal of Augusta for the arrest of both, and procured their arrest, and arranged with the officers that the hearing here upon said complaint should be postponed for a week or ten days, until he returned from Maine.

The officers, having both plaintiffs in their custody, left Augusta and returned to Massachusetts, and on March 3, 1874, lodged them in jail at Plymouth, and directed another state constable to take them before a trial justice, and because the case was not fully prepared, and the witnesses not all ready, to get a postponement of the case until March 11; and this officer, acting under these directions, brought them before a trial justice, represented to him that the government was not ready to proceed, and procured from him a postponement of the case until March 11, an order that they should recognize for their appearance at that time, and upon their failure to furnish sureties, a warrant, for their commitment to jail in Plymouth, where they were detained until that day.

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o'clock, A. M., unless they shall before recognize to the Commonwealth, with sufficient sureties, in the sum of six thousand dollars each, for their personal appearance at said time and place, and for the purpose above mentioned. Witness my hand and seal, this third day of March, A. D. 1874.

"Otis W. Soule, Trial Justice." [Seal.]

On this was the following return: "Plymouth. ss. Plymouth, March 3, 1874. In obedience to the within warrant, I have conveyed the within named Sophia E. and Nathan S. Gibbs to the jail in Plymouth, in said county, and delivered them to the keeper thereof, with an attested copy of this warrant

"Jas. B. Collingwood, Constable of the Commonwealth."

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The defendant remained with his wife for a week in the plaintiffs' house at Augusta, and on March 9 returned to Massachusetts, saying at that time, to a witness who testified at the trial of this action, that he had got his daughter and her husband both in jail, and could keep them there till he got his bonds.

He arrived at Plymouth on the same day, and took no steps to bail or discharge them until March 11, when he applied to the trial justice for their discharge, and being examined upon oath before him, said that he had his daughter arrested and imprisoned for the purpose of getting into her house and seeing his wife, and that his object was to get the plaintiffs away so as to have access to his wife, and get the bonds, and that he was now satisfied that his daughter and her husband had nothing to do with taking the bonds and furniture, and he wished "to lift the thing" from her. Both plaintiffs were therefore discharged by the justice, and immediately brought this action.

No complaint was made or warrant issued against the female plaintiff otherwise than as above stated.

The defendant contended, and requested the judge to instruct the jury, that there had been no prosecution of the female plaintiff, for or by reason of which this action could be maintained; and that if this action could be maintained at all, he could not be held liable for any damages resulting to her from the imprisonment from March 8 to March 11.

The jury were instructed that the making of the complaint to the trial justice did not of itself render this defendant liable for the subsequent arrest and imprisonment of the female plaintiff; but that if he intended and participated in her arrest and imprisonment upon the complaint, the requisition or the warrant, he was, if, and so far as, her arrest and imprisonment were caused by such acts of his, done with malice and without probable cause, liable in damages therefor in this action.

The jury returned a verdict for the plaintiffs. Judgment was to be rendered on the verdict, or judgment for the defendant, or a new trial ordered, as, in the opinion of the full court, law and justice might require.

G. Marston, for the defendant. 1. To maintain this action, it must appear that the female plaintiff was prosecuted by the defendant. The word "prosecuted" is technical, and means only

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the use of legal process against the party, as a party defendant, *which must* be at an end, and is to be proved by copies of the record. 2 Greenl. Ev. §§ 449, 450, 452. A prosecution can never be said to be at an end if it never was begun, and the proceedings cannot be shown from a record if there never was any proceeding which resulted in a judgment and a record thereof. "There is no similitude or analogy between an action of trespass, or false imprisonment, and this kind of action. An action of trespass is for the defendant's having done that, which, upon the stating of it, is manifestly illegal. This kind of action is for a prosecution which, upon the stating of it, is manifestly legal." *Johnstone* v. *Sutton*, 1 T. R. 510, 544.

2. There never was any prosecution of the female plaintiff; there was no complaint against her in which process was sought against her, and no warrant was ever issued against her. She never was arrested on any warrant issued upon any complaint against her. The complaint only charges the husband with the crime, and prays process only against the husband. The warrant is only for the arrest of the husband; and so the prosecution is only of the husband. It ought to appear that the plaintiff "was acquitted of the charge." 2 Greenl. Ev. § 452. That is not possible in a case where no process has been issued upon which she could have been put upon trial. If the defendant is liable at all, it is for false imprisonment, or trespass, and not in this action.

3. The commitment of the wife by the trial justice was wholly illegal, and was in no sense a legal process under the complaint and warrant which were before the trial justice. The defendant cannot be held liable for damages resulting from an unauthorized and extra-judicial act of the trial justice.

C. G. Davis, for the plaintiffs.

WELLS, J. The female plaintiff was brought before a trial justice upon a criminal charge. She was required to plead to the complaint, to answer further thereto at a subsequent day, and to give surety in $6000 for her appearance for that purpose. In default of bail she was committed by order of the magistrate, and a mittimus therefor in due form was issued. Upon the day fixed for the trial she was discharged, the magistrate finding and adjudging her to be "not guilty of said charge." All this appears from the records of the trial justice.

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This was a sufficient prosecution and acquittal therefrom to furnish a foundation for the common action for malicious prosecution, notwithstanding any insufficiency of the complaint, or defect of process by which she was brought before the court, or want of jurisdiction of the magistrate arising from such defect. 2 Greenl. Ev. §§ 449, 452, and cases cited. 1 Am. Lead. Cas. (4th ed.) 215, 216, notes to *Munns* v. *Dupont*. *O'Brien* v. *Barry*, 106 Mass. 300, 304. *Cardival* v. *Smith*, 109 Mass. 158. The magistrate had jurisdiction of the subject matter of the complaint, which was not the case in *Bixby* v. *Brundige*, 2 Gray, 129, and *Whiting* v. *Johnson*, 6 Gray, 246.

Ordinarily the preferring of a complaint, if done maliciously and without probable cause, would be sufficient to charge the complainant with liability for the prosecution to which it gave rise; because that is its natural and legitimate sequence, and its presumed purpose. But the form of this complaint is such that, as it prayed for process only against the other person named as an offender, some other evidence was rightly required to charge the defendant with an intention to prosecute the female plaintiff. The instructions required the jury to find that the defendant intended to cause, and participated in, her subsequent arrest. That fact, being found, involves him in responsibility for the subsequent proceedings as its natural and ordinary sequence, just as much as if there had been a proper complaint and warrant to justify the arrest, as he asserted in his affidavit that there were. 2 Greenl. Ev. § 450. *Judgment on the verdict.*

Isaac N. Damon *vs.* Inhabitants of Scituate.

Plymouth. October 19. — 22, 1875. Ames & Morton, JJ., absent.

In an action against a town for an injury sustained by a defect in a highway, the mere fact that the injury was sustained while the plaintiff was attempting to pass in his carriage another carriage travelling in the same direction, in violation of a statute, does not as matter of law defeat the action, if his own fault or negligence did not contribute to the injury; but it is competent evidence of negligence on his part to be submitted to the jury.

Tort for personal injuries and for injuries to the plaintiff's horse and carriage, occasioned by an alleged defect in a highway

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which the defendant was bound to keep in repair. Answer, a general denial.

At the trial in the Superior Court, before *Rockwell*, J., it appeared that the injuries were sustained by the carriage going off of a bridge over a culvert, the bridge not being protected by a railing, while the plaintiff, who was driving, was attempting to pass on the right hand side of the road, another carriage travelling in the same direction.

There was no evidence that the plaintiff requested the other carriage to give him room to pass, and its driver being called by the plaintiff testified without contradiction, that the first he knew of the plaintiff's whereabouts, was that he heard the sound of wheels on the stones; directly saw the plaintiff's horse abreast of him; thought there was not room for him to pass; turned his own horse to the left, and immediately heard a crash.

The defendant called the attention of the court to and read the Gen. Sts. c. 77, §§ 2, 4, and asked the judge to instruct the jury as follows:

"That the plaintiff, to maintain his case, must show that he was in the exercise of due care; that attempting to pass the carriage on the right hand side of the road is evidence tending to show want of due care, and, unless justification thereof is shown, is conclusive evidence of want of such care.

"That the plaintiff, to maintain his case, must show that he was in the exercise of due care; that attempting to pass the carriage on the right hand side of the road is evidence tending to show want of due care, and, unless justification therefor is shown, is conclusive evidence of want of such care; and that the burden of showing such justification is upon the plaintiff.

"That the town is obliged to maintain its road only for persons lawfully travelling thereon; that the plaintiff at the time the accident occurred was not lawfully travelling on the defendant's road, and the defendant is not responsible for any injuries at such time received by him."

The judge declined so to instruct the jury, and among other instructions not objected to, instructed them as follows: "That the plaintiff, to maintain this case, must show that he was in the exercise of due care, and must also show that the defendant was guilty of negligence; and that the accident was due to its negli-

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gence alone, and that he in no wise contributed to it; that the jury upon the question of due care on the part of the plaintiff, will consider the evidence in relation to his passing to the right of the preceding carriage, and whether or not the attempt to pass on that side is evidence of the want of due care; but in determining that question for the purposes of this case, the statute alluded to and read is immaterial, and the question is to be determined as if no such statute existed."

The jury found for the plaintiff; and the defendant alleged exceptions.

P. E. Tucker, (*B. W. Harris* with him,) for the defendant.

J. D. Long, for the plaintiff.

GRAY, C. J. The question at issue in this case was whether the injury to the plaintiff was caused solely by a defect in the highway, and in no part by his own negligence.

The mere fact that he was travelling on the wrong side of the road, in violation of the statute, did not as matter of law defeat this action, if his own fault or negligence did not contribute to the injury. But it was competent evidence of negligence on his part, to be submitted to the jury. *Smith* v. *Gardner*, 11 Gray, 418. *Spofford* v. *Harlow*, 3 Allen, 176. *Jones* v. *Andover*, 10 Allen, 18, 20. *Steele* v. *Burkhardt*, 104 Mass. 59, 61.

The instruction of the learned judge, that the statute was immaterial, and that the case was to be determined as if no such statute existed, was therefore erroneous, in withdrawing from the consideration of the jury an element which, if they had been permitted to consider it, might have had some weight in their determination of the question whether the plaintiff, in attempting to pass the other carriage on the wrong side of the road, used such care as was required of him under the circumstances in which he found himself. ***Exceptions sustained.***

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MILLARD E. BROWN *vs.* ABINGTON SAVINGS BANK.

Plymouth. October 28.—30, 1875. WELLS, COLT & MORTON, JJ., absent.

In an action against a savings bank, on an account annexed, to recover the amount of a deposit, the book of deposit is admissible in evidence at least to show the amount of the plaintiff's money received by the defendant, although the book contains printed conditions of deposit and payment.

Exceptions which are certified by the judge, who presided at the trial, not to have been saved or taken at the trial are not open in this court.

CONTRACT on an account annexed, to recover $793.23 and interest, money had and received to the plaintiff's use. At the trial in the Superior Court, before *Aldrich*, J., the jury returned a verdict for the plaintiff, and the defendant tendered to the judge a bill of exceptions, in substance as follows:

The plaintiff had given the defendant notice to produce at the trial the book of deposit numbered 2,890, containing an account of deposits and interest accrued thereon, in the name of the plaintiff, the items being the same contained in the account annexed to the plaintiff's declaration, together with printed conditions of deposit and payment. The defendant's counsel stated that they had the book in court, but objected to producing it. The judge ruled that refusal to produce the book would entitle the plaintiff to introduce secondary evidence of its contents. The book was handed to the plaintiff's counsel, the defendant reserving an objection to its admissibility, and protesting that neither the book nor its contents were admissible as evidence under the declaration. The judge overruled the objection, and admitted the book, to which the defendant thereupon excepted. The book was then used throughout the trial, and went to the jury.

The defendant produced an order signed by the plaintiff, addressed to the treasurer of the defendant corporation, as follows: "September 16, 1874. For value received pay to James Brown or order $793.22, on my deposit with said bank; and he is hereby authorized to receipt for the same in my name." There was evidence in the case tending to show that the plaintiff, when a minor, had signed said order in blank, and delivered it to his father, James Brown, who then had possession of the said deposit book,

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and given said James Brown authority to fill up said order; that said Brown went to the defendant bank and procured a loan, depositing said book as security therefor with the bank, and about seven months after the plaintiff became of age, said loan to said bank being then over due, the plaintiff delivered to said bank a notice, dated July 17, 1874, forbidding the bank to pay over the money on deposit in his name to any other person, and revoking any order previously given, and also a few days afterwards sent to James Brown a notice, dated July 23, 1874, revoking any order made during minority, and demanding any bank book or other evidence of debt in the possession of James Brown. James Brown (about two months after said notice was delivered to the bank) filled up said blank order with the amount, and dated the same, and the next day presented said order to the bank, and the amount of said deposits was thereupon paid to James Brown, and by him applied to the payment of notes to said bank, for which said book had been held as collateral, and said payment was entered in said deposit book. The treasurer of said bank testified that at the time of said payment upon said order, he supposed said order was executed upon the day of its date, and paid the same in good faith in the ordinary course of business.

Before proceeding to address the jury, the defendant's counsel asked the judge to rule, "that if the defendant paid the deposits in good faith upon the order produced, and entered such payment in the deposit book, any legal defect in the order, not brought to the notice of defendant at the time of such payment, will not avail the plaintiff as against such payment." The judge declined so to rule, but ruled, "that if the order upon which the payment was made was a forgery, the bank would not be protected, though the payment was made in good faith, without notice of the defect, and such payment entered in said deposit book." To which the defendant thereupon excepted.

The judge wrote and signed the following certificate on this bill of exceptions: "The first of the foregoing exceptions is allowed. The second exception is disallowed, on the ground that it was not saved or taken at the trial, until after the verdict had been returned."

P. Simmons & A. Mason, for the defendant. 1. The book of deposit was not admissible in evidence under the declaration.

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The printed conditions of deposit and payment constituted a special contract which should have been declared on. *Wall* v. *Provident Institution for Savings*, 3 Allen, 96. Gen. Sts. *c.* 129, § 2, *cl.* 9.

2. The instruction was erroneous. *Levy* v. *Franklin Savings Bank*, 117 Mass. 448.

W. H. Osborne & H. Kingman, for the plaintiff.

By the Court. The book of deposit was admissible in evidence, at least to show the amount of the plaintiff's money received by the defendant, and it does not appear to have been admitted for any illegal purpose. The exception to the instructions is certified by the presiding judge not to have been saved or taken at the trial, and is therefore not open to the defendant.

Exceptions overruled.

Charles E. Gifford *vs.* Catherine Rockett & trustee.

Bristol. October 26, 1875. Wells & Morton, JJ., absent.

Exceptions, alleged by the plaintiff in trustee process to a ruling in favor of an adverse claimant to the funds in the hands of the trustee, cannot be entered in this court before judgment has been rendered in the court below discharging the trustee for the amount allowed to the claimant.

Trustee process begun in the Police Court of Fall River, where the principal defendant and the trustee were defaulted, and James Featherstone appeared as claimant of the funds in the hands of the trustee, and was adjudged to be entitled to the funds, and the plaintiff appealed. In the Superior Court, *Wilkinson*, J., ordered that the trustee be charged on his default in the court below, and found for the claimant in the sum of $55.01. No judgment was entered against the defendant. The plaintiff alleged exceptions to this order, which need not be stated.

A. N. Lincoln, for the plaintiff.

H. K. Braley, for the claimant.

Gray, C. J. An adverse claimant of funds in the hands of a trustee is made a party to the suit, only for the purpose of being heard upon the question whether, and for what amount, the trus-

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tee shall be charged; he is entitled to be heard even if the trustee is defaulted; and he cannot, except in the matter of costs, have judgment in his own name against the plaintiff or the defendant or the trustee. Gen. Sts. *c.* 142, §§ 15, 16, 73. *Morrison* v. *McDermott*, 6 Allen, 122. *Boylen* v. *Young*, 6 Allen, 582. *Fuller* v. *Storer*, 111 Mass. 281. *Stockwell* v. *Silloway*, 113 Mass. 382. *Peck* v. *Stratton*, 118 Mass. 406.

If, as was admitted at the argument of these exceptions, the amount to which the claimant was held by the Superior Court to be entitled equalled the whole fund in the hands of the trustee, it may well be doubted whether the provision of the Gen. Sts. *c.* 142, § 13, that a person, duly summoned as trustee, who, not appearing or answering, is defaulted, shall be adjudged a trustee, could rightfully be applied to the case.

But that fact does not appear upon the record before us, and, however it may be, a ruling in favor of the claimant is no more than an interlocutory order; and, until it has been embodied in a judgment as between the plaintiff and the trustee, discharging the latter so far as the claimant is held to have maintained his claim, exceptions to the ruling cannot be entered in this court, because the record has not been completed and the case finally disposed of in the court below. *Safford* v. *Knight*, 117 Mass. 281. *National Bank of Clinton* v. *Taylor*, 117 Mass. 283, note.

The principal defendant having been defaulted in the Police Court, and not having appealed to the Superior Court, nor moved in that court to take off the default, the case might, as to him, be treated as finally disposed of, because nothing remained to be done to entitle the plaintiff to the formal judgment accompanying an award of execution, and the plaintiff could not have taken such judgment and execution without waiving his exceptions to any order discharging the trustee. *Jarvis* v. *Mitchell*, 99 Mass. 530.

But because the case does not appear by the record to have been finally disposed of in the court below as between the plaintiff and the trustee, the exceptions have been prematurely entered here, and must be *Dismissed.*

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MARTHA WALSH *vs.* JOSEPH L. MACOMBER.

Bristol. October 27, 1875. WELLS & MORTON, JJ., absent.

Land was conveyed by metes and bounds with a reservation to the grantor of a right of way over the granted premises, and a mortgage of the land was given back to the grantor, in which the land was described by the same metes and bounds as in the deed, and as "being the same premises conveyed thereby, this mortgage being part of the same transaction." The land was sold by the mortgagee for breach of condition under the power of sale in the mortgage and was described in the deed to the purchaser by the same metes and bounds, and as being the same described in the mortgage. No reservation was made or incumbrance mentioned in the mortgagee's published notice of sale. *Held*, that the last named deed did not convey the right reserved to the grantor in the original deed.

TORT for breaking and entering the plaintiff's close.

The answer of the defendant admitted the plaintiff's title to the close, but alleged that the same was subject to the right of the defendant to enter the close, and to pass to and from the well thereon for the purpose of obtaining water, and that in the proper exercise of that right he entered the close, and not otherwise.

At the trial in the Superior Court, before *Aldrich*, J., without a jury, the plaintiff put in evidence a deed of the said land, from the defendant to Henry E. Atwell, dated November 19, 1866, conveying the granted premises by metes and bounds, and containing the following clauses: "Together with a right of way over the passage way on the southeasterly side of the above described lot to and from the barn now standing on said premises. And the aforesaid grantor reserves the privilege of passing over said conveyed lot to and from the well to draw water. And the aforesaid grantee is to build and maintain the fence on the southeasterly line of said lot adjoining my remaining land, so long as I shall own adjoining."

The plaintiff also put in evidence a mortgage with a power of sale from Atwell to the defendant, dated November 19, 1866, in which the premises were described by the same metes and bounds as in the said deed, as "being the same premises which the aforesaid Macomber conveyed to me by his deed of the date hereof, this mortgage being part of the same transaction;" and a deed of the premises to the plaintiff from the defendant, reciting that the latter sold the same on breach of condition by virtue and in

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pursuance of the power of sale contained in the mortgage. This deed contained the same description by metes and bounds as the first named deed and the mortgage, and the following clause: "Being the same described in the above named mortgage of the said Henry E. Atwell to me, the aforesaid Joseph L. Macomber."

The affidavit of sale, signed by the defendant as mortgagee, was as follows: "I, Joseph Macomber, named in the deed hereto annexed, do hereby certify, on oath, that by virtue of the power mentioned and referred to in the said annexed deed, I did enter upon the mortgaged premises referred to in said deed, and did sell the same, and all equity of redemption of the said Henry E. Atwell, at public auction on the premises. Said sale was made on the twenty-ninth day of February, A. D. 1868, to Martha Walsh, for the sum of $1100, she being the highest bidder therefor; I gave notice of the time and place of said sale by publishing, three weeks successively, previous to said sale, in the Bristol County Republican aforesaid, a notice, of which the following is a true copy: 'Mortgagee's sale. By virtue of a power of sale contained in a mortgage from Henry E. Atwell to Joseph L. Macomber, dated November 19, 1866, the premises described therein will be sold at public auction on Saturday, the 29th day of February next, at three o'clock in the afternoon. Said premises are situated in the city of Taunton, on the southwesterly side of Summer Street, being a lot of land with the buildings thereon, bounded as follows,'" [describing the land by the same metes and bounds as in the mortgage.]

The plaintiff did not contend that the defendant, if he had a right of way over the premises, did anything more than he properly might do in the usual exercise of that right, and admitted that her only title to the land was under the deed to her from the defendant.

The deed from the defendant to Atwell, and the latter's mortgage back, were recorded soon after their date and long before the deed to the plaintiff was given.

No question was made as to the executing of the deeds or regularity of the proceedings. The plaintiff contended and asked the judge to rule, as a matter of construction of these several deeds, that the defendant had conveyed by his deed to the plaintiff any right he had reserved in his original deed to pass over

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the premises to draw water; but the judge ruled as a proper construction thereof that he conveyed therein to the plaintiff no greater estate than he conveyed to Atwell in his original deed, and his reserved right to pass over her close and draw water still remained; and found for the defendant. To this ruling the plaintiff alleged exceptions.

J. Brown, for the plaintiff. By his mortgage deed, Atwell could lawfully convey no more than the estate he held; but by its terms he conveyed an unincumbered estate. If the defendant foreclosed, the easement would be merged. If he chose to sell in order to realize on his debt, he had the power to offer at public auction an unincumbered estate, which is of greater market value than one burdened with an easement, and the recovery of his whole debt by sale was better secured. He accepted the power to sell at public auction just such an estate as he could sell at private sale after foreclosure of a mortgage deed in which by apt words the easement had or had not been excepted. In executing the power of sale the mortgagee must convey his own title as well as that of the mortgagor. *Torrey* v. *Cook*, 116 Mass. 163.

In the publication of notice of sale, no reservation is made or incumbrance mentioned, even by implication. In his deed to the plaintiff, he conveys an unincumbered estate by metes and bounds. He had power to give the deed in his own name, or by attorney, or both. By fair construction of his grant after the recital of his doings and the statement that by virtue and in pursuance of the power of sale in the mortgage, he conveys his entire title in his own name, fully and effectually. *Brown* v. *Smith*, 116 Mass. 108. After having done all this, it is too late for him to say that he did not intend to convey his easement. He cannot be aided by claiming under the reference or recital in the mortgage deed: "being the same premises which the aforesaid Macomber conveyed to me by his deed of the date hereof, this mortgage being a part of the same transaction." That it was a part of the same transaction could be shown as well by parol. The lot of land being described by metes and bounds as well as courses and distances, and in the precise words of Macomber's deed to Atwell, the reference neither adds to nor detracts from the grant, so far as third parties are concerned. It makes certain what was before

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certain. It is true, that when there is a deed and a mortgage back executed simultaneously and as part of the transaction, they must, as between the parties to them, be construed together, and in such a manner as to give full effect to both. But that rule is applied only where there is ambiguity or doubt. *Cloyes* v. *Sweetser*, 4 Cush. 403. *Pomeroy* v. *Latting*, 15 Gray, 435. Such a rule or practice has no effect here, where third parties are concerned, even if upon the facts disclosed it would affect the parties as between themselves, which is doubtful; for the reference would not make the mortgage deed include other premises, that were or might have been conveyed by Macomber's deed, not even the right of way mentioned unless it was necessarily appurtenant thereto. The reference has no stronger effect to except the easement from the grant than if Atwell had given a warranty deed to a third party with the same description, and substantially the same reference to Macomber's deed. It is not referred to for a more particular description, nor is it made a part thereof by any apt words. The argument that it was a part of the same transaction has no force, for the parties have plainly expressed in their deeds what they intended without ambiguity, and in such cases what is written is binding on both, and there is no call for extraneous aid to limit or enlarge what is plainly written and set forth in their instruments. If they intended more or less than the instruments show they should have expressed it.

If it is contended that a foreclosure or sale and conveyance by an assignee of the mortgagee would not have the effect to deprive the defendant of his easement, the answer is, that the mortgagee had a power coupled with an interest or title, the whole of which he sold and conveyed without reservation. He could and did divest himself of his easement. Perhaps a sale by an assignee of the mortgage would not affect it. *Merritt* v. *Harris*, 102 Mass. 326.

E. H. Bennett & W. E. Fuller, for the defendant, were not called upon.

By the Court. The deed to the plaintiff was an execution of the power in the mortgage, and passed all the mortgagee's title under the mortgage, as well as the mortgagor's equity of redemption. *Brown* v. *Smith*, 116 Mass. 108. *Torrey* v. *Cook* 116 Mass. 168. *Hall* v. *Bliss*, 118 Mass. 554. But it did not convey the

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independent right which had been reserved to the mortgagee as grantor in the original deed to the mortgagor.

Exceptions overruled.

BERNARD H. ALGER *vs.* INHABITANTS OF EASTON.

Bristol. October 27, 1875. WELLS & MORTON, JJ., absent.

An action of tort cannot be maintained against a town for the acts of its assessors and collectors in assessing and levying a poll tax upon a person not an inhabitant thereof, even if the assessors act with integrity and fidelity and are therefore by the Gen. Sts. c. 11, § 51, not themselves liable to an action.

TORT for assault and battery and false imprisonment. Trial in the Superior Court, before *Aldrich*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff was assessed by the assessors of the defendant town, there being no want of integrity and fidelity on their part, for a poll tax for the year 1873. The assessors duly committed their tax list with their warrant to the collector of the defendant town. The collector afterwards duly issued a warrant to Rufus H. Willis, a deputy sheriff, residing in said town of Easton. The deputy, after due notice to the plaintiff, and for want of sufficient goods upon which to levy said tax, took the body of the plaintiff, and committed him to prison. The plaintiff paid the tax and costs on the following day and was discharged from imprisonment. The amount of the tax, which was two dollars, was afterwards paid into the town treasury by the collector.

The plaintiff admitted, and it appeared in evidence, that all the proceedings of the assessors, collector and deputy, were regular, and in legal and proper form; but contended and offered evidence tending to show that he was not an inhabitant of the town of Easton on May 1, 1873, and that he was then an inhabitant of West Bridgewater, an adjoining town, to which he moved in May, 1872.

The defendant asked the judge to rule, that if the plaintiff was not an inhabitant of Easton on May 1, 1873, and for that reason was improperly assessed by the assessors of the town, and

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arrested and imprisoned as before stated, yet this action could not be maintained against the town.

The judge declined so to rule, but submitted the case to the jury upon instructions not objected to.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

E. H. Bennett & H. J. Fuller, for the defendant, were stopped by the court.

J. Brown, for the plaintiff.

GRAY, C. J. This action cannot be maintained. The assessors and collectors, though elected by the inhabitants of the town, are not the agents of the town, but are public officers whose duties are prescribed by law. *Dunbar* v. *Boston*, 112 Mass. 75. If the tax was illegally assessed upon the plaintiff, his only remedy is by action of contract against the town to recover back the money paid. *Baker* v. *Allen*, 21 Pick. 382.

The plaintiff relies upon the case of *Durant* v. *Eaton*, 98 Mass. 469, in which, upon facts like those of the present case, an action of tort was brought against the assessors and collector and the officer who served the warrant; and Chief Justice Chapman said, "The statute which protects assessors from responsibility except for the want of integrity and fidelity on their own part, (Gen. Sts. *c.* 11, § 51,) throws the exclusive responsibility upon the town, and makes it responsible to the plaintiff if he can establish his case." But the question of the form of action against the town was not then before the court; and that the Chief Justice did not mean to say that the town would be liable to an action of tort is shown by the first words of his opinion, "The case of *Baker* v. *Allen*, 21 Pick. 382, is decisive of this case." See also *Loud* v. *Charlestown*, 99 Mass. 208.

Exceptions sustained.

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ELIZA A. TUCKER *vs.* JOHN A. TUCKER.

Bristol. October 26. — 28, 1875. WELLS & MORTON, JJ., absent.

In an action by the payee against the maker of a promissory note alleged to be dated July 1, 1869, for $1000 payable on demand, the evidence at the trial was that the plaintiff lent the defendant $1000 in July, in 1868 or 1869, and at the same time received from him a note, which had been lost and could not be produced. There was no evidence when the note was payable. *Held*, that the note might be presumed to be payable on demand, and that the evidence was sufficient, in the absence of evidence that any other note of that amount was ever given by the defendant to the plaintiff, to warrant the jury in returning a verdict for the plaintiff, and the court in rendering judgment in his favor, upon his filing a sufficient bond of indemnity.

The assignment by the payee of a promissory note of all his right therein, without any indorsement, does not prevent the maintenance of an action upon the note in the name of the payee.

CONTRACT upon a promissory note for $1000 dated Attleborough, July 1, 1869, payable on demand to the plaintiff and signed by the defendant. Writ dated December 18, 1873. The declaration alleged the following particulars:

On or about July 1, 1869, the defendant made and delivered to Eliza A. Tucker a promissory note for the sum of $1000, payable on demand to her order, which she soon after lost, and the same has never been found or paid. Afterwards she indorsed, transferred and assigned all her right, title and interest in said note to Annie F. Newell of said Attleborough.

The plaintiff offered to indemnify the defendant against any claims on account of said note by a sufficient and satisfactory bond of indemnity.

The answer alleged that if, upon the facts stated in the declaration, the defendant was indebted to any one upon the note, he was indebted to Annie F. Newell and not to the plaintiff; contained a general denial, and alleged payment.

At the trial in the Superior Court, before *Wilkinson*, J., the plaintiff testified as follows: "I reside in Attleborough. Know John A. Tucker. He is my son. I loaned him money in July, $1000, in 1868 or 1869. The same year I received it of Mr. Stanley. Received a note from him at the time I let him have the money. I can't find it. The last time I saw it was the time I gave up the company note. I have n't seen the note since the

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time I received it. I do not know what became of it. The note was given at the time he gave up the company note. Did not let him have the money at the time, but it was in consideration of giving up a company note. Interest was paid up to the time I took John A. Tucker's note. Have received no interest or principal since I let him have it. I have searched for the note a number of times where I have kept my papers, different places where I thought it could be found. I have searched in all the places where I keep my papers. Been unable to find it." On cross-examination she testified as follows: "Since I received this note I have received money, about $2000, of John A. Tucker. It was on another note." This was all the evidence in the case.

The defendant objected that this evidence was not competent and sufficient to warrant the jury in finding a verdict for the plaintiff, and requested the judge so to rule. The judge refused so to rule, and the case was submitted to the jury under instructions not excepted to.

The jury returned a verdict for the plaintiff for the full amount claimed; and the defendant alleged exceptions.

J. Brown, for the defendant. 1. An inspection of all the evidence in this case discloses no attempt to prove the contents of the note. The plaintiff says she received a note; a memorandum or acknowledgment would be a note. The declaration is upon a promissory note. The evidence does not disclose a promise to pay as part of the contents of the lost note. The evidence is too general, and would apply to any other note as well as the one described in the declaration. For aught that appears it might have been a six years' note and not yet due. The action was brought in 1874. It was a stale claim at best. She had not seen the note since the time she received it. She had received $2000 since, but she says that was on another note. No man's legal rights are safe, if the court upon such a state of facts refuses to instruct the jury that the evidence is too vague, uncertain, unsatisfactory and wholly insufficient to warrant a verdict for the plaintiff. It not appearing by the evidence what the contents of the note were, it would be impossible to properly describe it in the bond of indemnity offered. The note declared on would not describe it, because there is no proof that such a note was given in

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substance or effect, and it appears other notes had been given by the defendant. To permit the plaintiff to recover on such proof, would open a wide door to fraud. *Tower* v. *Appleton Bank*, 3 Allen, 387, 392.

2. Under the declaration, Annie F. Newell, to whom it had been indorsed and to whom all the plaintiff's right, title and interest in the note had been assigned, was the proper plaintiff, the note declared on being negotiable.

E. H. Bennett & H. J. Fuller, for the plaintiff, were not called upon.

GRAY, C. J. The note declared on was dated July 1, 1869, for $1000 payable on demand. The evidence at the trial was that the plaintiff lent the defendant $1000 in July, in 1868 or 1869, and at the same time received from him a note, which, there being no evidence when it was payable, might be presumed to be payable on demand; and that this note had been lost and could not be produced. This evidence was sufficient, in the absence of evidence that any other note of this amount was ever given by the defendant to the plaintiff, to identify the note in suit, and to warrant the jury in returning a verdict for the plaintiff, and the court in rendering judgment in her favor upon her filing a sufficient bond of indemnity. *Clark* v. *Houghton*, 12 Gray, 38. *Goddard* v. *Sawyer*, 9 Allen, 78. *Nichols* v. *Allen*, 112 Mass. 23. *Tower* v. *Appleton Bank*, 3 Allen, 387. *McGregory* v. *McGregory*, 107 Mass. 548.

The assignment of all the payee's right in the note, without any indorsement, did not prevent the maintenance of an action upon the note in the name of the payee. *Foss* v. *Nutting*, 14 Gray, 484. *Cock* v. *Fellows*, 1 Johns. 143. *Smalley* v. *Wight*, 44 Maine, 442.

Exceptions overruled.

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JOHN HARRINGTON *vs.* FALL RIVER IRON WORKS COMPANY.

Bristol. October 26. — 28, 1875. WELLS & MORTON, JJ., absent.

A servant, who by his contract of hiring agrees that if he intends to leave his master's employ, he will give notice of such intention, and work ten full working days thereafter, and, in default thereof, forfeit all money that may be due him, may recover from the master wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the master, and is absent only so long as he is so disabled.

CONTRACT on an account annexed, for services in the defendant's mill during fifteen days in the month of May, 1873. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

No question was made at the trial as to the amount due, if the plaintiff was entitled to recover. It appeared that the plaintiff on entering the employ of the defendant signed an agreement, a copy of which is printed in the margin; * that, after working for the defendant a short time, that part of the works in which he was laboring suspended operations, and he ceased to work for the defendant and was paid in full. The evidence was conflicting as to whether he was discharged or not, the plaintiff contending that he was, and the defendant contending that he was told he might return when that portion of the works started up, and that he did in fact in about eight weeks afterwards return and was set to work in another part of the establishment. After his return as aforesaid, which was in January, 1873, the plaintiff continued to work as the defendant intended under the contract aforesaid until May 19, 1873; at the close of his work on that day he left as usual, and did not return till the following Monday. The superintendent, after waiting two or three days, and, as he testified, hearing nothing from him, hired another man in his place, and told the plaintiff, when he came to him on the Monday aforesaid, that he had nothing for him to do. The plaintiff testified that he was compelled to stay away by sickness, and

* "I, the undersigned, employee of the F. R. I. Works Co., agree that in case I intend to leave their employment I will give notice of such intention, and work ten full working days; in default of which I agree to forfeit all money which may be due me."

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there was no evidence to the contrary, and that he sent word to the superintendent of that fact; the evidence was conflicting as to whether he did or did not send word.

The judge, among other instructions not objected to, instructed the jury that if the plaintiff was prevented from working by sickness, and gave notice to the defendant of the fact in a reasonable time, and returned to his work as soon as he was able, that would not be such a leaving of the defendant's employ as to require the working of the notice, and that he would be entitled to recover. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. M. Morton, Jr., for the defendant.

H. K. Braley, for the plaintiff, was not called upon.

GRAY, C. J. If, as the jury have found under the instructions of the court, the plaintiff was kept from his work by sickness, and gave reasonable notice thereof to the defendant, and was absent only so long as he was so disabled, his absence was not wilful or intentional, and did not forfeit his right to his wages, either under the contract of the parties, or by the general rules of law. *Naylor* v. *Fall River Iron Works*, 118 Mass. 317. *Noon* v. *Salisbury Mills*, 3 Allen, 340. *Fuller* v. *Brown*, 11 Met. 440. *Caden* v. *Farwell*, 98 Mass. 137. *Exceptions overruled.*

EDWARD GALLIGAN *vs.* CHARLES A. CLARK.

Bristol. October 27. — 28, 1875. WELLS & MORTON, JJ., absent.

The provision of the Gen. Sts. *c.* 156, § 27, that in the taxation of costs "the plaintiff shall be allowed only one term fee if the defendant is defaulted without having appeared," does not apply when the defendant is defaulted on the main issue, and avails himself of the right reserved to him by the Gen. Sts. *c.* 133, §§ 2, 3, of being heard upon the assessment of damages, and of moving that such assessment be made by a jury.

APPEAL by the defendant from the taxation of costs by the clerk of the Superior Court, in an action of tort.

The case was submitted to the Superior Court, and to this court, on appeal, upon an agreed statement of facts in substance as follows:

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The action was entered in the Superior Court at September term 1873. The defendant did not appear and was defaulted at that term, and the case was continued for assessment of damages. The default has never been taken off.

At December term 1873, the defendant's counsel asked the consent of the plaintiff's counsel to the taking off of the default and to their appearance for the defendant in the suit, which was refused. They then said they should be heard upon the assessment of damages. The case was continued from term to term until March term 1875, and no entry of any kind for the defendant was made upon the docket until that term, when the clerk made the entry of "Dean & Reed, upon question of damages."

The case was set down for a hearing by the court at that term, and upon the day it was in order the defendant's counsel filed a motion in writing, asking that the damages might be assessed by a jury, which was granted upon the terms that the defendant first pay the plaintiff his costs in preparing for a hearing that day.

Subsequently at the same term the damages were assessed by a jury, the defendant asking for and having a view.

The clerk taxed the plaintiff's costs for each term, including those of March term 1875. The Superior Court affirmed the taxation.

J. H. Dean, for the defendant.

G. E. Williams, for the plaintiff.

GRAY, C. J. The provision of the Gen. Sts. *c.* 156, § 27, that in the taxation of costs "the plaintiff shall be allowed only one term fee if the defendant is defaulted without having appeared," relates to the time when costs are taxed; and a defendant, in order to come within it, must at that time stand defaulted and not have appeared to defend himself against the plaintiff's claim. To construe it with literal and grammatical strictness would deprive the plaintiff of costs after the first term, where the defendant, having once failed to appear, had been defaulted, although he had since had the default taken off, and taken part in the trial of the whole case. It would be equally inconsistent with the object of the statute, which is to prevent the plaintiff from accumulating costs by keeping an undefended case in court, to apply it to the case of a defendant who, although defaulted on the main

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issue, has availed himself of the right, reserved to him by the *Gen. Sts. c.* 133, §§ 2, 3, of being heard upon the assessment of damages, and of moving that such assessment be made by a jury.

Taxation affirmed.

THOMAS HILL *vs.* INHABITANTS OF SEEKONK.
ELIZABETH HILL *vs.* SAME.

Bristol. October 28.—29, 1875. WELLS & MORTON, JJ., absent.

In an action against a town to recover for injuries caused by a defective highway which the town was bound to keep in repair, one of the plaintiffs, who were riding together in their carriage in the daytime, testified that the defect was a hole in the way, caused by the dropping down of the capstone of a culvert, that the other plaintiff was driving, and that he was not at the time looking ahead, but was looking as any other person would who was driving in a carriage. The plaintiff who was driving testified that she had no previous knowledge of the defect, that the horse was gentle and was walking at the time, and that she was then looking straight ahead. The evidence also showed that the road was rough, that there was mud and water upon it, and that there was room to pass safely upon the side of the way. One witness for the plaintiff testified that any one who was on the lookout could have seen the hole. The presiding judge, at the defendant's request, instructed the jury in substance, that if the plaintiffs in the daytime, and at a walk upon a broad and substantially level road, with ample width for passing by the hole, went into it, when it was conspicuous, obvious and in plain sight, they were not in the exercise of due care, unless they show some excuse for their inattention to their track; and that the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous, obvious and in plain sight, unless some sufficient reason excuses the inattention, and refused to give the further instructions requested by the defendant, that no such excuse was offered or shown by the evidence in this case, and that there was no evidence in the case of due care on the part of the plaintiffs, or either of them. The judge, at the request of the plaintiffs, also instructed the jury that it was enough if the plaintiffs looked ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway. The jury found for the plaintiffs. *Held*, that the last instruction was correct, that the other instructions were sufficiently favorable to the defendant, and that the case was rightly submitted to the jury.

ACTIONS OF TORT to recover for injuries occasioned by a defect in a highway, which the defendant was bound to keep in repair. The cases were tried together in the Superior Court, before *Wilkinson*, J., who, after a verdict in each case for the plaintiff, allowed a bill of exceptions in substance as follows:

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The plaintiffs were riding on the highway in an open wagon, with the horse at a walk, on Fast Day, April 8, 1873, and the accident occurred at about 5 o'clock in the afternoon.

Thomas Hill, one of the plaintiffs, testified that they were driving along, his daughter, the other plaintiff, having the reins; the horse was on the horse path and the wheels in the ruts; that the road at that time was rough, owing to the season; that there was mud and water in the road; that he had not seen the hole before; that he passed the place in the morning going to Providence, but was then leading his horse on the other side of the roadway, there being two carriage tracks, so that the horse was between him and this hole; that at the time of the injury the wagon went into the hole and brought up suddenly, because at the end it was abrupt, caused by the dropping down of the capstone of the culvert bridge; that he was then thrown out of the wagon by the striking of the wheel against the fallen capstone; that before that he had been looking the same as any other man riding in a carriage; that he was not looking to see a hole, and did not expect there was one there, and did not see it; that he was looking the same as any other man riding in a wagon; that his daughter, who was about twenty-four years old, had been accustomed to drive for many years.

Cross-examined. "The road was wide enough to go by safely, can't swear that I was looking at the road immediately before me; I saw the hole after I was thrown out; didn't see it before because I was n't looking at the road immediately before me; I can't say that I was looking right ahead just then; I was not exactly looking to see if the wheel was going into that place."

Elizabeth Hill, the other plaintiff, testified that she was accustomed to drive, and had been for years; that she was driving at the time; that the horse was a gentle one and was walking; that she had no previous knowledge of the defect in the road; that the wagon wheel went into the hole, and brought up abruptly where the capstone of the culvert had fallen in, and she was thrown against the horse, injuring her; that at the time she was driving along looking straight ahead with her eyes open, and the first she knew they were thrown out by the wagon getting into the hole; that the road was rough, and there was mud

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and water on the road; that she did not see the hole before they went into it.

Cross-examined. "Father said nothing to me about the hole, nor I to him before the accident. I didn't see the hole because I was not looking. I was not looking in the ruts to see where the wheels were going. The wagon did not leave the ruts. We were looking ahead all the time, and not over the side, and not in the ruts."

Henry H. Goff, for the plaintiffs, testified that there were deep ruts all along there full of mud and water; that he saw this hole in the road when he went out to help the plaintiffs; that the stone had caved in, and that it was eighteen inches deep from the top of the capstone. It was two or three feet from the top of the road to the bottom of the hole.

Ezekiel C. Cushing, for the plaintiffs, testified that he was riding on the road in the morning before the accident, and saw the hole because he rode into it; that the hole was at the place where the capstone fell down, and that where the capstone had fallen it was eighteen or more inches deep; that after the accident he filled the hole, and it took a one half ox cart load of stones, and two thirds of a load of dirt on that to fill it; that the wagon must have gone into the hole gradually and brought up suddenly, where the stone had fallen in; that he dug away the earth and found the wall of the culvert had fallen down and the capstone had fallen in. The hole was four or five feet long and eighteen inches to two feet wide, and twenty-four inches deep. Any one could pass this hole that could drive. The road was broad and substantially level, and of ample width for two carriages to pass. There were no obstacles to the freest vision.

Leroy T. Bennett, for the plaintiffs, testified that he examined the place after the accident, and the cavity was from four to five feet long, fifteen inches wide, and he judged it eighteen or twenty inches deep; that he drove through it the Monday before.

David Allen, for the plaintiffs, testified that he saw the hole a few days before, and judged it to be about six feet long and eighteen or twenty inches wide; that he drove into it and was nearly capsized in the forenoon; and on his return avoided it.

James N. Goff, for the plaintiffs, testified: "Any man could have seen the hole if he had been upon the lookout. I saw it

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an hour or two before the accident." *Cross-examined.* "Any man could see it if he was n't a fool."

James E. Goff, for the plaintiffs, testified: "There was room enough to go by safely on the south side of the hole."

John C. Marvel, for the plaintiffs, testified: "I went by there the day before; remember it was a very bad hole; I turned out for it; say four feet long, and eighteen or twenty inches deep, with no water. I turned out and went right by."

Charles E. Jenks, for the plaintiffs, testified: "I went by in the afternoon of the day of the accident; saw the hole at the culvert; say eighteen inches wide, and eight inches deep. I saw it and turned out. It was no trouble to turn out and avoid the defect."

John Thacher, for the plaintiffs, testified: "There was some water in the ruts but it had nearly settled. The hole was thirty inches deep. I measured it with a stick to the bottom of the culvert. I was walking on the road at the time."

The above was all the evidence in the case affecting these exceptions.

The defendant requested the judge to give the following instructions to the jury, the first two of which were given as requested, and the last two refused:

"1. That if the plaintiffs, in the sunlight, and at a walk, upon a broad and substantially level road, with ample width for passing by the hole, went into a hole in a culvert bridge, which hole was three or four feet long, and two feet wide, and eighteen to twenty-four inches deep, conspicuous and obvious and in plain sight, they were not in the exercise of due care, or that care required of people driving on a road, unless they show some excuse for their inattention to their track.

"2. That the law requires of one riding in the daytime such attention to the road over which he is about to pass, as to see large holes that are conspicuous and obvious and in plain sight, unless some good and sufficient reason excuses the inattention.

"3. That no such excuse is offered in this case or shown by any evidence.

"4. That there is no evidence in this case of due care on the part of the plaintiffs or either of them."

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At the conclusion of the charge the plaintiffs requested the following instruction to the jury, which was given against the defendant's objection: "It is enough if he looks ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway."

The case was submitted to the jury under instructions upon the duty of the plaintiffs to exercise due care, which were not excepted to otherwise than as above. The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

T. M. Stetson, for the defendant.

W. H. Cobb, for the plaintiffs, was not called upon.

By the Court. The instruction that it was enough if the plaintiff looked ahead in such a manner as persons of ordinary prudence do in riding upon a highway was correct. The other instructions were, to say the least, sufficiently favorable to the defendant. The case was rightly submitted to the jury.

Exceptions overruled.

Mary E. Wales *vs.* Atherton Wales.

Bristol. October 28. — 29, 1875. Wells & Morton, JJ., absent.

The St. of 1873, c. 371, § 2, modifying the remedy given by the St. of 1870, c. 404, in proceedings for divorce for the cause of desertion, in cases where no judicial decree had been rendered, is within the constitutional power of the Legislature.

Under the St. of 1870, c. 404, providing for a decree *nisi* from the bonds of matrimony, for certain specified causes, including utter desertion, to be followed by an absolute decree in case the parties live separately for five years, a decree of divorce *nisi* was rendered at November term 1873 of this court upon a libel filed in May 1873, upon the default of the respondent after notice, for the cause of utter desertion from August 1872 to the date of the libel. The St. of 1873, c. 371, which took effect June 11, 1873, repealed the provision of the St. of 1870 authorizing the court to grant a divorce *nisi*, and provided that "no divorce shall be granted for desertion unless the desertion has continued for at least three consecutive years next prior to the filing of the libel for divorce." *Held*, upon a petition to set aside the decree, that the decree was unauthorized by law, and should be vacated.

Petition to set aside a decree of divorce *nisi* from the bond of matrimony, rendered by a justice of this court at November term 1873, upon the default of this petitioner, after notice to her, on

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a libel filed against her by the respondent on May 17, 1873, for the cause of utter desertion on August 15, 1872, and continued to the date of that libel.

The present petition alleged that by the St. of 1873, *c.* 371, which took effect June 11, 1873, it was not competent for the court to enter any decree whatever upon the libel. At the hearing before *Gray*, C. J., the allegations of the petition were proved, and it was ruled that the prayer thereof should be granted; and, at the request of the respondent, the question of the correctness of this ruling was reserved for the consideration of the full court, according to whose opinion a decree was to be entered accordingly, or the petition dismissed.

J. Daggett, for the respondent.

E. Ames, for the petitioner, was not called upon.

GRAY, C. J. The original libel was filed under the St. of 1870, *c.* 404, for utter desertion, which, not having continued for five years, was not a cause for a divorce from the bond of matrimony under the Gen. Sts. *c.* 107, § 7.

Under the St. of 1870, the court could not decree a divorce from the bond of matrimony for the cause alleged, but only a divorce *nisi*, which was in the nature of a divorce from bed and board, did not dissolve the marriage, and could not be made absolute except upon a new petition filed not less than three years from the time of the first decree. St. 1870, *c.* 404, §§ 2, 3. *Graves* v. *Graves*, 108 Mass. 314. *Edgerly* v. *Edgerly*, 112 Mass. 53.

The St. of 1873, *c.* 371, § 2, repealed the provision of the St. of 1870 authorizing the court to grant a divorce *nisi*, but authorized a divorce from the bond of matrimony to be granted for the cause of desertion continued for three consecutive years before the filing of the libel for such divorce. As applied to cases of desertion, this statute merely changed and simplified the form of remedy, by substituting, for the double proceeding of a libel for a divorce *nisi*, and a petition to make it absolute at the expiration of not less than three years afterwards, as allowed by the St. of 1870, a single proceeding by a libel for an absolute divorce after the desertion had continued for three years. Such a modification of the remedy, in cases in which no judicial decree had been rendered, was clearly within the constitutional power of the Legisla-

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ture, and not open to the objections upon which the St. of 1874, *c. 397, § 1,* was declared void in *Sparhawk* v. *Sparhawk*, 116 Mass. 215.

It *follows that* the decree of divorce *nisi*, granted in this case since the St. of 1873 took effect, was by inadvertence, without authority, and of no legal effect, and should therefore be set aside and vacated. *Edson* v. *Edson*, 108 Mass. 590. *Ex parte Crenshaw*, 15 Pet. 119. *Collins* v. *Taylor*, 3 Green Ch. 163.

Petition granted.

WILLIAM WALLACE *vs.* TAUNTON STREET RAILWAY COMPANY.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

In an action against a street railway corporation for injuries caused by the act of one of its conductors in wrongfully expelling a passenger from a car, the plaintiff introduced evidence that his knee was injured while he was so expelled; that in consequence he was confined to his house from four to six months, and was afterwards obliged to walk with crutches. The defendant introduced evidence, in reply, that the plaintiff was seen walking in his dooryard, and the streets, with little apparent lameness and without crutches, within two or three days after the alleged injuries were received, and from time to time within the period named by the plaintiff. The plaintiff, at the close of the defendant's evidence, offered evidence that during that period the witnesses had seen him in his house with his foot upon a pillow, and had helped him from his chair to his bed. It did not appear that this evidence related to the days and times testified to by the defendant's witnesses. *Held*, that this evidence was part of the plaintiff's case, and that it was within the discretion of the judge at the trial to exclude it when offered in rebuttal.

The extent to which a witness may be cross-examined to prove bias rests largely in the discretion of the judge presiding at the trial; and where, in an action against a corporation, it appears that its president and treasurer are members of another corporation having persons in its employ, and the plaintiff's counsel, in cross-examining a witness for the defendant, asks him if he is not an employee of the latter corporation, for the purpose of showing bias, no exception lies to the exclusion of the evidence.

TORT for injuries caused by the act of a conductor of the defendant corporation in expelling the plaintiff from one of its cars, in which he was a passenger. At the trial in the Superior Court, before *Aldrich*, J., the plaintiff introduced evidence tending to show that he was wrongfully expelled from the car by the con-

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ductor; that his knee was wrenched and seriously sprained while being so expelled; that he was thereby made very lame, and for some time was unable to walk, and was confined to his house four months or six months before he was able to walk out doors; and that at that time he was still lame and walked with crutches. To establish these facts as to the plaintiff's condition, and to show the extent of his injuries and his incapacity to walk, the plaintiff testified on his own behalf, and called his physician and several other witnesses.

The defendant contended, and introduced evidence tending to show, that the plaintiff was rightfully ejected from the car on account of his improper and disorderly conduct; and in reply to, and in contradiction of, the plaintiff's evidence as to the length of time he was confined to his house and the extent of his injuries, called several witnesses who testified that, within two or three days after the alleged injuries were received, they saw the plaintiff walking in his dooryard, and in the public streets, and that they so observed him walking from time to time during the period of four or six months covered by the plaintiff's evidence, and that at those times he walked with little apparent lameness and without crutches. To contradict and control this evidence of the defence, the plaintiff offered to call several witnesses who would testify that they had seen him from time to time during the four months he said he had been confined to his house, and that they had seen him sitting in his house with his foot resting upon a pillow in a chair, and that they had helped him from his chair to his bed. This evidence was objected to at this stage of the trial, after the close of the defendant's evidence, on the ground that it should have been introduced, if at all, as a part of the plaintiff's evidence in chief, and that it was not competent and had no legitimate tendency to contradict the evidence of the defence. There was no offer to show by these witnesses, whom the plaintiff proposed to call, that they had seen or that they knew the plaintiff was in his house, or elsewhere than the defendant's witnesses swore they had seen him, on the days and times referred to in their testimony. The offered testimony was excluded, and the plaintiff excepted. The plaintiff was allowed, in rebuttal of the defendant's evidence, to testify that he was not out of his house, or in his yard, or on the public streets, on any of the times and

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days sworn to by the defendant's witnesses; and full opportunity was given to the plaintiff to call any witness who would say he had seen the plaintiff in his house on any of the days and times aforesaid.

It appeared in evidence that William C. Lovering was president, and Henry M. Lovering was treasurer of the defendant corporation; and it also appeared that they were members of the Whittenton Mills, a manufacturing company doing business in Taunton, and having persons in its employment. In the cross-examination of one of the defendant's witnesses, the plaintiff's counsel asked him if he was not an employee of said Whittenton Mills, for the purpose of showing that he was biased or prejudiced in favor of the defendant corporation; the question was objected to and excluded, as incompetent for the purpose for which it was put, and the plaintiff excepted.

Full instructions, not objected to, were given in regard to all the issues raised by the pleadings and upon every part of the case.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the exclusion of the evidence offered by him.

J. Brown, for the plaintiff.

T. M. Stetson & G. E. Williams, for the defendant, were not called upon.

By the Court. The evidence, offered by the plaintiff in reply, which was excluded by the presiding judge, related to the degree of the plaintiff's injury, and was part of his case, and did not directly contradict any of the testimony introduced by the defendant. It was therefore admissible, at this stage, only in the discretion of the judge, and no exception can be sustained to its exclusion.

The extent to which a witness may be cross-examined to prove bias rests largely in the discretion of the judge presiding at the trial, and the bill of exceptions does not show that such discretion was illegally exercised in this case. It does not even appear that the witness knew that the officers of the defendant corporation were stockholders in the manufacturing company by which he was employed. *Exceptions overruled.*

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HENRY C. HAWKINS & another *vs.* CITY OF FALL RIVER.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

Upon the assessment of damages sustained by the taking of land for a highway, a witness who has testified without objection to the value of the land taken, may state the reasons of his opinion.

PETITION to the county commissioners for a jury to assess damages for the taking of land by the respondent to widen Pleasant Street, in Fall River.

At the trial before a sheriff's jury the respondent called one Franklin L. Almy as an expert, to testify to the value of the land taken by the city, and he was permitted to testify thereto without objection, having known of sales of land at or about the time of the taking. The respondent then asked him the following question: "How did you get at your opinion of the market value?" The petitioners objected, and the sheriff excluded the question; and the respondent excepted. The jury returned a verdict for the petitioners, which was certified to the Superior Court. In that court the verdict was set aside on motion of the respondent, and the petitioners appealed to this court.

J. C. Blaisdell, for the petitioners.

J. M. Morton, Jr. & M. Reed, for the respondent, were not called upon.

BY THE COURT. The refusal of the sheriff to permit the witness Almy to state the reasons of his opinion was erroneous. The point has been repeatedly decided, both as to witnesses testifying to value, and as to experts strictly so called. *Commonwealth* v. *Webster*, 5 Cush. 295. *Keith* v. *Lothrop*, 10 Cush. 453. *Dickenson* v. *Fitchburg*, 13 Gray, 546. *Lincoln* v. *Taunton Copper Co.* 9 Allen, 181. *Sexton* v. *North Bridgewater*, 116 Mass. 200. *Demerritt* v. *Randall*, 116 Mass. 331.

Judgment setting aside the verdict affirmed.

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FIRST BAPTIST SOCIETY *vs.* CITY OF FALL RIVER.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

Land was taken for the alteration of a highway by the mayor and aldermen of a city, who awarded the petitioner $2000 as damages. The owner being dissatisfied with the award applied for a jury, who at the trial were directed to add interest from the time of the taking of the land upon the amount of damages found by them to have been thereby occasioned to the petitioner's estate, and to return the amount of damages and interest in one sum. The jury returned a verdict, that "they estimate and assess the amount of damages sustained by the petitioner at the sum of $2166.75." *Held*, that the jury must be presumed to have followed the direction to them, and that the damages awarded by the mayor and aldermen were not increased so as to entitle the petitioner to costs under the Gen. Sts. c. 43, § 73.

PETITION under the Gen. Sts. c. 43, for a jury to assess the damages occasioned by the widening of Columbia Street, in Fall River, over land of the petitioner. The case was submitted to the Superior Court, and to this court on appeal, on an agreed statement of facts, in substance as follows:

The land was taken on August 19, 1873, by the mayor and aldermen of Fall River, who awarded the petitioner $2000 as damages. The petitioner being dissatisfied with the award applied for a sheriff's jury to assess the damages. On June 11, 1875, the case was tried before a sheriff's jury, who rendered a verdict: that "they estimate and assess the amount of damages sustained by the said petitioner at the sum of two thousand one hundred and sixty-six dollars and seventy-five cents."

The jury were instructed by the sheriff, first to consider the value of the land taken; second, to consider the damage to the remaining property by the taking of the land; then, to consider the benefits, if any, to the petitioner, direct or special, not shared in common with others abutting on said street, and if any such benefits are found, deduct the same from the amount of damages agreed upon, and to the remaining amount add interest at six per cent. per annum, from August 19, 1873, to June 11, 1875, putting the amount of damage and interest in one sum.

The verdict was duly returned to June term 1875, of the Superior Court. At the next term the petitioner moved that the verdict be accepted and recorded, and judgment be entered thereon; and that the petitioner be allowed the charges and costs arising on the application, which were taxed at $177.07.

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The respondent objected to the allowance of the charges and costs; the clerk disallowed them; his taxation was affirmed by the court; and the petitioner appealed.

J. C. Blaisdell, for the petitioner. 1. The agreed statement of facts establishes conclusively that the city awarded the petitioner as damages the sum of $2000, and that the jury assessed the amount of damages at the sum of $2166.75, as damages.

2. Although the jury were instructed in the manner stated, yet their verdict finds, not damages and interest to be $2166.75, but damages alone to be that amount. The court will not go behind the verdict, as that is a conclusion of fact found by the jury. *Kidder* v. *Oxford*, 116 Mass. 165. The petitioner is therefore the prevailing party, and is entitled to its costs. Gen. Sts. *c.* 43, § 73; *c.* 156, § 1.

M. Reed, for the respondent, was not called upon.

By the Court. The jury were directed by the sheriff to add interest, from the time of the taking of the land, upon the amount of damages found by them to have been thereby occasioned to the petitioner's estate, and to return the amount of damages and interest in one sum; and they must be presumed to have followed that direction. It thus appears that their verdict included interest, and that, making due allowance for the interest so included, the damages awarded by the mayor and aldermen were not increased by the jury. The petitioner is therefore not entitled to costs. Gen. St. *c.* 43, § 73. *Kidder* v. *Oxford*, 116 Mass. 165.

Taxation affirmed.

John Hogan *vs.* Thomas Coleman.

Bristol. October 29, 1875. Wells & Morton, JJ., absent.

In an action for work and materials furnished by the plaintiff to the defendant, the judge who tried the case without a jury found as matters of fact that the plaintiff did not prove the contract declared on; and that, there being conflicting evidence upon the question whether the defendant promised to see him paid for work and materials which he originally agreed to furnish to another person, the liability of the original debtor was not extinguished, and ordered judgment for the defendant. *Held*, the findings of fact not being subject to revision in this court, that the judge rightly ruled as matter of law that such promise would not support the declaration.

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CONTRACT. The declaration alleged that the plaintiff made a verbal agreement with the defendant to dig and wall his cellar, furnish the materials for the mason work, and to do the labor in putting up and putting on said materials in mason work for a six tenement block, belonging to the defendant, in Fall River, for the sum of $1425; that in pursuance of said verbal agreement he furnished the materials, dug and walled the cellar, and put up and put on the materials in mason work to the said six tenement block for the defendant for the said sum; that the defendant, in consideration thereof, paid him on or about August 13, 1873, the sum of $725 towards the same, and that the defendant owes the plaintiff the balance of $700, and interest on the same from October 15, 1873, according to an account annexed.

The answer of defendant contained a general denial, alleged payment and denied any agreement to pay interest.

At the trial in the Superior Court without a jury, *Pitman*, J., ordered judgment for the defendant, subject to the plaintiff's exceptions upon the following findings and rulings:

"I find that the plaintiff has not established by a preponderance of proof the contract or agreement set forth in his declaration. There is also evidence tending to show that after an original undertaking had been entered into between the plaintiff and one Francis Hye to furnish on his account the work and materials for which this suit is now brought, that said plaintiff declined or refused to furnish the same, and that the defendant thereupon promised to see him paid. The defendant offered evidence to the contrary.

"As upon my view of the whole evidence there does not appear to me, if this were proved, to have been a novation or an extinguishment of the original liability of Hye, I have not deemed it material to determine whether or not there was such a collateral undertaking, because if proved it would not be the contract declared on. Upon the pleadings I therefore find for the defendant."

L. Lapham, for the plaintiff.

W. E. Fuller, for the defendant, was not called upon.

BY THE COURT. The declaration is for work and materials furnished by the plaintiff to the defendant. The judge below has found as matters of fact (which are not subject to revision)

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that the plaintiff did not prove the contract declared on, and that, if the defendant promised to see him paid for work and materials which he originally agreed to furnish to another person, the liability of the original debtor was not extinguished; and rightly ruled as matter of law, that such a promise would not support the declaration. *Exceptions overruled.*

THOMAS BRADY *vs.* AMERICAN PRINT WORKS.

Bristol. October 29, 1875. WELLS & MORTON, JJ., absent.

Under the Gen. Sts. c. 43, § 40, authorizing the Superior Court to set aside the verdict of a sheriff's jury for "good cause," the question whether, upon the proof of the irregular and improper conduct of the officer having the jury in charge, the verdict should be set aside or accepted by the Superior Court, is within the discretion of the presiding judge, and to the exercise of that discretion no exception lies.

COMPLAINT under the mill act, Gen. Sts. *c.* 149. Trial before a sheriff's jury, who returned a verdict for the petitioner, which verdict was certified to the Superior Court. In that court, the respondent moved to set aside the verdict, "because the deputy in charge of said jury entered the room where they were deliberating before they had agreed and sealed up their verdict." *Wilkinson*, J., allowed a bill of exceptions in substance as follows:

It appeared that the deputy sheriff, who was left in charge of the jury, went into the room where they were, and while they were deliberating upon their verdict; that the room occupied by them was a large one, and that the officer stepped in for the purpose of warming himself, and sat a few minutes by a stove in the room; that he left the room before they had agreed upon a verdict, and had no conversation with any of said jurors while he was in the room; that as he was entering the room, the foreman asked him if the sheriff had gone, and he answered yes; that the foreman asked him "Who is going to give us instruction if we want any?" and he made no answer to this question.

The court thereupon ordered the verdict to be set aside, and the petitioner alleged exceptions.

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E. H. Bennett & H. J. Fuller, for the petitioner. The acts of the deputy do not constitute any "good cause" for setting the verdict aside. There was no officious intermeddling by him, nor was the respondent in the least degree injured. *Leach* v. *Wilbur*, 9 Allen, 212. *Tripp* v. *County Commissioners*, 2 Allen, 556. *Commonwealth* v. *Roby*, 12 Pick. 496, 519.

J. M. Morton, Jr., for the respondent, was not called upon.

BY THE COURT. The Superior Court is authorized by statute to set aside the verdict of a sheriff's jury for "good cause." Gen. Sts. *c.* 43, § 40; *c.* 149, §§ 13, 14. The question whether, upon the proof of the irregular and improper conduct of the officer, such an interference with the deliberations of the jury was to be inferred, as required the verdict to be set aside, was a question of fact, largely depending upon the credit given to witnesses, and addressed exclusively to the discretion of the presiding judge; and the exercise of that discretion, not appearing to have involved any ruling in matter of law, is not subject to revision, whether the verdict is set aside or accepted. *Norton* v. *Wilbur*, 5 Gray, 7. *Shea* v. *Lawrence*, 1 Allen, 167. *Tripp* v. *County Commissioners*, 2 Allen, 556. *Leach* v. *Wilbur*, 9 Allen, 212. *Stetson* v. *Medford*, 109 Mass. 242.

Judgment setting aside the verdict affirmed.

WILLIAM F. ROSE *vs.* CITY OF TAUNTON.

Bristol. Oct. 26. — Nov. 3, 1875. WELLS & MORTON, JJ., absent.

The recital in a deed of land of the consideration paid is not admissible in evidence to show the value of adjoining land, as between persons not parties to the deed.

At the trial for the assessment of damages sustained by the taking of land for a highway, under the Gen. Sts. *c.* 43, the petitioner offered office copies of four deeds of land in the neighborhood to show the price paid for the lots of land described therein. Objection was made to the admission of all the deeds, but special grounds of objection were assigned to the admission of three of them only. All the deeds were admitted in evidence. *Held*, that all the deeds were duly objected to at the trial as incompetent evidence of the price or value of the land, and that the respondent was entitled to insist upon this objection as a ground for setting aside the verdict

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An order of the Superior Court, setting aside the verdict of a sheriff's jury, is a final disposition of the case so far as that court is concerned, and any question of law involved in the order may be brought at once to this court by exceptions or appeal.

PETITION to the county commissioners for a jury to assess damages for the taking of land by the respondent to lay out a highway in the city of Taunton.

At the trial before a sheriff's jury, the petitioner offered office copies of four deeds of land, one from Thomas Leach to Helen E. Felch, one from Helen E. Felch to Thomas Leach, one from Abram R. Pontin to Lewis H. Goward, and one from Joseph H. Rines to David Johnson, to show the price paid for these lots of land, therein described, and for any other purpose for which they were competent. Objection was made to the admission of all these deeds, the objection being to the Leach and Felch deeds that they were of land not similar in character to the petitioner's; and to the deed from Rines to Johnson, because the land was from eight hundred to one thousand feet distant, and that much farther from the thickly settled part of the city. But it appeared to the sheriff that all of these tracts of land were of a similar character to the petitioner's, and that it might give the jury some light respecting the price of the petitioner's land, and they were admitted. The jury returned a verdict for the petitioner.

In the Superior Court the verdict was set aside. The petitioner appealed to this court.

W. E. Fuller, for the petitioner.

G. E. Williams, for the respondent.

GRAY, C. J. The office copies of deeds were incompetent evidence for the purpose for which they were offered and admitted at the trial before the sheriff's jury. Even as against a party to a deed, the recital of the consideration paid is not conclusive, and is admissible as *primâ facie* evidence, only because one party has signed and the other has accepted the deed containing the recital. *Paige* v. *Sherman*, 6 Gray, 511. As between third persons, such recitals are no evidence whatever. *Spaulding* v. *Knight*, 116 Mass. 148, 155.

The sheriff's certificate shows that the copies of deeds were offered and admitted as evidence of the price paid for the land,

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that objection was made to the admission of all four of them, and that the special grounds of objection extended to three of them only. It is manifest therefore that all the deeds were objected to at the trial as incompetent evidence of the price or value of the land, and that the respondent was entitled to insist upon this objection as a ground for setting aside the verdict.

As several appeals have been entered at this term from orders of the Superior Court setting aside the verdict of a sheriff's jury, and have been entertained by this court without waiting for the result of another trial, it is proper to add, in order to prevent misunderstanding, that such an order does not stand upon the same ground as an order of the Superior Court granting a new trial in a suit pending in that court, which cannot be brought to this court for revision by appeal or exceptions until the case has been finally disposed of in the Superior Court.

Upon a proceeding to assess damages, begun by petition to the county commissioners, and tried upon a warrant from them before a sheriff's jury, nothing is ever returned to or entered in the Superior Court but the verdict of the jury and the certificate of the rulings at the trial, and the only action which the court can take in the matter is to pass an order accepting or setting aside the verdict, and to certify the result to the county commissioners. After such an order, either of acceptance or rejection, has been so made and certified, the case no longer remains in the Superior Court or upon its docket. If the verdict is accepted, no further judgment or execution follows in the Superior Court; but if the amount of the verdict is not paid, a warrant of distress is issued by the county commissioners. If the verdict is set aside by the Superior Court, a new application for a jury is presented to the county commissioners, and when the jury summoned thereon return a verdict, it is certified anew by the presiding officer to the Superior Court, and takes a place upon its docket as if no previous action in the court had been had. Gen. Sts. c. 43, §§ 33, 40, 42, 43; c. 183, § 8. *New Bedford* v. *County Commissioners*, 9 Gray, 346, 347.

An order of the Superior Court, either setting aside or accepting the verdict of a sheriff's jury, is therefore a final disposition of the case, so far as that court is concerned, and any question of law involved in the order may be brought at once to this court

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by exceptions or appeal. *Parker* v. *Framingham*, 8 Met. 260. *Walker* v. *Boston & Maine Railroad*, 3 Cush. 1. *Fitchburg Railroad* v. *Boston & Maine Railroad*, 3 Cush. 58. *Tucker* v. *Massachusetts Central Railroad*, 116 Mass. 124. *Hogan* v. *Ward*, 117 Mass. 67. *Judgment setting aside the verdict affirmed.*

LOUM SNOW & another, executors, *vs.* CATHERINE FOLEY & others.

Bristol. Oct. 28. — Nov. 3, 1875. WELLS & MORTON, JJ., absent.

A testator by his will bequeathed a certain sum of money to trustees, who were directed to pay the income accruing therefrom to his wife during her life. The will provided that the trust should terminate upon the death of the wife, when the trustees were directed to pay over to his wife's niece the sum of $3000; a certain sum to another legatee, and the residue of the trust fund to the residuary legatees. A codicil to the will provided: "To my wife's niece I give the sum of $7000 in addition to the $3000 given in my will, making $10,000; and I ratify and confirm my said will in all other particulars." *Held*, that the legacy given by the codicil must be paid from the trust fund upon the same conditions as the original legacy to the niece.

BILL IN EQUITY by the executors of the will and codicil of Thomas Sullivan, against the legatees named in the will, to obtain the instructions of the court. The testator by his will, which was dated September 5, 1873, after declaring that his lawful debts and funeral expenses should be paid, devised and bequeathed to his wife, Julia A. Sullivan, specific real estate and chattels, and gave $30,000 to trustees, who were directed to invest the same and pay to his wife the income accruing therefrom during her life. The will then provided as follows:

"After the decease of my said wife, Julia A. Sullivan, I direct that said trust shall end and determine, and from the capital of said trust fund, I give, bequeath and devise the following legacies, which I direct my said trustees then to pay over, to wit:

"1st. To my wife's niece, Ida A. Kanouse, I give the sum of three thousand dollars.

"2d. To Marion Flavan, the daughter of my sister Hannah Barrett, by her first husband, of Halifax, Nova Scotia, I give the sum of two thousand dollars.

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"3d. All the rest and residue of said trust fund shall fall into the residue and be disposed of as hereinafter provided."

"All the rest, residue and remainder of my property and estate of every description, I give, bequeath and devise unto my two sisters, Catherine Foley, wife of Robert Foley, and Hannah Barrett, wife of James Barrett, all of Halifax, Nova Scotia, to them and their heirs to be equally divided between them, and in case of the decease of either or both of my said sisters prior to my decease, then to her or their issue by right of representation."

The codicil to the will, dated November 10, 1873, provided as follows: "To my wife's niece, Ida A. Kanouse, I give the sum of seven thousand dollars in addition to the three thousand dollars given in my will, making $10,000; and I ratify and confirm my said will in all other particulars."

The bill alleged payment to the trustees named in the will of the trust fund of $30,000, and that there remained in the hands of the executors certain personal property not yet converted into cash, but amounting to $8065 at the inventory values, which, after deducting charges of administration, was applicable to the payment of the legacies given in the will and codicil; and that the said Ida A. Kanouse claims that, by the true meaning and construction of said will and codicil, her said legacy of $7000 given in said codicil is payable, so far as there are funds in the hands of said executors to pay the same, out of the residuum of said estate after the creation of said trust fund, and that the payment thereof is not deferred to the decease of the said Julia A. Sullivan, the widow of said deceased, and she has demanded payment of the same; but that the residuary legatees claim that said legacy of $7000 is payable out of said trust fund at the termination of said trust after the decease of said Julia; and they claim that the funds in the hands of said executors ought to be paid to them, and they have demanded the same.

The answers of the defendants admitted the averments of the bill.

C. W. Clifford, for the guardian of Ida A. Kanouse. All bequests given by a codicil are to be paid out of the residuum so far as it is sufficient, unless the bequest specifies some other mode of payment. 1 Jarman on Wills, (Perkins's ed.) 201, and cases

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cited. This is an absolute bequest, and falls within the above rule. It is not limited in terms. The absence of any limitation aids the construction. In the will, the mode of payment of the bequests is expressly stated. The words "in addition to" distinguish rather than assimilate the bequest of the codicil to the bequest of the will. The burden is upon the residuary legatees to show the qualification of the bequest. This is an additional not a substituted bequest.

G. Sennott, for the residuary legatees.

GRAY, C. J. The legacy, given by the codicil, of $7000 "in addition to" the $3000 given to the same person by the will, the codicil expressly ratifying and confirming the will in all other particulars, is to be paid out of the same fund and subject to the same conditions as the original legacy, and is therefore payable upon the death of the widow and out of the trust fund of which she has the income during her life. *Crowder* v. *Clowes*, 2 Ves. Jr. 449. *Day* v. *Croft*, 4 Beav. 561. *Warwick* v. *Hawkins*, 5 De G. & Sm. 481. *Russell* v. *Dickson*, 1 Con. & Laws. 284, 289; *S. C.* 2 Dru. & War. 133, 138. *Pike* v. *Walley*, 15 Gray, 345, 347. *Decree for residuary legatees.*

COMMONWEALTH *vs.* KATIE C. TWOMBLY.

Essex. November 3, 1875. WELLS, COLT & MORTON, JJ., absent.

At the trial of a complaint under the Gen. Sts. c. 87, §§ 6, 7, for keeping and maintaining, on May 1, 1875, and on divers other days between that day and September 27, 1875, a tenement for the illegal sale of intoxicating liquors, a witness for the government testified that a few days before the trial, which was at October term 1875, the defendant told him that a card which the witness produced and upon which were printed the defendant's name and address, and the words, "Dealer in imported wines and liquors," "Porter" and "Lager Beer," was her card, and that she had the card printed about a year before. *Held*, that the witness was rightly permitted to read the card for the purpose of showing that the defendant was keeper of the tenement on May 1, 1875.

COMPLAINT under the Gen. Sts. *c.* 87, §§ 6, 7, for keeping and maintaining on May 1, 1875, and on divers other days between that day and September 27, 1875, a certain tenement, in Glouces-

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ter, used for the illegal sale and illegal keeping of intoxicating liquors, said tenement being then and there a common nuisance.

At the trial in the Superior Court, at October term 1875, before *Pitman*, J., a witness for the government produced a printed card, containing the following words: "Katie C. Twombly. Dealer in Imported Wines and Liquors. Beach Street, Gloucester, Mass. Choice Cigars. Tobacco. Porter. Lager Beer." He then testified that, within a few days, he had a conversation with the defendant, who then told him that that was her card, and that she had the card printed about a year ago. The counsel for the government asked the witness to read the card for the purpose of showing that the defendant was keeper of the house on the first day of May last. The defendant objected to the reading of the card for that purpose, but the judge allowed the card to be read; and the defendant alleged exceptions.

C. A. Benjamin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth, was not called upon.

By the Court. The testimony that the defendant, a few days before the trial, told the witness that the card was hers, and she had had it printed about a year before, without qualifying in any way the natural inference from that admission, made the card competent evidence against her that the facts stated thereon were true at an intermediate time.

Exceptions overruled.

Commonwealth *vs.* Henrietta Fields.

Essex. November 8, 1875. Wells, Colt & Morton, JJ., absent.

At the trial, on appeal from a Police Court, of a complaint for a sale of intoxicating liquor to a person unknown, if the evidence corresponds with the allegation of the complaint, the jury may, in the absence of proof to the contrary, presume the offence proved to be the same as that of which the defendant was convicted in the Police Court.

Complaint to the Police Court of Gloucester for an unlawful sale of intoxicating liquors at Gloucester, "to a man whose name is unknown to the complainant," on July 2, 1875. At the trial

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on appeal, in the Superior Court, before *Pitman*, J., there was only one witness for the government, and he testified that he went into a shop in Gloucester, in which there was a bar and bottles and other things usually found in a bar-room; that he saw four men standing at the bar, and the defendant standing behind it; that he heard the four persons severally call for intoxicating liquors, each designating the kind; that the defendant passed to each a tumbler with liquor which was drunk, that he saw one of them pay ten cents for his drink; that witness then went out; that whether the others did or did not pay he did not know; and that he was a witness before the Police Court in this case and testified to the same there. This being the whole evidence upon the question of sale, the defendant's counsel asked the judge to instruct the jury that as the evidence uncontradicted proved four distinct sales, and there was no evidence to show on which one the complaint was made, or on which the court below convicted, the defendant should be acquitted. But the judge declined to so instruct the jury and left it to them to decide, under general instructions not otherwise objected to than on the ground above stated, as a question of fact, for what the complaint was made and conviction had in the lower court. To which rulings and refusals to rule the defendant alleged exceptions.

C. A. Benjamin, for the defendant.

C. R. Train, Attorney General, for the Commonwealth, was not called upon.

By the Court. In the absence of proof to the contrary, the jury were authorized to find that the offence of which they found the defendant guilty was the same as that of which he had been convicted in the Police Court. *Commonwealth* v. *Burke*, 14 Gray, 81. *Commonwealth* v. *Carroll*, 15 Gray, 412. *Commonwealth* v. *Carr*, 111 Mass. 423. ***Exceptions overruled.***

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COMMONWEALTH *vs.* STEPHEN P. RANDALL.

Essex. Nov. 3. — 15, 1875. WELLS, COLT & MORTON, JJ., absent.

On the trial of an indictment for larceny of railroad tickets, the property of a railroad corporation, the government introduced evidence that five packages of tickets, containing one hundred each, belonging to the railroad corporation, and numbered in regular succession from 1 to 500, were placed in the hands of its ticket-agent; that soon after one of these packages, containing tickets numbered from 200 to 300, was found to be missing, and that two tickets identical in appearance and general description with those contained in the missing package, and numbered as they should have been if contained in that package, were found in the possession of the defendant. There was also evidence that the defendant said that he bought those tickets of the ticket-agent, who denied this. *Held*, that on this evidence the jury were warranted in returning a verdict of guilty.

INDICTMENT on the Gen. Sts. *c.* 161, § 18, charging that the defendant on November 12, 1874, at Rockport, in the County of Essex, "one hundred railroad tickets, of the value of one dollar each ticket, thirty other railroad tickets, of the value of seventy cents each ticket, of the goods and chattels of the Eastern Railroad Company, a corporation duly established by law in said Commonwealth, then and there in the possession of said corporation being found in the building of said corporation in said Rockport, then and there feloniously did steal, take and carry away, in the building aforesaid, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Trial in the Superior Court before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

There was evidence on the part of the government tending to show that two Rockport and Gloucester tickets, numbered 276 and 283, were traced to the possession of the defendant.

Howard A. Saville, ticket agent of the Eastern Railroad Company at Rockport, testified as follows: "On September 29, 1874, I received from the Eastern Railroad Company, five packages of Rockport and Gloucester tickets, done up in a paper bundle. The tickets differed from any I had before received from the company. I opened the bundle, took out the packages, and looked to see if there were five packages. Each package was bound with a string, and the tickets were numbered as far as I saw. I looked at the number of the first and last tickets of each

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package. The numbers of the first and last tickets of the first package were 0 and 99, of the second package 100 and 199, of the third 200 and 299, of the fourth 300 and 399, and of the fifth 400 and 499. I commenced selling from the first package of tickets, and had sold seven tickets at the time the third package was missing. I afterwards sold to No. 114, and noticed no irregularity in the numbers. On October 5 one of the packages, of which the first ticket was marked 200 and the last 299, was missing. The only way I knew what tickets were in the package was by examining the first and last tickets. I did not look at the intermediate numbers in any package, excepting the first package."

There was evidence tending to prove that all the tickets in the bundle were of the same color and general description, excepting the numbers. There was also evidence that the defendant said that he bought the tickets marked 276 and 283 of Howard A. Saville, the ticket agent, who denied this. It was conceded on the part of the defence that if a package of tickets was taken, it was the property of the Eastern Railroad Company.

Upon this testimony the defendant requested the judge to rule that there was no evidence from which the jury could find that the tickets found in the possession of the defendant were the property of the Eastern Railroad Company, or that they were in the package alleged to have been stolen. The judge declined so to rule, and gave instructions upon this point to which no objection was taken, unless the ruling requested by the defendant should have been made.

The defendant was found guilty; and alleged exceptions to the refusal of the judge to rule as requested.

H. B. Moulton, (*J. T. Mahoney* with him,) for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

AMES, J. The evidence at least tended to show that five packages of tickets, containing one hundred each, belonging to the Eastern Railroad Company, and numbered in regular succession as far as No. 500, were placed in the hands of their agent Saville; that shortly afterwards one of these packages, containing tickets numbered from 200 to 300, was found to be missing; and that two tickets, identical in appearance and general description with those contained in the missing package, and numbered

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as they should have been if contained in that package, were found in the possession of the defendant. This evidence was supplemented by proof that the defendant said that he bought those two tickets of Saville, an explanation which Saville distinctly declared to be false. It might therefore have been presented to the jury as a case of recent possession of property, like in kind to that which had escaped from the hands of the true owner, and where no sufficient explanation was given by the defendant. We cannot doubt that upon such evidence a verdict of guilty might lawfully have been rendered.

Exceptions overruled.

COMMONWEALTH *vs.* MARY MOYLAN.

Essex. Nov. 3. — 18, 1875. WELLS, COLT & MORTON, JJ., absent.

Under the St. of 1875, c. 99, § 12, authorizing the mayor and aldermen of a city, by whom a license to sell intoxicating liquors has been issued, to declare a license forfeited upon proof satisfactory to them of a violation of its conditions, after notice to the licensee and reasonable opportunity for him to be heard by them, a licensee cannot be convicted of selling intoxicating liquors in violation of law upon the production of the record of the board of aldermen, showing only that before the sale the board declared his license "revoked," and parol evidence that the licensee was heard upon a charge of having sold intoxicating liquor on the Lord's day, and upon the question of revocation.

COMPLAINT under the St. of 1875, *c.* 99, for the illegal sale of intoxicating liquors on September 16, 1875, to Margaret Monarch. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The government introduced testimony tending to show that a sale of intoxicating liquor was made to said Monarch.

The defendant relied upon a license of the first class, mentioned in the St. of 1875, *c.* 99, § 7, issued by the mayor and board of aldermen of the city of Salem, dated May 3, 1875, and authorizing the defendant to sell all kinds of intoxicating liquors at the building where said sale was alleged to have been made to said Monarch, until May 1, 1876.

The government then introduced the record of the board of aldermen of the city of Salem, as follows:

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"Aug. 17, 1875. The committee on licenses to whom was referred the proposed revocation of the license of Mary Moylan, common victualler and liquor dealer, reported verbally, that they had given a hearing to all parties interested, and were of opinion that it was inexpedient to take further action in the matter. The report was accepted. After some discussion, on motion of Alderman Chapman, it was ordered, that the license to sell intoxicating liquors granted by this board to Mary Moylan May 8, 1875, be and the same is hereby revoked."

Parol evidence was offered by the government, tending to show that the defendant had an opportunity to be heard and was heard, upon a charge of having sold liquor on the Lord's day, before the committee on licenses of the board of aldermen of the city of Salem, and upon the question of the revocation of said license. The defendant objected to the introduction of this evidence; but the judge admitted it, and the defendant excepted.

It was not contended on the part of the government that the sale to Margaret Monarch was in violation of any of the conditions of the license.

The defendant then requested the judge to rule that no revocation of the license was proved; but the judge refused so to rule, and instructed the jury that the evidence introduced was competent in law to show a revocation of the license. The jury returned a verdict of guilty; and the defendant alleged exceptions.

H. B. Moulton, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

DEVENS, J. The license, which had been granted to the defendant, was subject to forfeiture in case of her conviction before a court of competent jurisdiction of having violated any of its provisions, or of the St. of 1875, *c.* 99, and it might also be determined by the mayor and aldermen by declaring it forfeited "after notice to the licensee and a reasonable opportunity to be heard by them, or by a committee of their number," upon proof satisfactory to them that she had violated or permitted to be violated any of the conditions thereof." St. 1875, *c.* 99, §§ 6, 12, 13. It should have appeared by their record, in some form, that the mayor and aldermen had upon such proof determined her license forfeited by reason of her violation of the conditions upon which it was to be exercised. They were dealing with that which,

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under this statute, is deemed a valuable privilege, to obtain which the defendant had paid a considerable sum, and of which she was not liable to be deprived except by such a decision. St. 1875, c. 99, § 7. It was not in their power to revoke or recall her license, either arbitrarily, or because they considered it to have been injudiciously granted in the first instance, or for any similar reason. Their power was much more limited, and it cannot be inferred from a vote simply that the license be "revoked," that they have adjudged it forfeited upon proof satisfactory to them, that its conditions had been violated.

Nor is it necessary to determine, in the case before us, whether the deficiency in the recorded vote of the mayor and aldermen could have been supplied by extrinsic evidence that they acted upon proof satisfactory to them, and upon such proof, although using the term "revoked," had determined the license. If the extrinsic evidence admitted be examined, it entirely fails to show that either the committee on licenses (before whom there was a hearing) or the mayor and aldermen ever found the defendant guilty of any breach of its conditions.

Exceptions sustained.

WILLIAM PICKERING, JR. *vs.* JAMES REYNOLDS, JR.

Essex. Nov. 3. — 4, 1875. WELLS, COLT & MORTON, JJ., absent.

The declarations of an occupant of land, in disparagement of his title, are admissible in evidence against one subsequently attaching and levying upon the land as his property.

Upon the issue, on the trial of a writ of entry, whether the tenant, or his father of the same name, under whom the demandant claimed, was grantee in a deed of land to one of that name, the bill of exceptions showed that the demandant introduced evidence tending to show that the father was grantee, that the deed was delivered to him, that after the delivery of the deed he made declarations as to the property when digging a cellar upon the premises, which were excluded in evidence without exception by the demandant. The tenant introduced evidence that his father bought the land with his money, that his father gave him a deed of the land after the action was commenced, and not before, and declarations of the father when digging the cellar that he bought the land for the tenant. The demandant in reply offered evidence of the declarations of the father to other persons, when digging the cellar, and before the action was commenced, that the land was his. This evidence

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was excluded. It was not contended that these declarations were part of the declarations of the father, put in evidence by the tenant. *Held*, that their exclusion, when offered in rebuttal, gave the demandant no ground of exception.

WRIT OF ENTRY, dated December 8, 1868, to recover land in Danvers. Plea, nul disseisin. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The demandant put in evidence the levy of an execution, amended by leave of court and ruled to be sufficient, upon the premises described in his writ, said execution having been issued upon a judgment in an action in which said premises were duly attached on September 24, 1867, as the property of James Reynolds, Sen., and duly set off to the demandant upon said execution on February 22, 1868.

The demandant also put in the deed of Gilbert A. Tapley to James Reynolds, produced by the tenant upon the call of the demandant, and called Tapley as a witness, who testified that he executed the deed, that Reynolds, Sen., paid him the consideration thereof, that he delivered the deed to him at the time of payment; that he saw Reynolds, Sen., upon the premises several times after the delivery of the deed, that he never saw nor spoke to the tenant about the land, and that the tenant was not present when the deed was delivered.

The demandant also offered evidence that Reynolds, Sen., dug a cellar upon the premises after the delivery of said deed; and also, as a part of his evidence in chief, offered the testimony of Frank Eveleth, who testified that he went with Reynolds, Sen., to the cellar, and afterward to the latter's house, where Reynolds, Sen., exhibited to him Tapley's deed of the demanded premises, and made certain declarations, which the judge excluded, without exception by the demandant. The declarations thus excluded were of the same character, and to the same effect, as declarations in relation to the demanded premises, again offered by the demandant in rebuttal of the tenant's case, as hereinafter stated. The demandant then rested his case.

The tenant then testified that he was the son of James Reynolds, Sen., now deceased; that in the year 1862, being at the time sixteen years of age, he enlisted in the United States service, and while in said service on two or three occasions sent his father

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money; that his father received his money paid for enlisting; and was further allowed to testify, under the demandant's objection and exception, as follows: "Some time after said purchase, father said he bought the land for me with money I sent home from the army, and calculated to build a house on it, and would pay for it." On cross-examination the tenant testified that his father handed him the deed after this suit was commenced, and that he never had it before.

The tenant called another witness who was allowed to testify, under objection and exception, that he asked Reynolds, Sen., while he was digging the cellar on the land, and after the said deed had been delivered to him, what he was doing, and he replied as follows: "For my son James, who has come from the war a cripple, and has sent home and saved from his bounty and pay about $300; I wish to get him up a place, so that when I die James will have a home." These declarations were offered for the purpose of showing to whom said land was conveyed.

The demandant then offered in evidence, to rebut the tenant's case, the declarations of Reynolds, Sen., made to other parties at the time of digging said cellar, as follows: "This land is all paid for, and I have a deed of it, and this land is mine." The declarations of Reynolds, Sen., thus offered in evidence, were made before the demandant attached the demanded premises, but it was not claimed that they were a part of any declarations put in evidence by the tenant as above stated. The judge ruled that the evidence offered was incompetent and excluded it.

The jury found for the tenant, under instructions to which no exception was taken; and the demandant alleged exceptions to the said rulings and admission and exclusion of evidence.

C. Sewall, for the demandant.

S. B. Ives, Jr., for the tenant.

GRAY, C. J. If the declarations of the elder Reynolds in disparagement of his title were made before the demandant's attachment, they were clearly admissible in evidence against the demandant who claimed under him, and the bill of exceptions does not show that they were made since the attachment.

The declarations of the same person, made at a different time, had no tendency to contradict the first declarations, and, if they were admissible at all, it was because they tended to prove the

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demandant's original case. *Kingsford* v. *Hood*, 105 Mass. 495. The demandant did not except to their exclusion when offered in chief, and has no right of exception to their exclusion when offered in rebuttal. *Wheeler* v. *Wheeler*, 116 Mass. 297. *Wallace* v. *Taunton Street Railway*, *ante*, 91.

Exceptions overruled.

BOSTON AND MAINE RAILROAD *vs.* SALOME D. MONTGOMERY & others.

Essex. November 5, 1875. WELLS, COLT & MORTON, JJ., absent.

Upon the assessment of damages sustained by the taking of land for a railroad, it appeared that the estate out of which the land was taken was a farm, and that the land taken was on the bank of a river. The bill of exceptions stated that a farmer who had lived many years in the vicinity of the land, and had known of sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconveniences resulting to a farmer from being deprived of access to the river, was asked what in his opinion was the damage to the remainder of the farm of the loss of the river bank, which was excluded; that the petitioner also claimed damages by reason of being excluded from the river bank for purposes of fishing and from a fishing ground, but that it did not appear that the witness had any special or superior knowledge on the subject of fishing or of fishing grounds; and that other witnesses for the petitioner testified to the value of the river bank as affording facilities for fishing. *Held*, that the bill of exceptions disclosed no error in the exclusion of the farmer's testimony.

PETITION for a jury by a railroad corporation dissatisfied with the assessment by the county commissioners of damages to the respondents' land, occasioned by the taking of a portion of it by the petitioner for a railroad. Trial in the Superior Court, before *Allen*, J. who allowed a bill of exceptions in substance as follows:

It appeared that the estate out of which the land was taken bounded upon the Merrimack River, and was occupied as a farm, and that the land so taken and cut off was next to the river.

A witness who was a farmer and had lived many years in the vicinity of this land, and had known sales of land in the neighborhood, and was allowed without objection to testify as to the value of the land taken, and of the inconveniences resulting to a

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farmer by being excluded from access to the river, was asked what, in his opinion, was the damage to the remainder of the farm by reason of the loss of the river bank, and, in another form, how much, if any, the remainder of the farm was diminished in value by reason of the taking and cutting off by the railroad of the river bank. The corporation objected to this question. The judge sustained the objection, and ruled in effect that the substance of the question in any form was inadmissible.

Among other elements of damage, the landowners claimed damages by reason of being excluded from the river bank for purposes of fishing and from a fishing ground, and it did not appear that this witness had any special or superior knowledge on the subject of fishing or of fishing grounds. Witnesses subsequently introduced by the landowners testified as to the value of the river bank as affording facilities for fishing.

The landowners, being dissatisfied with the amount awarded by the jury, alleged exceptions.

H. N. Merrill, for the landowners.

H. Carter, for the corporation, was not called upon.

BY THE COURT. The bill of exceptions shows that the witness was allowed to estimate in money the value of the land taken, and leaves it at least doubtful whether he was not allowed to estimate in the same way the amount of the inconveniences resulting to a farmer from being deprived of access to the river — so that the consequent diminution in value would be ascertained by deducting the one sum from the other, which could easily be done by the jury — and does not show that the owners of the land claimed damages by reason of being excluded from the river bank for any purposes as to which the witness had any special or superior knowledge. The landowners therefore fail to sustain their exceptions.

Exceptions overruled.

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JAMES D. MARTIN & others *vs.* AMOS P. TAPLEY.

Essex. Nov. 6.—9, 1875. WELLS & MORTON, JJ., absent. ENDICOTT, J., did not sit.

An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it; he has no right to take the case up, by bill of exceptions or otherwise.

After verdict for the plaintiff in an action of contract, the defendant died, and the plaintiff moved the court to strike from the record a plea of discharge in bankruptcy filed by the defendant since the verdict, and to enter judgment *nunc pro tunc* as of a term before his death. At the hearing of these motions, no executor or administrator of the defendant having been appointed, his heir, and the sureties on the bond given to dissolve the attachment on the writ, were allowed by the presiding judge to appear for the purpose of being heard on these motions, but not as parties to the suit; and the counsel of the deceased defendant was heard in their behalf, and as *amicus curiæ*. *Held*, that neither the heir, nor the sureties, nor the *amicus curiæ*, could allege exceptions to an order of the judge granting the motions.

PETITION to establish the truth of exceptions. The material facts, appearing by the records referred to in the petition were as follows:

An action of contract, brought by Amos P. Tapley against Lucretia W. Martin, was tried at November term 1870 of this court in Essex, and a verdict returned for the plaintiff, and exceptions taken by the defendant at the trial were allowed by the presiding judge, and entered upon the law docket in that county at November term 1871. On February 26, 1872, the defendant pleaded a certificate of discharge in bankruptcy, obtained January 20, 1872, in the District Court of the United States for the District of Maryland. On June 15, 1874, Ambrose A. Ranney, Esquire, the attorney for the defendant, suggested of record that her death occurred June 12, 1874. On October 22, 1874, the plaintiff filed a motion that the plea of discharge in bankruptcy be taken off the record of this court, upon the ground that it would appear from an inspection of the whole record and final decree of the United States Court (copies of which were produced) that the certificate of discharge had not been granted, but had been refused. In November, 1874, the exceptions taken at the trial were argued by Mr. Ranney, as *amicus curiæ*, and by the counsel for the plaintiff, and overruled. See *Tapley* v. *Martin*, 116 Mass. 275.

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At a subsequent hearing before *Wells*, J., on motions of the plaintiff that the plea of discharge in bankruptcy be ordered to be taken off the record, and that judgment be entered for the plaintiff *nunc pro tunc* as of November term 1871, James D. Martin, the son and heir of the deceased defendant, and Andrew C. Mudge and Penfield B. Goodsell, the sureties upon the bond given by the defendant to dissolve the attachment upon the writ, were "allowed to appear for the purpose of being heard upon the pending motions to strike off the plea of bankruptcy and to enter judgment *nunc pro tunc*, but not as parties to the suit;" Mr. Ranney, counsel for the defendant in her lifetime, was heard as *amicus curiæ*, and also as counsel for the heir and the sureties; and it was ordered "that said motions be granted, and that said plea of discharge in bankruptcy be taken off the record of this court — it appearing that the alleged discharge, a copy of which was filed in support of said plea, was vacated by the court by which it purported to have been granted, before the filing of said plea, and at the term at which the alleged discharge was granted, and upon a final hearing and adjudication thereon a discharge was refused in the defendant's lifetime" — and that judgment be entered for the plaintiff in this action *nunc pro tunc* as of November term 1871.

Mr. Ranney, as counsel for the defendant during her lifetime, and as *amicus curiæ*, and as attorney of the heir and the sureties, tendered a bill of exceptions to this order and to various rulings at the hearing upon the motions; and the bill of exceptions was disallowed by the judge.

The heir, the sureties, and Mr. Ranney, as counsel for the deceased defendant and as *amicus curiæ*, thereupon filed this petition to establish the truth of the exceptions so tendered; alleging the facts above stated, and also that the defendant died leaving no estate of any kind in this Commonwealth, and there had never since been any property, effects or credits here to be administered upon, and therefore no letters of administration, either original or ancillary, had been or could be granted here; and that the exceptions alleged were true, and were disallowed by the judge solely because neither of the petitioners was so far a party to the suit or so far related to it as to be entitled to be allowed or to prosecute a bill of exceptions.

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The petitioners moved that the petition be referred to a commissioner to hear the parties and report the facts to the court. The original plaintiff moved to dismiss the petition, because the petitioners were not entitled to allege exceptions.

F. W. Hurd, (*A. A. Ranney* with him,) for the petitioners. This is a petition to prove exceptions taken to the right of the court to enter judgment for the plaintiff *nunc pro tunc* after the death of the defendant. The objection is raised that there is no party before this court to take exception. The theory upon which such a judgment is entered is, that the court by a fiction goes back to the time when the parties were living, and enters such judgment as would then have been entered but for the delay of the law. This is expressed in *Currier* v. *Lowell*, 16 Pick. 170, 173, as follows: "The court will go back to the time when the judgment might have been rendered on the verdict, if no motion had been made which prevented it." In *Kelley* v. *Riley*, 106 Mass. 339, 342, it is said that "the court in now rendering judgment will go back to the time when it would have been rendered if no action had been taken to prevent it." In *Bridges* v. *Smyth*, 8 Bing. 29, 32, Tindal, C. J., said: "The case therefore does not depend on the St. of Car. II., but on the rule of common law, that where parties are hung up by act of the law, neither of them loses his right, but eventually judgment is entered *nunc pro tunc*, as if the party were still alive." Similar expressions are found in a great number of cases. Freeman on Judgments, (2d ed.) § 56 *& seq.*

If this is the theory for the purpose of entering judgment, is it not the same for the purpose of showing cause why such judgment should not be entered? In *Miles* v. *Bough*, 15 L. J. (N. S.) Q. B. 30, 32, Wightman, J., said: "If it could be shown that the defendants or any third person would be prejudiced by entering the judgment as prayed, that would no doubt be ground for the court refusing to interfere; but in the absence of any well founded objection of that kind, it appears to me that the rule for entering the judgment *nunc pro tunc* must be made absolute."

The cases are numerous where arguments have been entertained by courts upon their power to render a judgment *nunc pro tunc* after the death of one party, and no suggestion has ever

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been made that there was no party in court competent to resist the motion. The arguments proceed upon the fiction that they are had while the parties are living. *Currier* v. *Lowell*, 16 Pick. 170. *Mayor of Norwich* v. *Berry*, 4 Burr. 2277. *Abington* v. *Lipscomb*, 11 L. J. (N. S.) Q. B. 15. *Miles* v. *Williams*, 9 Q. B. 47; *S. C.* 16 L. J. (N. S.) Q. B. 56. *Griswold* v. *Hill*, 1 Paine C. C. 483. *Heathcote* v. *Wing*, 11 Exch. 355. *Freeman* v. *Trawah*, 12 C. B. 406.

The petitioners were allowed to be heard before a single judge as to whether or not the record in this case was ready for final judgment; and if allowed to be heard upon that question there, have they not the right to ask a review of the ruling made upon matters of law? They were admitted as parties so far as the motion to enter judgment was concerned, and ask now only to be heard upon that same motion. In *Kelley* v. *Riley*, 106 Mass. 339, the exceptions were allowed after death of the party excepting. In *Freeman* v. *Rosher*, 13 Q. B. 780, after verdict for the plaintiff, with leave reserved to move a nonsuit or verdict for the defendant, the defendant died before a motion could be made; and the rule *nisi* was afterwards obtained in his name. Suppose in *Kelley* v. *Riley* the exceptions as filed had been disallowed; might they not have been proved? It may be said that in the above cases the exceptions were taken while the parties were living, but they were such as must have been taken at or before verdict, which could only be had while the parties were living; in the case at bar, the exceptions arise from proceedings that could only be taken after the death of one of the parties. Now it must either be held that the court proceeds *ex parte* in fiction as well as in fact, in allowing judgment *nunc pro tunc* after death of one of the parties, or that the decision of a single judge is final upon the legal power to enter such a judgment. Suppose, when *Kelley* v. *Riley* was sent back to the Superior Court, a question had arisen as to the legal power of the court to enter judgment; would the decision of a single judge of the Superior Court have been final?

O. W. Holmes, Jr., contra.

GRAY, C. J. The authorities cited for the petitioners show that the counsel for a deceased party might be heard as *amicus curiæ* before the full court, if the exceptions sought to be estab-

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lished had been allowed and entered in his client's lifetime; because the delay in disposing of them would be deemed the act of the court; *Tapley* v. *Martin*, 116 Mass. 275; *Bridges* v. *Smyth*, 8 Bing. 29; *S. C.* 1 Mo. & Sc. 93; *Miles* v. *Williams*, 9 Q. B. 47; or if the exceptions had been taken by the party in his lifetime, though not allowed or entered until after his death; because they would be his own exceptions, seasonably alleged and tendered by himself, and the subsequent allowance and entry of them might be treated as mere forms to put them in order for hearing; *Kelley* v. *Riley*, 106 Mass. 339; or if the ruling below had been in his favor, and the questions of law reserved on the motion of the other party; *Currier* v. *Lowell*, 16 Pick. 170; or if the questions of law had been reserved by the judge himself at the trial or hearing, and brought before the full court by his report, or by motion pursuant to leave so reserved. *Springfield* v. *Worcester*, 2 Cush. 52, 62. *Freeman* v. *Rosher*, 13 Q. B. 780.

But the difficulty in this case lies deeper. None but a party to a suit has a right to allege exceptions, or to file a petition to establish the truth thereof. Gen. Sts. *c.* 115, §§ 7, 11. At the time when these questions of law were first raised, the defendant was dead, and no executor or administrator had, so far as appears, been appointed or named. The heir of the defendant had no right to appear as a party to a personal action. The sureties upon the bond to dissolve the attachment were not, and could not be made, parties to the action in their own name; and they could not use the name of the defendant, because she was dead, nor of her executor or administrator, because it does not appear that there was any. Both the heir and the sureties were allowed to come in and be heard, not as parties to the suit, but, just as any stranger might be, for the information of the judge before whom the motions were pending. The counsel for the deceased defendant had no right to be heard as such, because his authority to act in her behalf had been revoked by her death. Like the heir and the sureties, he could be heard only as *amicus curiæ*. An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it. He has no control over the suit, and no right to institute any proceeding therein, or to bring the case from one court to another, or from a single judge to the full court, by exceptions, appeal or writ of

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error. 4 H. VI. 16, pl. 16. *Isley's case*, 1 Leon. 187. Vin. Ab Amicus Curiæ. *Knight* v. *Low*, 15 Ind. 374.

None of the petitioners being parties to the suit, the exceptions alleged by them were not legally alleged, and were rightly disallowed by the presiding judge, and the petition to establish the truth of them must be *Dismissed.*

JOSIAH B. THOMAS & another *vs.* BUILDERS' MUTUAL FIRE INSURANCE COMPANY.

Essex. Nov. 4. — 17, 1875. WELLS, COLT & MORTON, JJ., absent.

A policy of insurance against fire which contains a provision that if the assured "shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of this company, in writing, then in such case this policy shall be void," is not defeated by the taking of a subsequent policy which is invalid by reason of the failure of the assured to obtain the assent of the company issuing it to the existence of other insurance upon the property as required by the terms of that policy; and the assured may set up the invalidity of the second policy, in an action by him upon the first policy, although he has received payment of the second policy from the insurer.

CONTRACT upon a policy of insurance against fire, issued by the defendant to the plaintiffs. At the trial in the Superior Court, before *Brigham*, C. J., the defendant declined to argue the case to the jury under the instruction of the presiding judge, submitted to a verdict for the plaintiffs, and alleged exceptions to the rulings of the judge and to his refusal to rule as requested, the substance of which appears in the opinion.

W. F. Slocum, for the defendant.

S. B. Ives, Jr., for the plaintiffs.

DEVENS, J. Many questions which were discussed at the trial and also at the hearing at bar, need not be considered, as there is one ground which we deem to be conclusive against the defence here sought to be established.

The policy of insurance, issued by the defendant upon December 13, 1872, and taking effect on that day, was for the term of three years, and contained the express condition "that if the assured shall have made or shall hereafter make any other insurance upon said property without the knowledge or consent of

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this company in writing, then in such case this policy shall be void."

On December 19, 1872, a policy of insurance was issued to the plaintiffs by the Merrimack Mutual Insurance Company, upon certain property of the plaintiffs for the term of five years. The loss occurred within the time included in both policies. The defendant offered evidence to prove that the latter policy with other property covered also the property insured by the defendant which was destroyed by fire, and contends that as there was no knowledge of or consent to such reinsurance there can be no recovery upon the policy here sued on.

Assuming the defendant to have proved that the property insured by it was covered by the instrument issued by the Merrimack Company as a policy, it is for the defendant to show that such instrument was a valid and legal policy, effectual and binding upon the insurers. If it was invalid so far as the property in question was concerned, there would by legal intendment be no second insurance upon it, and therefore no avoidance of the first policy.

The policy of the Merrimack Company was also upon the condition "that without the consent of this company no other insurance shall exist" upon the property insured by it, and no such consent was given. The Merrimack Company was to have been the subsequent insurer of this property, (if it was in terms covered by its policy,) and the plaintiffs therefore failed to do what was necessary in order that a contract might be perfected with it, and having effected no valid subsequent insurance, they have not avoided the prior policy with the defendant. The whole question comes clearly within the decided cases. *Jackson* v. *Massachusetts Mutual Fire Ins. Co.* 23 Pick. 418. *Clark* v. *New England Mutual Fire Ins. Co.* 6 Cush. 342. *Hardy* v. *Union Ins. Co.* 4 Allen, 217.

Nor is the fact that the plaintiffs have received payment from the Merrimack Company upon their policy important in this connection. The inquiry here is simply whether there was a valid insurance at the time, and this is not affected by what the plaintiffs or the Merrimack Company saw fit to do afterwards. Those acts can in no way have affected injuriously the defendant, so as to estop the plaintiffs from asserting that there was no valid

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policy issued by the Merrimack Company, nor can they alter the rights of the parties. *Hardy* v. *Union Ins. Co., ubi supra. Bardwell* v. *Conway Ins. Co.* 118 Mass. 465. *Philbrook* v. *New England Ins. Co.* 37 Maine, 137. *Exceptions overruled.*

SWAMSCOTT MACHINE COMPANY *vs.* JOHN R. PERRY & wife.

Essex. Nov. 6.—19, 1875. WELLS, COLT & MORTON, JJ., absent.

If a debtor has mortgaged land, by the intervention of a third person, to his wife, without consideration and in fraud of creditors, and the wife has never taken possession, and no mortgage debt exists, but the husband remains in possession, a creditor to whom a portion of the land has been set off on execution against the debtor, and possession delivered, has a full, adequate and complete remedy at law by writ of entry against the debtor, and cannot maintain a bill in equity to obtain a release from the wife of all her right in the land set off.

BILL IN EQUITY by the Swamscott Machine Company, a corporation established under the laws of the State of New Hampshire, against John R. Perry and Cornelia B. Perry, his wife, alleging the following facts:

On August 1, 1871, John R. Perry was seised in fee of a tract of land in the city of Lawrence in this Commonwealth; and on that day executed and delivered to George S. Armstrong a promissory note payable to Armstrong or order, for the sum of $6200, and at the same time executed and delivered to Armstrong a mortgage deed of said tract of land, conditioned for the payment of the note to Armstrong when due, which deed was duly acknowledged and recorded.

On December 18, 1871, Armstrong, by his deed of that date, assigned the mortgage deed and the debt secured thereby to Cornelia B. Perry and indorsed to her the said note. This deed was duly recorded. Cornelia B. Perry has never taken possession of the premises, but they remain in the possession of her husband.

On January 9, 1874, the plaintiff recovered judgment in the Superior Court for the county of Essex against John R. Perry for the sum of $1587.23, on which judgment execution issued on January 21, 1874, and on February 3, 1874, the plaintiff caused the execution to be levied on a certain described portion of said

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land, subject to the inchoate right of dower of Cornelia B. Perry. Seisin and possession of said tract were delivered thereunder to the plaintiff, who has remained and now is in possession thereof; and thereupon the execution was returned by the officer as fully satisfied with all costs by the levy, and the execution and the return thereon were recorded in the registry of deeds and returned to the court issuing the same, and the right of redeeming the levy has expired.

The levy was not made subject to the said mortgage, nor the amount thereof deducted from the value of the land as estimated by the appraisers, but the land was set off to the plaintiff at its full value.

The bill further alleged that the defendants fraudulently colluding together and contriving to defeat the creditors of John R. Perry and to transfer and secure to his wife a part of his property, made the said mortgage deed, note and assignment; that the note was without consideration as between John R. Perry and Armstrong, and that Cornelia B. Perry paid nothing therefor to Armstrong; that there is not now existing and due any debt whatever which the mortgage secures; that the note has, as a matter of law, become void and of no effect; that Cornelia B. Perry now claims that the mortgage is a valid lien and incumbrance on the land, and is threatening and intending to enter under the same and expel the plaintiff as soon as it shall become lawful for her so to do, and that the mortgage is a cloud upon its title.

The prayer of the bill was that Cornelia B. Perry might be ordered to execute to the plaintiff a release of all right or claim in or to the tract of land set off to it on the levy, and for further relief.

The defendant Cornelia B. Perry demurred for want of equity. The case was heard on the bill and demurrer by *Endicott*, J., the demurrer sustained, and the bill dismissed. The plaintiff appealed.

N. W. Harmon, for the defendants.

C. U. Bell, for the plaintiff. The allegations of the bill show that the plaintiff has title in part of the land. That title gives it the right to question the mortgage of Mrs. Perry and inquire into its present validity, and claim a discharge of it, if it

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secures no debt. The bill shows that there was no debt at the date of the levy, the note being without consideration and not taken by Mrs. Perry for value. This is not charged as a fraudulent conveyance because voluntary, but only to determine the amount to be paid to redeem. Although the facts charged might prove fraud, the plaintiff is not obliged to take that view of them. It has an election to rely on fraud or not.

The note has become void because it is now the property of the maker's wife. *Bassett* v. *Bassett*, 112 Mass. 99. *Chapman* v. *Kellogg*, 102 Mass. 246.

It is the province of a court of equity to order the discharge of mortgages, where, after breach of the condition, the debt is discharged. Here the condition, which was the payment of $6200, has never been performed, but has been broken, while the debt is cancelled. *Howard* v. *Howard*, 3 Met. 548.

2. A writ of entry would not lie, as the legal title was in Mrs. Perry. *Parsons* v. *Welles*, 17 Mass. 419. *Bigelow* v. *Willson*, 1 Pick. 485. *New England Jewelry Co.* v. *Merriam*, 2 Allen, 390. Nor a petition to quiet the title, as the plaintiff was not in actual possession taking the profits. The bill alleges that John R. Perry, one of the defendants, is in possession. *Munroe* v. *Ward*, 4 Allen, 150. It is in its nature a bill to redeem, of which the court has jurisdiction. There are two rights which cannot be settled in one action at law, that of Mrs. Perry and that of the holder of the rest of the land. Gen. Sts. *c.* 113, § 2, *cl.* 6.

GRAY, C. J. Upon the facts stated in the bill, the plaintiff has the legal title; John R. Perry, one of the defendants, has the possession, without any title; and his wife, the other defendant, has neither title, nor possession, nor immediate right to take possession. The plaintiff has a full, adequate and complete remedy at law, by writ of entry against John R. Perry, and cannot therefore maintain this bill. *Dolby* v. *Miller*, 2 Gray, 135. *Clark* v. *Jones*, 5 Allen, 379. *Commonwealth* v. *Smith*, 10 Allen, 448. *Jones* v. *Newhall*, 115 Mass. 244. *Decree affirmed.*

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LEONARD F. LAWRENCE *vs.* CITY OF BOSTON.
WILLIAM B. FOWLE *vs.* SAME.

Suffolk. November 9. — 10, 1875. WELLS & ENDICOTT, JJ., absent.

On the trial of a petition by the lessee of a part of a building, for the assessment of damages occasioned by the taking by a city of land, on which the building stood, to widen a street, it appeared that the owner of the estate surrendered the entire estate to the city by a deed in which he covenanted to indemnify the city against all claims for damages, and that in pursuance of this agreement he defended the action. *Held*, that declarations by him as to the value of the lease, made after notice to him of the taking and before his agreement with the city, were not admissible in evidence except to contradict him.

On the issue of the value to the lessee of rooms in a building which had been taken by a city to widen a street, it is within the discretion of the judge presiding at the trial to permit a witness who underlets rooms in a building in the vicinity, and who, for this purpose, has informed himself generally of the rents of buildings, to give an opinion as to the value of the lessee's premises, although he has not examined, and is not familiar with, the building in question.

On the trial of a petition under the St. of 1871, *c.* 382, § 7, by the lessee of a part of a building, for the assessment of damages occasioned by the taking of the land on which the building stood, by a city to widen a street, the jury were instructed in substance that the value of the lease was its market value; that market value meant the fair value of the property as between one who wanted to buy and one who wanted to sell, irrespectively of peculiar circumstances rendering the lease of greater value to the lessee or of a desire on his part to retain the premises. No special objection was taken to this instruction, but the petitioner requested the further instruction that in determining the value of the lease the jury were to consider, among other things, the amounts which persons desiring to take the lease would be willing to give therefor, not excluding the amounts which the petitioner himself would give. The judge stated that he had no objection to giving this instruction with the modification, "if the petitioner is in the market for the lease." *Held*, that the petitioner had no ground of exception to the refusal of the judge to give the instruction without the modification. *Held*, *also*, that the petitioner had no ground of exception to the refusal of the judge to instruct the jury, as requested by him, that the statute entitled all persons whose property was taken for public uses, to receive damages for the value thereof, that the term "market value" was not used in the statute, and that the lessee was entitled to compensation for any value the property might have other than a market value.

TWO PETITIONS to the Superior Court under the St. of 1871, *c.* 382, § 7, for a jury to assess damages for the taking by the respondent of the land on which the Boston Post building stood, on the corner of Water Street and Devonshire Street, in Boston, to widen Water Street, the petitioners having a leasehold estate therein. Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

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The land and building belonged to James H. Beals and others. The petitioner Lawrence held a lease from them of a store on the first story on Water Street, which would terminate November 4, 1878. The petitioner Fowle held a lease from one Apthorp of a room on the second story on Devonshire Street, which would terminate May 1, 1875. Apthorp held a lease from the owners of the same and other premises which would terminate at the same time.

The city determined, April 18, 1873, to widen Water Street by taking a portion of the estate. On March 31, 1873, the owners notified the city that they objected to the proposed widening, and elected to surrender the entire estate to the city. On November 15, 1873, the city determined to take the entire estate for the purpose of the widening. Subsequently the owners settled with the city for the value of the estate, and in consideration of $325,000 paid to them, and of the use of the building till September 1, 1874, and the remission of taxes for that year, the owners conveyed the estate to the city, on April 15, 1874, and in their deed covenanted to indemnify the city against all claims for damages on account of the granted premises or the taking thereof. The owners notified the tenants that they must remove on September first.

It was conceded that in pursuance of this agreement the present suit was defended in fact by the owners of the estate.

At the trial James H. Beals was called as a witness for the petitioners, and testified that he appeared in behalf of himself and other owners before the city authorities during the negotiations which resulted in the settlement with the city. The petitioners then offered to show by this witness that he made representations to the committee that the owners would have to pay large damages to these tenants, and that these rooms could be let for more than the rent reserved in the existing leases, also as to the amount at which the office occupied by Beals, Green & Co. in the building, which office adjoined Lawrence's store, could then be let. The counsel offered this evidence, not as in any way controlling Beals's statements at this trial. He was not asked his opinion as to the value of the leases, but counsel stated that they offered this evidence as admissions heretofore made by the said Beals. The judge excluded the testimony, and the petitioners alleged exceptions.

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The respondent called Charles W. Freeland to testify as to his opinion of the rental value of premises occupied by the petitioners. The witness testified that he was lessee under a long lease of a building known as the City Exchange, on Devonshire Street, about one hundred and fifty feet from the corner of Water Street and Devonshire Street, which building he underlet, and that he made it a part of his business to underlet this building, and that he attended to letting tenements not exceeding twenty in that building; that his knowledge of the value of leases outside of his own building was not very extensive; that he was not in the habit of making any inquiries as to what other people were doing; that he had general knowledge of what certain things would rent for per square foot; that for the purpose of letting this building he had informed himself generally of the rents of buildings; that knowledge came to him by the way of people coming to make inquiries, and when he talked about the rent of his building they would tell him what they could hire in such a building for such a price; that he had not sought the knowledge, but it came to him in that way; that he had been consulted a great many times by owners of buildings as to rents, but he could not state any particular territories as to which he was thus consulted, and that he had hired a building for his business on Winthrop Square. It did not appear that the witness had examined the Boston Post building. The petitioners thereupon objected that the witness was not qualified to testify as to his opinion of the value of the petitioners' premises. But the judge permitted him to testify thereto, and the petitioners excepted.

The judge instructed the jury as follows: "The value of the leases is their market value; 'market value' means the fair value of the property, as between one who wants to purchase and one who wants to sell any article, not what could be obtained for it under peculiar circumstances, when a greater than its fair price could be obtained; not its speculative value; not a value obtained from the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction, under the hammer. It is what it would bring at a fair public sale, when one party wanted to sell and the other to buy. The fact, therefore, that one of these lessees, Lawrence, as had been argued by his counsel, did not want

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to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. If Lawrence had wanted to go out, the question is, what would his lease have brought? Not what it would have been worth to him if he had wanted to stay there, because it may have been of greater value or of less value to him than its value upon the market. That simply determines its value to him, not its market value. The question for you to consider is, if Lawrence wanted to sell this lease, what could he have obtained for it upon the market, from parties who wanted to buy and would give its fair value?" No specific objection was taken to this charge, but the counsel for the petitioners then asked the judge to give this instruction: "In determining the value of the leasehold estate, the jury are to consider among other things the amounts which persons desiring to take the leases would be willing to pay for the same, not excluding from such consideration the amounts which the petitioners themselves would give." The judge stated that he had no objections to giving this instruction, with this modification, "if the petitioners are in the market for the lease; but if they, rather than be turned out, would give more than anybody else, that is not the market value of the lease," and did so give it. The counsel contended that it should be given without the modification; and excepted to the refusal of the judge so to do.

No evidence was offered of any other than the market value of the leases upon either side, or that the petitioners would have been glad to stay if they could do so, or what they would be willing to pay for the leases if they could stay; but the petitioners testified as to the conveniences of the tenements for their purposes, and it was conceded for this trial by the respondent, and the judge so instructed the jury, that in estimating the rental value for the remainder of the term, they might assume that the lease could be renewed at a fair rental.

The petitioners' counsel then asked the judge to give this instruction: "The statute entitles all persons, whose property has been taken for public uses, to receive damages for the value thereof; the term 'market value' is not used in the statute, and it may be that property has value other than a 'market value,'

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wight v. *County Commissioners*, 11 Cush. 201,

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208, the court said, "the market value is a near and perhaps the closest approximation to" the true value; not that it is the same thing. In *Edmands* v. *Boston*, 108 Mass. 535, the Superior Court used the term "market value" as defining the value for which the petitioners were entitled to compensation, and the expression was repeated in the opinion of this court; but it does not appear that the court intended to sustain the accuracy of the expression. In *Cobb* v. *Boston*, 112 Mass. 181, the expression is also used. With these exceptions, it is believed that there is no case in which this court has held that the terms "value" and "market value," as applied to property taken for public uses, are synonymous. But assuming that the objection to the term "market value" is not well founded, or that it is immaterial, if the jury were instructed accurately or sufficiently favorably to the petitioners as to its meaning, then it is submitted that the instruction was incorrect in excluding from the consideration of the jury the amounts which the petitioners themselves would give for the premises, unless "the petitioners were in the market for the lease." "The value to him . . . . was the measure of his (the owner's) claim to indemnity." Shaw, C. J., in *Patterson* v. *Boston*, 20 Pick. 159, 166. "A fair compensation for the property taken and injury done, ascertained by general rules, is a substitute to the owners for that of which they are deprived." Wells, J., in *Edmands* v. *Boston*, 108 Mass. 544. See *Robb* v. *Maysville Turnpike Co.* 3 Met. (Ky.) 117. "The question for the jury was, what was a proper price, or in other words, what was the value of the land taken?" Ames, J., in *Pinkham* v. *Chelmsford*, 109 Mass. 225, 228.

The petitioners were entitled to have instructions substantially to the above effect. The jury, in determining the true value of the premises, were bound to consider all the evidence as to the actual demands that existed for them, their adaptation to all persons, including the owners, the opinions of experts and their own general knowledge and experience on the subject. It may be difficult to give an exact definition of the term "value" as it is of "ordinary care." There was, as the petitioners submit, no necessity for elaborating a definition to the extent undertaken by the court. But if the elements of value needed to be stated with greater minuteness than this court has hitherto found necessary,

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it is submitted that there is no reason or authority for excluding, as one of such elements, the actual value of the premises, as they were at the time of the taking, to the person from whom they were taken, under the circumstances under which they were taken. The natural and inevitable tendency of the instruction was to impress on the jury that they were to give the tenant only what the lease would bring at a fair public sale, where the party most liable to offer the true value was excluded from the competition.

G. O. Shattuck & M. Storey, for the respondent, were not called upon.

GRAY, C. J. Beals was not a party to the record. He defended this suit, not by reason of any relation to the city, or liability for the act for which this suit was brought, when that act was done, but by virtue of a subsequent contract between himself and the city. His previous declarations, made when his interests were adverse to those of the city, were not admissible in evidence, except to contradict him; and not being offered for that purpose, they were rightly excluded.

The question whether Freeland was qualified to testify to his opinion of the value of the premises was within the discretion of the presiding judge, and no error in law is shown in the exercise of that discretion.

The instructions to the jury were such as have been usually given in similar cases in this Commonwealth, and were correct and sufficient. *Exceptions overruled.*

BENJAMIN F. BROOKS & others *vs.* JAMES M. CUTTER & others.

Suffolk. November 10, 1875. WELLS & ENDICOTT, JJ., absent.

A lease of rooms in a building, which provided that in case of the destruction of the premises by fire the rent should be suspended or abated, was surrendered to and accepted by the lessor in consideration of three notes made by the lessee payable to the lessor at different dates. The first two notes were duly paid, and before the last note was due, the premises were destroyed by fire. *Held*, that the lessee was liable for the amount of the last note when due.

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CONTRACT by Benjamin F. Brooks, Edward A. White, and Joseph Sawyer, trustees under the will of John Simmons, upon a promissory note for $1167, dated April 1, 1871, signed by the defendants, payable to Edward A. White, trustee, who indorsed it in blank. The case was submitted to the Superior Court, and after judgment for the plaintiffs for the amount of the note, to this court, on appeal, upon agreed facts, in substance as follows:

The defendants executed the note and are liable to pay the same to the plaintiffs, unless the following facts constitute a defence.

On November 2, 1868, John Simmons executed to the defendants a lease of the basement and lower floor of the four-storied store No. 89 Devonshire Street, Boston, at an annual rent of $3000, payable in equal quarterly instalments of $750 each, for the term of five years from October 1, 1869. The lease contained the following provision: "And provided, also, that in case the premises, or any part thereof, shall, during said term, be destroyed or damaged by fire or other unavoidable casualty, so that the same shall be thereby rendered unfit for use and habitation, then, and in such case, the rent hereinbefore reserved, or a just and proportionate part thereof, according to the nature and extent of the injury sustained, shall be suspended or abated until the said premises shall have been put in proper condition for use and habitation by the said lessor, or these presents shall thereby be determined and ended at the election of the said lessor or his legal representatives."

The defendants paid the rent, and the obligations of the lease were fully complied with on both sides, until April 1, 1871. In the mean time John Simmons had died, and the plaintiffs, trustees under his will, had become invested with all his rights as lessor of the demised premises.

Before April 1, 1871, the defendants had moved out of the premises, and negotiations had been pending for some time between them and the plaintiffs, having in view the assumption of the premises by the latter. On the last named date the plaintiffs sent the defendants the following letter with reference thereto: "Boston, April 1, 1871. Messrs. Cutter, Tower & Co., Boston. Gentlemen, — I have had a conference with the other trustees, and we have agreed to renew the proposition last made to you in

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reference to assuming the lease of the store on Devonshire [illegible] street belonging to the estate. You to pay the rent to this d[illegible] we will assume the balance of the lease by your paying to the trustees the sum of one thousand dollars per annum, and at that rate for any part of a year, and payable at the quarter day as had been said rent, you giving your note or notes for the same, if not paid in cash at this time.

"The trustees to put the property in condition to rent, y[illegible] pay the expense of the same, and what to be done you will [illegible] agree with Mr. White about as being proper and necessary. [illegible] acceptance of the above or rejection we would like to-d[illegible] if it is to come into our hands we wish to enter upon it wi[illegible] delay to prepare for tenantry.

"In behalf of the trustees, Joseph Sawyer [illegible]

This proposition the defendants accepted on the same [illegible] Thereupon the amount payable under this agreement was [illegible] aged, and it was agreed that the defendants should give the p[illegible] tiffs therefor, which they consequently did, three bankable [illegible] all dated April 1, 1871: one for $1167 on twelve months, w[illegible] matured April 1, 1872, and was paid; one for $1166 on eig[illegible] months, which matured January 1, 1873, and was paid; a[illegible] third, the note in suit, which has never been paid. The defen[illegible] ants, on April 1, 1871, surrendered the premises to the plaintif[illegible] who entered into possession of the same, and shortly after leas[illegible] them to another tenant, who was still occupying under his lea[illegible] when the store was burned down and totally destroyed on N[illegible] vember 9, 1872.

M. Storey, for the plaintiffs, was not called upon.

J. D. Long, (*S. B. Allen* with him,) for the defendants.

BY THE COURT. The consideration of the notes given by the lessees was the acceptance by the lessors of the surrender of the lease. After this, the defendants had no interest in the estate, and their liability upon the notes was not affected by the condition of the premises, or by the provisions of the lease which had ceased to exist. *Judgment for the plaintiffs affirmed.*

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JAMES HALL, JR., *vs.* ALPHEUS S. RIPLEY.
ALPHEUS S. RIPLEY *vs.* JAMES HALL, JR.

Suffolk. November 10.—11, 1875. WELLS & ENDICOTT, JJ., absent.

In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, it is a question of fact for the jury whether the plaintiff, in the exercise of ordinary care, could, by stopping or turning out, have avoided the collision, and whether his failure to do so contributed to the injury.

In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, the fact that the plaintiff was at the time driving at a rate of speed prohibited by a city ordinance does not, as matter of law, defeat the action, if his own fault or negligence did not contribute to the injury; but it is competent evidence of negligence on his part to be submitted to the jury.

TWO ACTIONS OF TORT for injuries caused by the collision of the carriages of the respective parties on Beacon Street in Boston. At the trial in the Superior Court, before *Putnam*, J., it appeared from the evidence of both parties that the collision took place between eight and nine o'clock in the evening of July 7, 1873, and that the part of Beacon Street where the collision occurred was about fifty feet wide between the sidewalks.

The evidence offered by Hall tended to show that he was driving into the city on the right hand side of the road, within a few feet of the edgestone; that immediately before the collision he saw Ripley coming in the opposite direction, and driving in an irregular and careless manner; that at a moment before the collision Ripley deviated from his course, driving obliquely towards Hall; and that, though Hall uttered a cry of warning, and turned and drove as far to the right as was possible, the collision occurred by Ripley's driving out of his course unnecessarily. Hall also offered evidence tending to show that the street was free from passing vehicles; that the evening was clear, the moon was nearly full, and the light was such that objects could be easily seen at a considerable distance.

Ripley offered evidence tending to show that he was driving out from Boston, and that Hall, coming in an opposite direction, was driving at a high rate of speed, some fifteen or eighteen miles an hour, and racing with other parties, and that this was the cause, or one of the causes, of the collision.

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Hall admitted in testimony that he was driving at the rate of eight or nine miles an hour, and that when he saw Ripley at a distance of seventy-five or eighty feet and coming towards him, and apprehended a collision, he did not stop or turn to the left, but drove as near as he could to the right hand sidewalk, and when asked why he did not stop or turn to the left to avoid the danger, he answered, "I do not know why I did not." The ordinance of the city of Boston, which prohibited, under a penalty, driving at a rate faster than six miles an hour in any street of the city, was put in evidence.

Ripley testified that, in turning to the left to pass a hack driving in the same direction with him, he was unable to see Hall in season to avoid a collision; and his counsel requested the judge to rule "that if Hall saw Ripley before the collision, at the distance of seventy-five to eighty feet, coming towards him, and that Hall then saw there was danger of a collision if he kept on, it was his duty to stop or turn to the left to avoid a collision, and if he did not do so and collision or damage occurred in consequence, he cannot recover; but the judge refused so to rule, but instructed the jury that it was for them to say whether, in the exercise of ordinary care, Hall ought to have stopped or turned; and if, in their judgment, it was his duty to have done so, and by such stopping or turning he might have avoided the collision, he could not recover."

The counsel of Ripley also asked the judge to rule that if, at time of the collision, Hall was racing and driving at a rate of speed prohibited by the ordinance, he could not recover for injuries resulting from such collision. But the judge declined so to rule, and instructed the jury that such violation of the ordinance would not, of itself, prevent a recovery by Hall; that if it was one of the causes of the collision, it would prevent a recovery by Hall.

Proper instructions were given to the jury by the judge as to what constituted due care, and upon other points, to which no exceptions were taken. The jury returned a verdict for Hall in both the actions; and Ripley alleged exceptions to the refusal of the judge to give the foregoing instructions as requested, and to the instructions given in place thereof.

J. B. Richardson, for Ripley.

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A. Russ, for Hall, was not called upon.

BY THE COURT. These cases were rightly submitted to the jury, and with apt and sufficient instructions. *Damon* v. *Scituate*, *ante*, 66, and cases cited. *Exceptions overruled.*

JOHN B. N. STULTS *vs.* MANUEL SILVA & another.

Suffolk. Nov. 11. — 12, 1875. WELLS, COLT & ENDICOTT, JJ., absent

A promissory note containing a provision that it shall be payable "in one and a half years, or sooner at the option of the mortgagor, from this date, with interest at the rate of seven per centum per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid," is not negotiable, whether made by the mortgagor or by a third person.

The objection that a promissory note appears upon its face not to be negotiable, is open at the trial of an action thereon against the payee, in which the declaration sets out a copy of the note, and alleges that it was made payable to the payee or order, and indorsed by the payee to the plaintiff, and the answer denies all the allegations.

CONTRACT against Manuel Silva and Benjamin B. Newhall. The first count alleged that Silva made a promissory note, a copy of which was annexed, payable to Newhall or order, and that Newhall, "waiving demand and notice, indorsed the same to the plaintiff," and that Newhall owed the plaintiff the amount of the note and interest thereon. The copy of the note was as follows:

"$2268.00. Boston, February 1st, 1872. For value received, I promise to pay to Benjamin B. Newhall, or order, $2268.00 in one and a half years, or sooner at the option of the mortgagor, from this date, with interest to be paid semi-annually at the rate of seven per cent. per annum during said term, and for such further time as said principal sum or any part thereof shall remain unpaid. Manuel Silva.

"Secured by mortgage of real estate in Boston, Mass., stamped as required by U. S. Internal Revenue Laws, to be recorded in Suffolk Registry of Deeds."

[Indorsed.] "Waiving demand and notice. Benjamin B. Newhall."

The second count was upon another note differing only in amount from the preceding, and with a similar indorsement. An-

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swer, a general denial. The plaintiff discontinued as to Silva, on the ground of his discharge in bankruptcy; and a trial was had against Newhall in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff proved the signatures of Silva as maker, and Newhall as indorser, as alleged; that the notes had not been paid; that he was the holder of the notes, and paid cash for them, and called upon Newhall, when they matured, to pay them, and he did pay the interest to August, 1873; and rested the case. The defendant contended and asked the judge to rule that the notes were not negotiable, and that this action could not be maintained against him as indorser; but the judge ruled otherwise. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

L. W. Howes, for the defendant.

C. S. Lincoln, for the plaintiff. 1. The notes are negotiable. Even if it is assumed that the maker is the mortgagor, which is not a fact apparent on the face of the notes, the maker promises to pay in a time certain, or sooner, at the option of the mortgagor, that is, if he pleases. The promise to pay sooner if the maker pleases, is no promise, and is absurd and meaningless. No right is reserved thereby to pay before maturity. Being meaningless, the words should be entirely disregarded.

In *Way* v. *Smith*, 111 Mass. 523, there was a distinct agreement that the maker should have the right to pay the note before maturity, and that a lower rate of interest should be paid.

In *Hubbard* v. *Mosely*, 11 Gray, 170, it was distinctly agreed that on the payment to the original payee, the note should be given up to the maker. In the present case, the payment could be made only to the actual holder.

The phrase, "or sooner at the option of the mortgagor," is rendered still more absurd and ambiguous, by the word "mortgagor." There is nothing on the notes to show who the mortgagor is. *Cota* v. *Buck*, 7 Met. 588. *Stevens* v. *Blunt*, 7 Mass. 240. *Baxter* v. *Stewart*, 4 Sneed, (Tenn.) 213. *Washington County Ins. Co.* v. *Miller*, 26 Vt. 77.

2. The defence that the notes were not negotiable, was not open to the defendant on his answer. The answer is a general denial. There is no denial of liability on the allegations of the

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plaintiff. The allegations of the plaintiff were all proved, and no question of law was raised by the defendant, either in his answer, or on demurrer.

3. The defendant Newhall is estopped to deny the negotiability of the notes. He indorsed them, waiving demand and notice. His intent to hold himself liable as indorser is plainly to be inferred from these words, or they mean nothing. There was an implied promise by Newhall to pay the notes at maturity if the maker did not. The payment of the interest by Newhall supports the inference of a promise. If there were no such intent, Newhall would have indorsed the note "without recourse." *Leidy* v. *Tammany*, 9 Watts, 353. *Seymour* v. *Van Slyck*, 8 Wend. 403. *Jones* v. *Fales*, 4 Mass. 245. *Sanger* v. *Stimpson*, 8 Mass. 260. *Van Staphorst* v. *Pearce*, 4 Mass. 258.

GRAY, C. J. Each of the instruments in suit expresses a promise to pay a certain sum of money in a year and a half from its date, "or sooner at the option of the mortgagor," with interest at a certain rate "during said term." The principal sum is to be paid, either at the time specified, or at any earlier time that the mortgagor may elect. The interest is to be computed only until the note is paid. Both the time of payment of the principal, and the amount of interest, are uncertain, and depend upon the election of the mortgagor, who would seem, from the memorandum upon the note itself, to be the maker of the note. But if he were a third person, it would not aid the plaintiff. In either alternative, the contract, not being a promise to pay a fixed sum of money at a definite time, lacks the essential quality of a negotiable promissory note, and cannot be sued upon as such. *Way* v. *Smith*, 111 Mass. 523. *Hubbard* v. *Mosely*, 11 Gray, 170. Story on Notes, § 22.

The allegation in the declaration, that the payee indorsed each note to the plaintiff, is, with all other allegations in the declaration, denied by the answer, and is legally impossible upon its face. The objection to the plaintiff's right to maintain this action against the defendant was open at the trial, and, if judgment had been rendered on default, would have been open on writ of error. *Davis* v. *Travis*, 93 Mass. 222. *Hubbard* v. *Mosely*, 11 Gray, 170. *Haskell* v. *Lambert*, 16 Gray, 592. *Hollis* v. *Richardson*, 18 Gray, 392.

Exceptions sustained.

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J. B. KINSMAN & others *vs.* CHARLES E. KERSHAW.

Suffolk. November 12, 1875. WELLS & ENDICOTT, JJ., absent.

A. sent B. to do work for C., and A.'s bookkeeper, after the completion of the work, made out, in accordance with his duty, the bill therefor upon one of A.'s printed bill-heads, which he placed in the hands of B., who demanded and received payment for the work from C. Upon the bill-head was printed in fine type, "All moneys to be paid to the treasurer and bills to be receipted by him." *Held*, in an action by A. against C. to recover for the work, that, in the absence of evidence that C. saw these words, there was evidence of payment to go to the jury.

CONTRACT on an account annexed to recover $34 for work done and materials furnished by the plaintiffs to the defendant. Answer, payment.

At the trial in the Superior Court, before *Allen*, J., the defendant testified that he called on John Babson, one of the plaintiffs, to ascertain the cost of some proposed work; that Babson said he would send a man to see what it would cost, and that afterwards John Q. Thayer called at the store of the defendant to estimate the probable cost; that the estimate made was satisfactory to the defendant, and that afterwards Thayer and another man came to his store; that Thayer superintended the work and acted as foreman, which work, with the materials used, formed the bill sued for; that some time afterwards Thayer came to his store with a bill made out upon one of the plaintiffs' bill-heads, and demanded payment of the defendant, giving as a reason for demanding payment that the company paid off their men that day; that the defendant found the bill correct and paid it. He then offered in evidence the receipted bill, which he testified was the bill Thayer had that day, and upon which he demanded payment; and it was admitted by the plaintiffs that the signature of Thayer was genuine.

The defendant then called John Babson, one of the plaintiffs, who testified substantially as follows: that he was one of the plaintiffs, and their secretary, treasurer and agent; that he knew Thayer, and at one time hired Thayer occasionally as a laborer to do work for the plaintiffs; that Thayer had no other connection with the plaintiffs, and had no authority to sell goods or to receive payment for them, and had never, while in the employ of

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the plaintiffs, sold goods or received payments for them; that he was paid by the day, two dollars a day when employed.

The defendant next called R. E. McDonald, formerly a bookkeeper of the plaintiffs, who testified substantially the same as the previous witness, as to the nature of Thayer's employment, and that he (McDonald) was in the employ of the plaintiffs as bookkeeper at that time; that it was a part of his work to make out bills; that Thayer came to him for payment for the labor which he had performed at the defendant's store, and that he, the witness, in accordance with his custom, gave the bill, which Thayer afterwards presented to the defendant, to Thayer, to take to the defendant, for the purpose of getting the defendant to approve the same, if correct, so that he, the witness, might know that Thayer had actually performed the labor charged for, before he paid Thayer; that Thayer did not return for his pay, and has not been seen since that day, and that the plaintiffs had not paid him (Thayer) for his work up to the time the witness left the plaintiffs' employ.

This was all the evidence bearing on the subject which was offered by either party. The bill produced by the defendant, receipted by Thayer, had at the top, in fine print, the following words: "All moneys to be paid to the treasurer, and bills to be receipted by him;" but there was no evidence that such printed lines were ever called to the attention of the defendant, or that he ever saw them. At the conclusion of the testimony, the plaintiffs asked the judge to instruct the jury that there was no evidence of payment, and to order a verdict for the plaintiffs. The judge refused to give this instruction, and ruled, in connection with other rulings, "that there was evidence of payment to go to the jury." The jury found for the defendant; and the plaintiffs alleged exceptions.

T. M. Babson, for the plaintiffs.

H. R. Brigham, for the defendant, was not called upon.

By the Court. The bill made out upon one of the plaintiffs' printed bill-heads by their bookkeeper in accordance with his duty, and by him put in the hands of Thayer, and by Thayer shown to the defendant, was sufficient evidence of Thayer's authority to justify the defendant in paying him the amount of the bill, if the defendant acted in good faith, and without having ob-

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served the words in fine print at the top of the bill requiring all moneys to be paid to the plaintiffs' treasurer. The case was rightly submitted to the jury. *Exceptions overruled.*

WILLIAM G. HARRIS & others *vs.* JOHN DOHERTY & trustee.

Suffolk. Nov. 12. — 13, 1875. WELLS & ENDICOTT, JJ., absent.

Under the Gen. Sts. *c.* 142, § 5, providing that trustee processes shall be served on the defendant and each of the trustees in the manner prescribed for the service of an original summons without an attachment, and *c.* 123, § 22, providing that in any action brought against a city or town the writ shall be served thirty days at least before the return day, a city cannot be summoned as trustee less than thirty days before the return day.

Where an action is begun by trustee process and the writ is not legally served upon the trustee, the plaintiff may, under the Gen. Sts. *c.* 142, § 7, proceed with the suit against the principal defendant, if he has been legally served.

TRUSTEE PROCESS. Writ dated December 15, 1874, and returnable to January term 1875 of the Superior Court, the return day being January 5. The city of Boston was summoned as trustee. It appeared by the officer's return that service was made on the trustee on December 16, 1874, and on the principal defendant on December 21, 1874.

At January term 1875 of the Superior Court the trustee entered a special appearance and prayed for a discharge on the ground that no legal service had been made upon it. The court ordered the trustee to be discharged, and gave judgment for the plaintiff for the amount claimed and costs. From the judgment discharging the trustee the plaintiff appealed.

A. H. Briggs, for the plaintiff.

C. F. Kittredge, for the trustee.

GRAY, C. J. By the Gen. Sts. *c.* 123, § 21, original writs issuing from this court or the Superior Court must be served fourteen days at least, and from a police court or justice of the peace seven days at least, before the return day; and by § 22, in any action brought against a city or town, or certain other corporations, the writ must be served thirty days at least before the return day. By *c.* 142, § 5, trustee processes must be "served

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on the defendant and each of the trustees in the manner prescribed for the service of an original summons without an attachment." As no time is otherwise prescribed for the service of trustee processes, "the manner" evidently includes the time, as well as the form, of service. This writ, therefore, having been served upon the city of Boston, as trustee of the principal defendant, less than thirty days before the return day, was not legally served upon the city. *Stimpson* v. *Malden*, 109 Mass. 313.

The provision of *c.* 123, § 19, that original writs issuing from this court or the Superior Court, "if required to be served fourteen days before the return day, shall be made returnable at the court next to be held after the expiration of fourteen days from the date of the writ; and if required to be served thirty days before the return day, shall be made returnable to the court next to be held after the expiration of thirty days from the date of the writ," creates no difficulty which may not be avoided by the plaintiff in any action; for if a city, town or other corporation named in § 22, is summoned as trustee, so that the writ cannot be made returnable within thirty days, it may be served on the principal defendant, as well as on another trustee, who is not entitled to more than fourteen days' notice, fourteen days before the return day. *c.* 142, § 6.

The writ in this case not having been legally served upon the trustee, the Superior Court rightly discharged him, and allowed the action to proceed against the defendant, who had been legally served. *c.* 142, § 7. *Belknap* v. *Gibbens*, 13 Met. 471.

Judgment affirmed.

CHARLES H. STUART & others *vs.* JABEZ H. SEARS.

Suffolk. November 12. — 15, 1875. WELLS & ENDICOTT, JJ., absent.

If in a settlement of mutual accounts one party thereto allows, without being induced by fraud, a certain sum by way of compromise of a doubtful claim, he cannot recover it back; but if he pays it relying upon erroneous vouchers produced by the other party at the time of the settlement, he may, even if there was no fraud, recover it back as money paid by mistake.

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CONTRACT by Charles H. Stuart, John H. Snow and Ether S. Foss, partners under the firm name of Stuart, Snow & Foss, to recover $1000 for work done and materials furnished by the plaintiffs for the defendant. The declaration also contained a count for the same amount, as money had and received by the defendant to the plaintiffs' use, and a count setting forth substantially the facts which appear in the evidence introduced by the plaintiffs.

At the trial in the Superior Court, before *Wilkinson*, J., the evidence on the part of the plaintiffs tended to prove that the defendant was liable to pay, and did pay, to the plaintiffs large sums of money, in many items, and at different times, due to the plaintiffs upon different contracts, and that an action was brought by the plaintiffs against the defendant to recover the balance due, and that, finally, on September 19, 1874, a final settlement was made between the plaintiffs and defendant, whereby the action was discontinued and a voucher given by the plaintiffs to the defendant, showing a total debit account to the plaintiffs of $63,520.29, and a credit account to the defendant containing the following item: "By cash sundry times, $46,700.00," and the following words, dated Boston, September 19, 1874, and signed by the plaintiffs: "The accounts of Jabez H. Sears are settled in full to this date."

There was in the account of the defendant an item of cash paid under date of March 13, 1874, $1000; and one other similar item of $1000 under date of May 13, 1874. On the plaintiffs' book there was a credit of $1000 under date of May 13, 1874, but no credit of $1000 under date of March 13, 1874. In other respects the accounts of the parties agreed. This discrepancy in the accounts was talked over by the parties before the settlement and efforts made to discover which was correct, and the settlement was delayed a week or more for that purpose.

As evidence of said payment, at the time of settlement the defendant produced a check for $1000, given by him to the plaintiffs, and taken up by him, dated March 13, 1874, and a receipt signed by the plaintiffs for $1000, "Mason work and materials," dated March 13, 1874.

The plaintiffs testified that, relying upon the accuracy of the date of the check and receipt they allowed in the settlement the

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$1000 charged in defendant's account under date of March 13, 1874. The plaintiffs then offered evidence tending to show that the true date of the check and receipt was May 13, 1874; that the check was presented to the bank May 15, 1874; that the receipt and check were intended for the payment made by the defendant May 13, 1874, and that the allowance of it, March 13, 1874, was a mistake, and that thereby they had given the defendant credit for $1000 more than he had in fact paid.

The defendant asked the judge to instruct the jury that, if at the time of said settlement the plaintiffs on an examination of the evidence, in the absence of fraud on the part of the defendant, decided to allow said disputed item of $1000 and did allow it, and said settlement was effected accordingly, this action cannot be maintained.

The judge declined so to instruct the jury, but did instruct them that if there was a doubtful claim settled by way of compromise, without fraud, the plaintiffs could not recover; but if the defendant produced, at the time of settlement, either by fraud or mistake, the check and receipt of March 13, 1874, as evidence of a payment of $1000 at that time, when in fact they were intended to cover the payment in May, and the plaintiffs were misled and induced thereby, erroneously, to allow the charge of $1000, under date of March 13, 1874, when no such payment had been made, the plaintiffs were entitled to recover the same back.

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions to the above refusal and ruling.

B. Dean, for the defendant.

W. H. Towne, for the plaintiffs.

GRAY, C. J. The instructions to the jury were in exact accordance with the well settled law. If the sum now sued for was allowed in the settlement between the parties, without fraud, by way of compromise of a doubtful claim, it could not be recovered back; but if it was paid by the plaintiffs, relying upon erroneous vouchers produced by the defendant at the time of the settlement, it might, even if there was no fraud, be recovered back as money paid by mistake. *Riggs* v. *Hawley*, 116 Mass. 596, 598. *Merchants' National Bank* v. *National Eagle Bank*, 101 Mass. 281, 285. *Paige* v. *Sherman*, 6 Gray, 511. *Union Bank* v. *Bank of United States*, 3 Mass. 74. *Exceptions overruled.*

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ALFRED DANKER *vs.* JAMES S. ATWOOD.

Suffolk. November 12. — 15, 1875. WELLS & ENDICOTT, JJ., absent.

A bond purporting in its body to be executed by J. S., "as principal and —— —— as sureties," and signed by the principal and A., is good against A. as surety, if duly executed by the principal, and it does not appear that A., at the time of execut ng it, understood that it was to be executed by any other person as surety.

The surety upon a bail bond is liable in *scire facias* thereon, if the writ upon which the principal was arrested is identified by a date, the court, the full name of the plaintiff, and the surname of the defendant, although his Christian name, as expressed in the bond, was not inserted in the writ.

SCIRE FACIAS against the defendant as surety upon the following bond:

"Know all men by these presents: That we, Samuel Snow, of Bath, State of Maine, as principal, and —— —— as sureties, are holden, and stand firmly bound and obliged unto W. H. Warren, Jr., one of the Constables of the city of Boston, in the sum of three hundred dollars, to be paid unto said W. H. Warren, Jr., his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

"Witness our hands and seals. Dated the third day of February, in the year of our Lord one thousand eight hundred and seventy-four.

"The condition of this obligation is such, that whereas the body of the above bounden Samuel Snow is taken by force of a writ or process, bearing date February third, A. D. 1874, wherein Alfred Danker, plaintiff, and said Samuel Snow is defendant, returnable before our Justices of the Municipal Court of the city of Boston, next to be holden at said Boston, within and for said county, for civil business, on Saturday, the fourteenth day of February, A. D. 1874, at nine of the clock in the forenoon, to answer unto said plaintiff in an action of tort, commenced by said plaintiff to be heard and tried at said court, as by the return of said writ or process will appear.

"Now therefore, if the above bounden Samuel Snow shall appear before said justices of said court, to be holden as aforesaid, to answer unto said plaintiff in said action or process, and shall abide the final judgment thereon, and shall not avoid, then the

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above written obligation shall be null and void, otherwise it shall be and remain in full force and virtue.

"Samuel Snow. (Seal.)
"James S. Atwood. (Seal.)"

The case was submitted to the Superior Court, and after judgment for the plaintiff for $198.15, to this court on appeal, upon agreed facts in substance as follows:

On February 3, 1874, the plaintiff sued out a writ from the Municipal Court of the city of Boston, said writ being returnable to said court February 14, 1874, and the defendant in said writ was described as "Mr. Snow, chief mate of ship Emma." By virtue of said writ the said Snow was arrested on mesne process, and signed and affixed his seal as principal to the said bail bond, which bond so signed was, by the officer, at the request of Snow, and upon his representations that the defendant Atwood would become surety for him thereon, sent to the store of Atwood, and was returned soon after with the signature of the defendant upon it, and thereupon the officer released Snow from arrest. The obligee in the bond is the officer who made the arrest, and no alteration was made in the bond after the defendant signed it. The plaintiff recovered judgment March 2, 1874, against "Mr. Snow, chief mate of ship Emma," for $150 damages, and $34.04 costs of suit, and on this judgment execution issued from said court March 13, 1874, against "—— Snow, chief mate of ship Emma." The execution was returned to the court by the officer, in due season, wholly unsatisfied, and with a proper return thereon. On July 14, 1874, the plaintiff brought the present action against Atwood, in said Municipal Court. The writ recited the judgment obtained against —— Snow on March 2, 1874, and that "James S. Atwood of said Boston, at Boston aforesaid on the third day of February, A. D. 1874, became bail and surety for the said —— Snow," and proceeded in the usual form of a *scire facias*.

J. M. Browne, for the plaintiff.

T. M. Babson, for the defendant.

GRAY, C. J. The bond containing the name of Samuel Snow as principal, followed by a blank before the words "as sureties," and signed by Samuel Snow and James S. Atwood, shows upon its face that Atwood must have signed as surety. *Smith* v. *Crooker*, 5 Mass. 538. *Burns* v. *Lynde*, 6 Allen, 305, 308, 310.

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United States v. *Nelson*, 2 Brock. 64, 70. *Ex parte Fulton*, 7 Cowen, 484. *Stone* v. *Wilson*, 4 McCord, 203. The bond was duly executed by the principal, and it does not appear that Atwood, at the time of executing it, understood that it was to be executed by any other person as surety. *Cutter* v. *Whittemore*, 10 Mass. 442. *Herrick* v. *Johnson*, 11 Met. 26. *Russell* v. *Annable*, 109 Mass. 72. The writ upon which the principal had been arrested is sufficiently identified by the date, the court, the full name of the plaintiff, and the surname of the defendant, although his Christian name, as expressed in the bond, was not inserted in the writ. Atwood was therefore rightly held liable in the present action. *Judgment affirmed.*

A. A. COOKE & another *vs.* G. W. HALLETT & another & trustee.

Suffolk. November 15, 1874. WELLS & ENDICOTT, JJ., absent.

A. delivered to B. a certificate of stock in a corporation as collateral security for a debt. B. thereupon surrendered the certificate to the corporation, and took out a new certificate in his own name as trustee. A. paid the debt, and B. delivered the certificate to A. and gave him a power of attorney, irrevocable in its terms, but not naming any attorney, to transfer the stock. After this, and before the stock was transferred on the books of the corporation, B. was summoned as trustee of A. in a process of foreign attachment. *Held*, that he could not be charged.

TRUSTEE PROCESS. Julius A. Palmer, summoned as trustee on January 31, 1874, answered, denying that, at the time of service upon him, he had in his hands and possession any goods, effects or credits of the principal defendants. The plaintiffs thereupon filed interrogatories to the trustee, and the material portions of his answers thereto were as follows:

On November 6, 1873, Charles W. Sweetland, one of the principal defendants, borrowed $500 of Palmer, giving his note therefor, payable in thirty days, and at the same time placed in Palmer's hands, as collateral security for the payment of said note, certificates of 254 shares of the capital stock of the Star Too. Company, a corporation existing under the laws of the State of Connecticut. These shares stood in the names of I. G. Gates

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and W. L. Hayden, and Palmer delivered up the certificates to the company, and took out an absolute certificate therefor, in the name of "Julius A. Palmer, trustee," and held the same until December 6, 1873, when Sweetland paid his note, and Palmer surrendered to Sweetland the said certificate, and gave him at the same time a power of attorney, irrevocable in its terms, but not naming any attorney, to transfer the stock.

On December 31, 1873, "Julius A. Palmer, trustee," transferred on the books of said company 100 shares of said stock to B. D. Washburn, and on February 9, 1874, 70 of said shares to N. B. Stevens, and 84 of said shares to B. D. Washburn. Said transfers were made under the said power of attorney, without the knowledge or collusion of Palmer. No notice was given to the company by Palmer of his surrender to Sweetland of the certificate of stock standing in Palmer's name, nor of his giving Sweetland the power of attorney.

The following by-law of the Star Tool Company was in force during all the time covered by the transfers hereinbefore named: "Shares of the capital stock may be transferred by the holder thereof, or by his attorney or legal representative, only upon the transfer books of the corporation. In every such transfer, the certificate previously issued shall be delivered up and affixed to the original certificate book in the place from whence taken, and a new certificate or certificates shall thereupon be issued, and no transfer shall be complete and valid until the new certificate is thus issued."

In the Superior Court the principal defendants were defaulted, and the plaintiffs moved that the trustee be charged on his answers. *Wilkinson*, J., ordered that the trustee be discharged, and the plaintiffs appealed.

H. Baylies, for the plaintiffs.

G. H. Poor, for the trustee, was not called upon.

BY THE COURT. The trustee took and held the shares as collateral security only for the debt due him from the principal defendant. After he had been paid that debt, and had delivered up the shares to the defendant, he had no goods, effects or credits of the defendant in his hands.

Judgment discharging trustee affirmed.

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ANDREW CARLAND *vs.* GILBERT F. YOUNG.

Suffolk. November 15, 1875. WELLS & ENDICOTT, JJ., absent.

In an action to recover for personal injuries sustained by a man by being struck by a wagon while crossing a street in a city, at eleven o'clock in the forenoon, it appeared that the street was sixteen feet wide, and that a person could see the whole length of the street. The plaintiff testified that his eyesight was good; that he looked and did not see the wagon, or hear it, until he was struck. A witness for the plaintiff testified that he was about twenty-five feet from the plaintiff, heard some one halloo and the rattle of a wagon, and turned and saw the wagon hit the plaintiff, who was then but a few steps in the crossing. The defendant testified that he saw the plaintiff and hallooed to him before he left the sidewalk, and when he was about fifteen feet from him; that the plaintiff turned and looked around, and undertook to run across. *Held*, that whether the plaintiff was in the exercise of due care was a question of fact for the jury.

TORT for injuries sustained by being run over by the defendant's milk wagon on a street in Boston.

At the trial in the Superior Court, before *Wilkinson*, J., it appeared that the plaintiff had come down Causeway Street, and turned to the right into Merrimac Street, and was crossing Prospect Street, when the defendant, driving down Prospect Street, ran upon him and injured him.

The plaintiff testified that he did not see nor hear the defendant or his wagon until he was struck; that he looked and did not see the wagon; that he could not tell whether the horse or wagon hit him, but the defendant told him it was the wagon. He also introduced one witness, who testified that he was standing in Merrimac Street or Square about twenty-five feet from the plaintiff, and heard some one halloo and the rattle of a wagon, and on turning round saw the wagon strike the plaintiff. The plaintiff had then got but a few steps in the crossing. The witness said he was not a judge of speed, but thought the defendant was driving at the rate of six to eight miles an hour. The plaintiff called no other witness who saw the accident.

The defendant testified that he saw the plaintiff and hallooed to him before he left the sidewalk, and when he was about fifteen feet from him; that the plaintiff turned and looked around and undertook to run across; that he had his horse well in hand, one rein in each hand, and that he was not going over seven miles an hour, and that, as he neared the plaintiff, he, the defendant

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swung his horse to the right, away from the plaintiff, but that the plaintiff persisted in crossing.

The jury viewed the premises. At the corner from which the plaintiff undertook to cross, one can see up the whole length of Prospect Street. The grade is a little descending. At the crossing, the street is sixteen feet between the edgestones. The accident occurred on July 6, about eleven o'clock in the forenoon. The plaintiff testified that his eyesight was good, and that at the time of the accident he was "smart as anybody." At the trial he was somewhat deaf. There was no other evidence as to the manner in which the accident occurred.

After the testimony was closed, the defendant requested the judge to instruct the jury that the plaintiff had not shown due care on his part; but that on the contrary, taking all the evidence in the case, it appeared that due care on the plaintiff's part was wanting. The judge declined so to rule, and left the case to the jury under instructions not objected to, if the case was rightfully left to the jury. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

S. J. Thomas, for the defendant, cited *French* v. *Taunton Branch Railroad*, 116 Mass. 537; *Pennsylvania Railroad* v. *Weber*, 76 Penn. St. 157.

L. C. Wade, for the plaintiff, was not called upon.

BY THE COURT. The case, as stated in the bill of exceptions, presented a pure question of fact for the jury, and was rightly submitted to them. *Exceptions overruled.*

PHILIP E. FIELD *vs.* JOHN THOMPSON.

Suffolk. November 15. — 16, 1875. WELLS & ENDICOTT, JJ., absent

In an action to recover the price of goods sold and delivered, the only issue was whether the delivery of the goods, which was made to a third party, was upon the defendant's order and credit. The plaintiff offered to show by entries in his books of account that the articles were charged to the defendant, and credit given alone to him. The judge excluded the evidence for that purpose, and ruled that "the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff," upon the issue. *Held*, that the first ruling excluding the evidence was correct, and that the second ruling was erroneous.

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CONTRACT on an account annexed to recover $169.85, the price of certain articles furnished for the burial of the wife of one Drinkwater, who was the sister of the defendant's wife.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the only issue was upon whose order and credit the articles were delivered.

The plaintiff offered evidence tending to show that the defendant, Drinkwater being present, verbally ordered the articles, and directed the plaintiff to charge them to him; that they were subsequently delivered at the house where both the defendant and Drinkwater lived, and were used in the burial.

The plaintiff further offered to show by his book of account that the articles were charged to the defendant, and credit given alone to him; but on objection by the defendant, the judge excluded the book for that purpose; and ruled that the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff, with reference to whether or not credit was given to the defendant, and the goods delivered on his order.

There was no evidence that the defendant ever saw the entry in the book; and he offered evidence tending to show that he never ordered the goods, and never directed that they should be charged to him, and never agreed to pay therefor. It was admitted that none of the articles were delivered to the defendant personally.

The judge found for the plaintiff; and the defendant alleged exceptions to the ruling of the judge, admitting the book in evidence.

J. L. Eldridge, for the defendant.

C. H. Fleming, for the plaintiff.

GRAY, C. J. The bill of exceptions shows that the delivery of the articles in question was not disputed, and that the only real issue in the case was upon whose order and credit they were delivered. The entries in the plaintiff's book of account were not admissible on that issue; they were not in the nature of a certificate required by law or usage, but were mere private memoranda; and the first ruling, excluding the book, was correct. *Somers* v. *Wright*, 114 Mass. 171.

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The entries might doubtless be shown to the witness to aid his recollection; and if they did not appear to have been admitted for any other purpose, the exception to their admission could not be sustained. *Dugan* v. *Mahoney*, 11 Allen, 572. *Cobb* v. *Boston*, 109 Mass. 438.

But the final ruling of the learned judge, as stated in the bill of exceptions allowed by him, went beyond this. It was, "that the entry in the book might be regarded as a memorandum made by the plaintiff at the time, and, as such, entitled to some weight in confirmation of the recollection and evidence of the plaintiff" upon the question at issue between the parties. This ruling was inconsistent with the first one, and allowed to these entries a weight as evidence, in corroboration of the plaintiff's testimony, to which they were not legally entitled. *Townsend Bank* v. *Whitney*, 3 Allen, 454. *Maine* v. *Harper*, 4 Allen, 115. *Bentley* v. *Ward*, 116 Mass. 333. *Prew* v. *Donahue*, 118 Mass. 438.

Exceptions sustained.

CHARLES T. HAMBLEN & another *vs.* THOMAS RATIGAN.

Suffolk. November 10. — 16, 1875. WELLS & ENDICOTT, JJ., absent.

The creditors of A. and B. by a composition deed agreed to accept from A. and B. "ten per cent. of the amounts due us and each of us from said A. and said A. and B. in full settlement and discharge of our debts against them, said ten per cent. to be paid within thirty days." The plaintiff, one of A.'s creditors who joined in the deed, held a note and account against him, which were then due. He also held another note, which would not become due until after the expiration of said thirty days, on which A.'s name appeared as indorser. *Held*, that this last note was not included in the composition deed.

CONTRACT upon a promissory note, dated February 2, 1874, signed by one Travers, and payable three months after date to the order of the defendant, who indorsed the same to the plaintiffs. Writ dated June 10, 1874. The case was submitted to the Superior Court, and after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

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Payment of the note was duly demanded of said Travers, the maker, who neglected to pay the same, and due notice of its non-payment was given to the defendant.

On February 24, 1874, before the said note became due, the plaintiffs joined with other creditors in the execution of a composition deed, of which the following is a copy:

"We, the undersigned, creditors of George D. Clement and Thomas Ratigan, both of Boston, in consideration of one dollar to each of us paid, do hereby agree to accept from said Clement and Ratigan a sum equal to ten per cent. of the amounts due us and each of us from said Ratigan, and said Clement and Ratigan, in full settlement and discharge of our debts against them as above, said ten per cent. to be paid within thirty days."

At the time of signing the composition deed the plaintiffs, in addition to the note now in suit, held another note for $100, signed by the defendant, which was then due and payable, and there was also due the plaintiffs the sum of $70 on open account for goods sold the defendant. In accordance with the terms of the agreement in the composition deed the plaintiffs received a dividend of $17, being ten per cent. of the amount due on the open account and on the note then due and payable, and no part of the note now in suit has ever been paid.

If, on these facts, the plaintiffs were entitled to recover at all, judgment was to be entered for them for $100 and interest from May 2, 1874, or for ten per cent. of that amount, as the court should find that the note declared on was covered by the composition deed or not.

W. S. Hall, for the plaintiffs.

J. D. Long, for the defendant.

DEVENS, J. By the composition deed the creditors of Ratigan agreed to accept ten per cent. of the amounts due them in settlement and full discharge of their debts, and at that time the plaintiffs held a note and account against the defendant both of which were due. This deed was dated February 24, 1874, and the ten per cent. was to be paid within thirty days. There was a contingency upon which there might become due from Ratigan to the plaintiffs a certain other sum, if Travers should fail to pay his note at maturity, and Ratigan should be properly notified thereof. The defendant contends that upon payment of ten per cent. of

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amounts due, he was entitled to be discharged from all debts, whether due or not. Whatever might have been the effect of the deed upon debts, the liability for which was fixed, the character and language of the deed does not indicate that it was intended to be a relinquishment of all liabilities by reason of which the defendant might afterwards upon the occurrence of certain events become chargeable as a debtor. While such a contingent demand might undoubtedly have been released if the parties had so intended, yet it should appear that they had it in view at the time of executing the deed. *Pierce* v. *Parker*, 4 Met. 80, 89. Here everything points to the opposite conclusion. Before it could be determined whether the defendant would become liable to pay this note, the composition deed would by its terms have been fully executed. There were two claims to which it strictly applied; and the subsequent conduct of the parties, who made no provision for any dividend upon this, tends to show that it was not understood upon either side that this claim was released.

Judgment for the plaintiffs.

COMMONWEALTH, by Insurance Commissioner, *vs.* HIDE AND LEATHER INSURANCE COMPANY. Columbian Book Company, petitioner.

Suffolk. November 16. — 17, 1875. WELLS & COLT, JJ., absent.

After receivers of an insurance company, established by the laws of this Commonwealth, have been appointed, and an injunction issued, under the Gen. Sts. c. 58, § 6, a petition in equity cannot be maintained by a creditor of a creditor of the company to reach, and apply to the payment of the petitioner's claim, the funds belonging to the creditor of the company in the hands of the receivers.

PETITION IN EQUITY, filed May 2, 1874, alleging that the plaintiff is a corporation established under the laws of Connecticut, and doing business in that state; that J. A. & E. S. De Golyer, copartners, doing business under the name of the Union Publishing Company in Chicago, in the State of Illinois, are indebted to the plaintiff in the sum of $215, for goods sold and delivered to them by the plaintiff; that the Hide & Leather In-

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surance Company is insolvent, and that James C. Davis is the receiver thereof, by appointment of this court; that the said Hide & Leather Insurance Company was indebted to J. A. & E S. De Golyer at the time of the appointment of the receiver, and that the receiver has in his hands, goods, effects and credits of J. A. & E. S. De Golyer.

The prayer of the petition was that the court would order the receiver to pay from the funds in his hands, belonging to J. A. & E. S. De Golyer, a sum sufficient to satisfy the claim of the petitioner, if there was so much in his hands after deducting his costs.

The answer of the receiver admitted that there was in his hands, at the time of service upon him, the sum of $225 of dividends declared upon a claim duly proved by J. A. & E. S. De Golyer against the Hide & Leather Insurance Company; and alleged that before the filing of the petition E. S. De Golyer had been duly adjudicated to be a bankrupt, and that on February 10, 1874, all his property was duly assigned to J. Edwards Fay, of Chicago, who was appointed his assignee; and that Fay had, before the filing of the petition, demanded of him the said dividends; and that after the filing of this petition, Fay had filed with him a paper dated August 27, 1874, and purporting to be signed by J. A. De Golyer, assigning to said Fay, as such assignee, all the interest of J. A. De Golyer in said dividends.

At the hearing, before *Endicott*, J., the above facts alleged in the answer were admitted by the petitioner.

The judge ruled that the funds in the hands of the receiver could not be reached by this method, and ordered the petition to be dismissed; and the petitioner appealed.

G. W. Morse & Z. S. Arnold, for the petitioner.

J. C. Davis, *contra*.

GRAY, C. J. In *Columbian Book Company* v. *De Golyer*, 115 Mass. 67, it was decided that the receivers of this insurance company were not chargeable as trustees in an action at law against one of its creditors; and that the question, whether the plaintiff in that action had any claim upon the property in the custody of the receivers, could only be tried on a petition upon the equity side of the court in the cause in which the receivers were appointed.

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Such a petition has now been presented, and, upon consideration, we are of opinion that the reasons are quite as strong against granting the prayer thereof. The property of the corporation is entrusted to the receivers by the authority of the law, for the purpose of distribution among the creditors of the corporation, not among the creditors of those creditors. To undertake to determine, as incidental to the administration of the estate of the corporation, the validity and equity of the claims of every creditor of a creditor of the corporation, would unreasonably embarrass and delay the distribution of the estate and the settlement of the accounts of the receivers.

In ascertaining the amount due to any creditor of the corporation, the court will indeed follow, as far as practicable, the rule established by statute in proceedings in insolvency or bankruptcy. *Commonwealth* v. *Shoe & Leather Dealers' Ins. Co.* 112 Mass. 131. But no statute provides for the intervention of creditors of creditors, either in ordinary proceedings in insolvency or bankruptcy, or in proceedings in equity for the sequestration of property and the appointment of receivers. The provision of the Gen. Sts. *c.* 142, § 23, allowing assignees of an insolvent debtor to be summoned as his trustees in a common law process of foreign attachment, does not (as has already been decided in the case of this petitioner in 115 Mass. 67) apply to receivers, and cannot be extended by analogy. The clause of the Gen. Sts. *c.* 113, § 2, which gives this court jurisdiction in equity of a bill by a creditor to reach and apply, in payment of his debt, property or rights of his debtor, which cannot be come at to be attached or taken on execution in a suit at law against the debtor, does not extend to property which is not in the control of the debtor, nor put by him into the custody of a third person, but which is in the hands of officers of the law for distribution under proceedings provided by statute for that purpose.

Order affirmed.

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WILLIAM A. WAIT, executor, *vs.* SARAH S. DEMERITT.

Suffolk. November 16. — 17, 1875. WELLS & COLT, JJ., absent.

The "attested copy" of the reasons of appeal filed in the probate office, which is required by the Gen. Sts. c. 117, § 10, to be served on the adverse party, must be attested by the register of probate; and the service of a copy, attested by the attorney of the appellant, is not a compliance with the statute.

APPEAL from a decree of the Probate Court for the county of Suffolk, allowing a certain instrument as the last will and testament of Sarah S. Ireland, deceased. The decree of the Probate Court was entered December 16, 1874; and within thirty days thereafter the appellant, who was one of the heirs at law of the testatrix, filed her claim and reasons of appeal in the probate office, and duly entered in this court attested copies of the papers on file in the probate office. The only service of the reasons of appeal upon the adverse party was by a copy thereof, attested by the attorney of record of the appellant, in the Probate Court, delivered more than fourteen days before the entry of the appeal in this court to the attorney in fact, and of record in the Probate Court, of the appellee. The receipt of the copies on the day of service was admitted by the counsel for the appellee.

On motion of the appellee, upon these facts, *Devens*, J., ruled that the service of the reasons of appeal upon the adverse party was insufficient in law, and dismissed the appeal. The appellant alleged exceptions.

A. A. Ranney, for the appellant.

H. G. Hutchins, for the appellee.

GRAY, C. J. The "attested copy" of the reasons of appeal filed in the probate office, which is required by the Gen. Sts. *c.* 117, § 10, to be served on the adverse party, must be attested by the register, who is the legal custodian of the original paper, and whose official attestation is of itself a sufficient verification of the copy. The service of a copy attested by the attorney of the appellant was not a compliance with the statute.

The St. of 1874, *c.* 187, authorizes further service of any writ, process or order, the first service of which is defective or insufficient, to be directed by the court, only "upon the motion of the plaintiff or petitioner." The bill of exceptions does not show that

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any motion for further service was made. We need not therefore consider whether this statute extends to probate causes.

Exceptions overruled.

HENRY E. FICKETT *vs.* JOSEPH J. DURHAM.

Suffolk. November 18. — 19, 1875. WELLS & COLT, JJ., absent.

The St. of 1875, *c.* 68, providing that "whenever any defendant in a civil action dissolves an attachment made in said suit, by giving bond as provided by the statutes of this Commonwealth, and has already been or afterwards is adjudged a bankrupt," the court may enter a special judgment, applies only to cases where bonds to dissolve attachments are given after the statute went into operation.

MORTON, J. The only question presented in this case is whether the plaintiff is entitled to a special judgment "to enable him to proceed against the sureties upon the bond given to dissolve the attachment," under the St. of 1875, *c.* 68.

There is no controversy as to the facts. The plaintiff's writ is dated October 1, 1872. An attachment of the defendant's property was made thereon, which was dissolved by a bond given on November 21, 1872. On February 6, 1875, the defendant was adjudged a bankrupt and has since obtained his discharge.

The attachment, having been made more than four months before the filing of the petition, would have continued a subsisting lien notwithstanding the bankruptcy, if it had not been dissolved by the acts of the parties, and the plaintiff would have been entitled to a qualified judgment to enforce it. But the attachment having been dissolved by a bond given under our statutes, the plaintiff is not entitled to a special judgment to enable him to hold the sureties upon the bond, unless this right is conferred by the St. of 1875. *Carpenter* v. *Turrell*, 100 Mass. 450. *Braley* v. *Boomer*, 116 Mass. 527. The case therefore turns upon the question whether the St. of 1875 is retroactive in its operation, so as to apply to cases in which bonds to dissolve attachments had been given before the statute took effect.

It is the settled rule in the interpretation of statutes that they are to be construed as prospective in their operation, and are not to be held to affect the rights or enlarge the liabilities of the sub-

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ject as to past contracts or transactions unless such intention is unequivocally expressed or clearly to be implied from their provisions. *Gerry* v. *Stoneham*, 1 Allen, 319. *Garfield* v. *Bemis*, 2 Allen, 445. *North Bridgewater Bank* v. *Copeland*, 7 Allen, 139. In the statute we are considering, there is nothing to indicate that the Legislature intended it to have a retrospective operation. On the contrary it is clear that it was intended to apply only to cases where bonds to dissolve attachments were given after it went into operation. The statute provides that "whenever any defendant in a civil action dissolves an attachment made in said suit, by giving bond as provided by the statutes of this Commonwealth, and has already been or afterwards is adjudged a bankrupt," the court may enter a special judgment. This language, by its natural import, applies to the dissolution of attachments by giving bonds in the future, and not to cases where bonds have already been given. In accordance with a practice in framing statutes, introduced in the revision of 1860, and which has since become nearly uniform, the present tense, "dissolves," is used instead of the future, but the meaning is the same as if the future tense had been used and the provision had read that "whenever any defendant in a civil action shall dissolve an attachment therein by giving bond," the court may enter a special judgment. A significant indication that this was the intention of the Legislature is also found in the second section of the act, which provides that "no bond shall hereafter be given to dissolve an attachment in a civil action, unless it contains, in addition to the conditions now required by law, a further condition obliging the sureties to pay to the plaintiff, within thirty days after the entry of any special judgment in accordance with the preceding section, the sum, if any, for which said judgment shall be entered." This implies that the understanding of the Legislature was that the act imposed upon the sureties a new condition and an enlarged liability, which could only properly be enforced against those who, by the terms of their contract, had assumed such liability.

Without considering the point taken by the defendant, that the statute, if it was retrospective, would be unconstitutional, we are of opinion that it was not intended to, and does not by a fair construction of its terms, apply to cases where attachments have been dissolved by bonds given before it took effect, and therefore

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that the plaintiff in the case at bar is not entitled to a special judgment, as ordered by the Superior Court.

Exceptions sustained.

D. C. Linscott, for the defendant.
E. Merwin, for the plaintiff.

SARAH W. BOARDMAN *vs.* ABRAHAM JACKSON & others.

Suffolk. Nov. 18. — 19, 1875. WELLS & COLT, JJ., absent.

If a person forges a deed of land to himself without the knowledge or consent of the owner, and fraudulently procures an acknowledgment of the deed by some other person, and then leases and afterwards sells the land, the owner has a plain, adequate and complete remedy at law, and cannot maintain a bill in equity against the person executing the deed, the assignee of the lessee, and the purchaser, to cancel the deeds and lease.

BILL IN EQUITY filed June 16, 1875, against Abraham Jackson, William M. Byrnes, and Ella S. Cahoon, alleging the following facts:

On March 27, 1873, the plaintiff was seised in fee simple of a certain parcel of land, with the dwelling-house thereon, situated on Ashland Street, in Boston. On that day, the defendant Jackson, intending and contriving to cheat and defraud the plaintiff of her said estate, fraudulently made or caused to be made a deed thereof to himself, with full covenants of warranty, and forged or caused to be forged thereto the name of the plaintiff as the grantor therein, and fraudulently procured the same to be acknowledged by some person other than the plaintiff; and in furtherance of this fraudulent purpose, on August 7, 1874, caused the said deed to be put on record with Suffolk deeds. Jackson, in furtherance of the purpose to injure and defraud the plaintiff in the premises, for the nominal consideration of $10,000, on March 31, 1873, executed and acknowledged a deed of release of the said land and buildings to the defendant Byrnes, which deed of release was, on April 14, 1875, recorded with Suffolk deeds. The deed to Jackson was a forgery, and was made, executed, acknowledged and recorded without the plaintiff's knowledge, signature or consent, and the deed to Byrnes was likewise without her knowledge or

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upon hearing of the record
, caused a caveat to be p
of Deeds, cautioning all pe
the said estate.
on, in furtherance of the sa
e, on or about September
years of the said dwell-
April 31, 1875, assigned
ow holds the lease and o
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made in fraud of the pl
out her knowledge and
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Byrnes.
ted *Whittemore* v. *Cowe*
Mass. 549.

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GRAY, C. J. Upon the allegations of the bill, the defen
Jackson and Byrnes have no title in the premises, and the
defendant is in possession under no other title than a lease
Jackson. The plaintiff's remedy at law, by writ of entry a
complete, and this bill cannot be maintained. *Brewer* v. *St*
13 Allen, 346. *Pratt* v. *Pond*, 5 Allen, 59. *Metcalf* v.
8 Allen, 587. *Bassett* v. *Brown*, 100 Mass. 355. *Suter* v.
thes, 123, 115 Mass. 253. *Swamscott Machine Co.* v. *Perry*,
Bill dismis

UNITED STATES MANUFACTURING COMPANY *vs.* A. N. C
& others.

Suffolk. November 15. — 20, 1875. WELLS & ENDICOTT, JJ., a

A. brought an action against B. and attached personal property. A. was the
by a creditor, and summoned as trustee. Both actions were returnable
entered at the same term. B. was adjudged a trustee, and paid on execution
creditor the full amount due from B. to A. Afterwards, during the same
judgment was ordered for the plaintiff for his costs, in the action of A. agai
and the clerk taxed the costs down to the time of such judgment, including t
for keeping the attached property after payment by the trustee. *Held*, unc
Gen. Sts. c. 142, § 20, that the taxation of costs was correct.

APPEAL by the defendants from the taxation of costs b
clerk of the Superior Court, in an action of contract. The
was submitted to the Superior Court, and to this court, on ap
upon an agreed statement of facts, in substance as follows:
The writ was dated October 19, 1874, was served the sam
by attachment of personal property, and a keeper put in ch
the writ was returnable to, and entered at, January term 18
On November 16, 1874, an action was commenced by Wi
A. Wallace, against the above plaintiff and the above defen
as trustees. Service was made on the trustees the same
The writ was returnable to and entered at January term 1
the trustees answered on January 15; the defendant wa
faulted; the trustees were charged on their answer; judg
was rendered on January 30th against the principal defen

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and its funds in the hands of the trustees, for $636.82 damages and $17.49 costs. Execution issued on February 2, and on demand by the deputy sheriff was paid by the trustees on February 3.

On November 16, 1874, James N. Cutter and others commenced an action against the plaintiff, and the defendants were summoned as trustees. The writ was served the same day; was returnable to, and entered at, January term, 1875; the trustees filed an answer and were charged on the same, and judgment for the plaintiff was rendered on January 30, 1875; execution issued February 3, and on the same day the trustees paid to the officer having the execution $415.10.

The sums paid by the trustees in the last two suits were the full amount for which they had been sued in the first named action, with interest to date of payment.

An additional answer was filed on February 4, setting up the above facts in bar. On March 13, a replication was filed admitting the above facts, and claiming judgment for costs. This claim was resisted by the defendants, who contended that no costs could be recovered beyond the time of the service of the writs in which they were summoned as trustees. A hearing was had in the Superior Court, March 13, and the decision of the judge was announced on March 23, and entered upon the docket, "Judgment for plaintiff for costs."

At the hearing before the clerk on the taxation of costs, both parties were represented. After the above adjudication the defendants claimed to be heard at the taxation of costs; and at such taxation the assistant clerk allowed costs to the plaintiff up to the time of the above adjudication by the court, which included the cost of keeping the attached property to February 24, 1875, for which costs an amendment to the officer's return was allowed by the court. There were no costs after February 24, and no costs were taxed accruing after the answer of the trustees except the officer's fees for keeping property attached, stated in his amended return.

From this taxation the defendants appealed, contending that no costs should be allowed after service of the trustee writs, or after answer by the trustees, or after judgment against them, or payment by them.

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The Superior Court affirmed the taxation of costs; and the defendants appealed to this court.

T. F. Nutter, for the defendants.

J. S. Abbott, for the plaintiff.

GRAY, C. J. This action, and that in which the defendants were summoned as trustees of the plaintiff, were returnable at the same term. Until that term, this plaintiff could not know whether the trustee process would be entered, and these defendants were not and could not be adjudged his trustees therein, nor the fact stated on the record of this action. The plaintiff, by the express provision of the Gen. Sts. *c.* 142, § 20, was entitled to judgment in this action for the costs due to him, which must include the taxable costs before and at that term, and no more have been allowed in this case. *Taxation affirmed.*

RODERICK RICHARDSON *vs.* J. W. PIERCE & another.

Suffolk. November 19. — 20, 1875. — WELLS & COLT, JJ., absent.

A., holding a promissory note of which B. was the maker and C. the indorser, signed a composition deed whereby the creditors of B. released all claim against him, the deed to be null and void unless signed by all his creditors, and wrote after his name the words, "provided this does not release the indorser in any manner." In an action against B. by another creditor, who had signed the deed, C.'s name did not appear among the signers of the deed; but it was agreed that if the signing by A. did not release the indorser, then all the creditors had signed. *Held*, that the condition annexed by A. to his signature was equivalent to a reservation of his rights against C., and did not prevent his execution of the deed from operating as a release of all his rights against B.; and that the deed was a bar to the action.

CONTRACT against J. W. Pierce and J. E. Lochman, on a promissory note dated May 20, 1873, payable four months after date, signed by Greenlaw & Gillis, and payable to the order of David Gillis, and indorsed by him and by each of the defendants. Writ dated January 20, 1874. The action was defended by Pierce alone. His answer set up a deed of composition dated October 8, 1873, between himself and his creditors, by which, in consideration of the payment of fifty per cent. of their respective claims, they agreed to release him from all claims which they then

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had against him, the deed to be null and void if not signed by all his creditors. This deed was signed by the plaintiff among others, but Lochman's name did not appear among the signers.

At the trial in the Superior Court, before *Allen*, J., it appeared that Samuel B. Rindge held a promissory note, of which Pierce was the maker and Lochman the indorser. The composition deed was signed "Samuel B. Rindge, provided this does not release the indorser in any manner." The plaintiff contended this was not a valid signing in contemplation of the agreement. It was admitted if this did not release the indorser, then all the creditors had signed. The judge submitted the question to the jury, whether the paper was signed by all the creditors. The jury found for the defendant; and at the request of the parties the judge reported the case to this court.

If the above signing was valid, judgment was to be entered on the verdict for the defendant; otherwise a new trial to be had.

S. J. Thomas, for the plaintiff.

J. H. Hardy, for the defendant Pierce.

GRAY, C. J. The condition annexed by Rindge to his signature of the deed of composition was equivalent to a reservation of his rights against Lochman as indorser of the note held by Rindge, and did not prevent his execution of the deed from operating as a release of all his rights against Pierce as maker of that note, although it could not affect any right of Lochman against Pierce. *Sohier* v. *Loring*, 6 Cush. 537. *Tobey* v. *Ellis*, 114 Mass. 120. But the report expressly states that if this execution of the deed by Rindge did not release the indorser, all the creditors of Pierce had signed the composition deed — which, as Lochman's name does not appear among the signers of that deed, necessarily implies that the relation between him and Pierce was such that he was not a creditor of Pierce, and would not, if called upon to pay the note as indorser, have any right to recover against Pierce. The deed of composition, having been signed by all the creditors of Pierce, is a bar to this action against him.

Judgment on the verdict for the defendant.

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MEMORANDUM.

ON the twenty-third day of November, 1875, Mr. Justice WELLS died at Salem, having held the office of an associate justice of this court since the twenty-second day of September, 1866.

OLIVE B. SABINS *vs.* BENJAMIN W. JONES.

Bristol. Oct. 28. — Nov. 27, 1875. MORTON, J., absent.

A justice of a District Court may receive a complaint, under the bastardy act, and issue a warrant, when the court is not in session.

A complaint under the bastardy act was addressed to the justice of a District Court and his certificate to the jurat contained the words "before said court," followed by his signature with his official description. The warrant issued on the complaint was signed by his name and official description. *Held*, that the complaint sufficiently appeared to be made to the justice and sworn to before him, and that he issued the warrant; and that it was to be presumed that he acted under his authority as justice, and that the court was not in session.

A supplementary complaint filed in the Superior Court, in a bastardy proceeding, need not be sworn to.

Evidence is not admissible, in a bastardy proceeding, that the complainant had criminal intercourse with men, other than the respondent, more than twelve months before the birth of her child.

At the trial of a complaint under the bastardy act, the respondent put in evidence the deposition of a witness, who testified on direct examination to having had intercourse with the complainant at a certain time. On reëxamination he testified to having seen the complainant having intercourse with other men at a time more than twelve months before the birth of her child. After the signature of the witness was a memorandum of the magistrate, who took the deposition, to the effect that after the counsel for the complainant had left, the witness wished to correct his statement as to the time mentioned in his direct examination, that the counsel for the complainant was recalled and objected, and the magistrate declined to make the correction. The respondent was found guilty, and a bill of exceptions was allowed, which stated that the judge excluded the reëxamination. *Held*, that the memorandum of the magistrate did not form part of the reëxamination, and that the bill of exceptions did not show that the memorandum was excluded.

COMPLAINT under the bastardy act, Gen. Sts. *c.* 72, to the justice of the Third District Court of Bristol, alleging that the complainant was then pregnant with child, which, if born alive, would be a bastard, accusing the respondent with being the father

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of the child, and charging that the child was begotten on February 15, 1874, in Dartmouth. The jurat on the complaint was as follows: "Bristol ss. Received and sworn to on the fourteenth day of August, in the year of our Lord eighteen hundred and seventy-four, before said court. Alanson Borden,

"Justice of the Third District Court of Bristol."

The warrant issued on the complaint recited that the complaint had been made "on oath to the justice of the Third District Court of Bristol," and was signed by the judge with his official description.

In the District Court, the respondent moved to dismiss the complaint "because it appears to have been made to, and taken and issued by, Alanson Borden, justice of the Third District Court of Bristol, as such, and not by said court, nor a justice of the peace; and therefore he moves that the same be dismissed and quashed, as issued by a person having no legal authority to issue the same in the capacity in which it was done." This motion was overruled; the respondent was adjudged guilty and required to give bond for his appearance before the Superior Court.

In that court a supplementary complaint was filed but not sworn to, setting forth the previous proceedings, and alleging the birth of the child on November 10, 1874. The respondent moved to dismiss the supplementary complaint because it was not sworn to, and also moved to dismiss the original complaint for the reason before assigned. These motions were overruled by *Pitman*, J. The respondent was then tried.

The deposition of William P. Reed, taken on June 7, 187*F*, was offered in evidence in behalf of the respondent. This witness testified that he had criminal intercourse with the complainant four times. In answer to the 9th interrogatory he fixed the time as in January and February, 1873. In answer to the 10th interrogatory he said it was "fourteen months from the past winter;" and in answer to the 12th interrogatory that it was "a year ago last January or February."

Under the head of "Re-direct," the deposition contained interrogatories to and answers by the witness, to the effect that he had seen other men have criminal intercourse with the complainant "about a year ago last October." Then followed the signa-

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itness and immediately after it was a memorandum
ate, who took the deposition, to the effect that after
d signed, and after the counsel for the complainant
witness asked to have the date in the answer to the
ory changed from 1873 to 1874; that the counsel
ainant was recalled and objected, and the change
-
el for the complainant objected to that part of said
led 'Re-direct,' and the court excluded that portion
ion from being read to or going to the jury." The
a verdict of guilty; and the respondent alleged

for the respondent.
pn, *Jr.*, for the complainant.
J. The objections to the jurisdiction of the court
ly taken. It is contended that the justice of the
t had no authority to receive the complaint and
rant. But the District Court and the justice thereof
e jurisdiction, power and authority as Police Courts
ices thereof have under the Gen. Sts. *c.* 116. St.
§§ 1, 5. By the Gen. Sts. *c.* 116, § 16, the justice
Court may receive complaints and issue warrants
ourt is not in session; and this section applies to com-
der the bastardy act. *Richardson* v. *Burleigh*, 3 Allen,
sufficiently appears that the complaint in this case was
d by the justice, sworn to before him, and that he issued
arrant. Having authority to do this, it is to be presumed
he acted under that authority, and that the court was not in
ion at the time, although in form it is stated to be sworn to
ore the court. *Richardson* v. *Burleigh*, *ubi supra*.
Nor is it necessary that the supplemental complaint filed in
e Superior Court should be sworn to by the complainant. Such
mplaint is not the foundation of the proceedings, but is rather
mode of stating the material facts and framing the issues to be
ed in the Superior Court, and may be signed by the attorney
the complainant. *Burt* v. *Ayers*, 116 Mass. 268. *Reed* v.
kins, 116 Mass. 198.
The reëxamination in the deposition of Reed was properly ex-
led. It related to acts of sexual intercourse, between the

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complainant and other men, more than twelve months before the birth of the child, and was not admissible in evidence. *Paull* v *Padelford*, 16 Gray, 263. *Eddy* v. *Gray*, 4 Allen, 435. *Parker* v. *Dudley*, 118 Mass. 602.

The defendant contended at the argument in this court that the effect of the exclusion of the reëxamination was to exclude the memorandum of the magistrate showing that the witness wished to correct an error in his direct examination, relating to the time of his intercourse with the complainant. But this memorandum is no part of the reëxamination. That had been closed and the deposition signed before the memorandum was made. Even if the memorandum could properly be taken to be a part of the deposition, it relates only to the direct examination, and it does not appear from the bill of exceptions that it was excluded. *Exceptions overruled.*

SILAS D. CROSSMAN & others *vs.* EDWARD H. FIELD & another.

Bristol. Oct. 28. — Nov. 27, 1875. MORTON, J., absent.

A testatrix by her will, after directing payment of all her debts, provided as follows "All my property both real and personal of whatsoever name or kind (except what shall be disposed of hereafter) I give for the maintenance support and bringing up of my niece J. F. under the management of my brother E. C. as guardian during his lifetime provided he does not bring home his wife F. or marry with some other person in which case my brother D. C. is to have the management or guardianship heretofore named, and if the said J. F. should not live, then the property which I now give to her, the improve only I give to my brother E. C. during his lifetime, provided he marries not nor supports his present wife in which case it must go to my brothers A. and D. C.," and then gave specific legacies to other persons. *Held*, that J. F. took an estate in fee.

PETITION for partition, filed December 18, 1874, by the heirs of Ebenezer Crossman, of a parcel of land in Taunton, alleging that they were tenants in common with the respondents, Edward H. Field and Henry Field, Jr. Trial in the Superior Court, before *Wilkinson*, J., who, after verdict, reported the case for the determination of this court in substance as follows:

It was admitted that the title to the land was in Mercy Crossman at the time of her death in 1834. The material parts of

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ich was dated September 2, 1834, and admitted to November 7 of the same year, were as follows:
t, that all my debts shall be paid and secondly that erty both real and personal of whatsoever name or t what shall be disposed of hereafter) I give for the support and bringing up of my niece Julia Frances nder the management of my brother Edward Cross- rdian during his lifetime provided he does not bring ife Fanny or marry with some other person in which other Daniel Crossman is to have the management or p heretofore named, and if the said Julia Frances live, then the property which I now give to her, the nly I give to my brother Edward during his lifetime ne marries not nor supports his present wife in which ast go to my brothers Ebenezer Crossman and Daniel

lly. I give to my nephew John H. Crossman one hun- fifty dollars in cash and fourthly to Mrs. Sarah Walters the amount of fifty dollars in furniture."

her appeared that Mercy Crossman was unmarried, and heirs at law were her brothers, Ebenezer, Daniel, Josiah vard, all of whom are now dead. There are no descend- Daniel living, and Josiah was unmarried.

ther appeared that Edward Crossman left one child only, ter, Julia Frances, who is the person mentioned by that the will of Mercy Crossman; that Julia Frances first one Waldron, who died leaving no issue by her; and erwards she married Henry Field, Jr., one of the respond- whom she had one child, Edward H. Field, the other ent, both of whom are now living; and that Julia Frances 1849. It did not appear that any of the property of Crossman had been disposed of or conveyed for the main- support or bringing up of Julia Frances.

these facts, the judge ruled that the will of Mercy Cross- vised to Julia Frances a fee in the land described in this and that this petition could not be maintained, and the jury to return a verdict for the respondents.

Reed, for the petitioners.

Fuller & S. M. Thomas, for the respondents.

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GRAY, C. J. The intention of the testatrix to give an estate in fee to her niece is manifested in several ways:

1st. By the use of the words "all my property, both real and personal, of whatsoever name or kind," which, in a will, ordinarily pass a fee. *Godfrey* v. *Humphrey*, 18 Pick. 537. *Leland* v. *Adams*, 9 Gray, 171. *Lincoln* v. *Lincoln*, 107 Mass. 590.

2d. By the addition of the words "except what shall be disposed of hereafter," which confirm the presumption that the testatrix did not intend to die intestate as to any part of her estate. *Tracy* v. *Kilborn*, 8 Cush. 557. *Gleason* v. *Fayerweather*, 4 Gray, 348.

3d. By the subsequent description of the subject of the devise as the "property which I now give to her." See cases under first point, *supra*.

4th. By contrast with the devise over of "the improve only" to Edward Crossman, giving him but a life estate. *Fay* v. *Fay*, 1 Cush. 93.

5th. By the consideration that if the word "it" in the final limitation to Ebenezer and Daniel imports a fee, (and so would prevent an intestacy as to the remainder, as would be the case if they should take only a life estate,) the implication is unavoidable that a like fee had previously been devised, which could only be to the niece.

The proviso that if the niece "should not live" is exactly equivalent to "if she should die," or "in case of her death," and (as she must die at some time, and no other period is mentioned in the will) must apparently be construed "if she should not survive me," the testatrix. *Briggs* v. *Shaw*, 9 Allen, 516. 2 Jarman on Wills, *c.* 48. But if the will could be construed to give the niece an estate in fee, subject to be devested upon her dying before Edward Crossman, she did in fact survive him, and the contingency upon which her estate would be devested has not arisen. *Brightman* v. *Brightman*, 100 Mass. 238. *Kimball* v. *Tilton*, 118 Mass. 311.

The legal effect of all the provisions of the will is too clear to be restricted by the mention of the purpose of the devise to the niece as for her "maintenance, support and bringing up;" by the appointment of Edward, or in certain contingencies Daniel,

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uardian; or by the consideration that, if the niece some of the limitations over may be repugnant and

Judgment on the verdict.

LLAGHAN vs. POCASSET MANUFACTURING COMPANY.

l. Oct. 28. — Nov. 29, 1875. MORTON, J., absent.

er works for a corporation under an agreement, by which the amount, ue him monthly, is paid in advance to a third person, who is to account er for it at the end of each month, the corporation is not liable in a ess to a creditor of the laborer, although the third person to whom the aid is the treasurer of the corporation.

FACIAS upon a judgment recovered against the defend- trustee process in which it was summoned as trustee of Burke. In the Superior Court, interrogatories were the defendant, and on its answers thereto it was dis- and judgment ordered for the plaintiff for his costs only; plaintiff appealed to this court. The facts of the case n the opinion.

. Peirce, for the plaintiff.

illiams, for the defendant.

ENS, J. The answers of the defendant to the plaintiff's atories disclose a contract between it and Matthew Burke, h Burke agreed to work as a day laborer in its employ, which it agreed to pay him monthly in advance. This payment was not made directly to Burke, but by his to a third person, who was the treasurer of the defend- oration. It further appeared that in the early part of th in which the writ was served the sum of $40 had been vanced by the defendant to such third person, and that, time of the service of the writ in the trustee process, work had amounted during that month to the sum of so that a small amount in excess of that actually due for ne had thus been paid by the defendant. Even if the of the $37.50 still remained in the hands of the third and had not actually been delivered over to Burke, there

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was no existing liability of the defendant to him, nor any debt which could then or afterwards be the subject of a suit by him. A laborer, if he desires, may contract that his wages shall be paid in advance, and such payment, whether made directly to him, or to a third person at his request, discharges any liability which might otherwise exist on the part of those with whom he thus contracts, when the work is actually performed. Even if it is the duty of the person holding the money to pay it back to those from whom he received it, in case the workman should not perform the labor, or such part as would represent the labor unperformed, should it be only partially performed, this would not, at least in the absence of fraud, affect the case, as such an arrangement would not place the alleged trustee under any liability to the workman, or leave any of his goods, effects or credits in his hands.

Nor is the contract affected by the fact that the third person to whom the advance payment was made was also a servant of the alleged trustee; its liability was not the less completely discharged, and it owed nothing to Burke for the labor performed by him. *Judgment affirmed.*

HARRISON G. WILSON *vs.* CITY OF LYNN.

Essex. Nov. 5. — 30, 1875. COLT & MORTON, JJ., absent.

Under the St. of 1871, c. 218, authorizing the city of Lynn, for the purpose of supplying the city with pure water, to take, hold and convey into the city the waters of Breed's Pond and all water rights connected therewith, and to take and hold, by purchase or otherwise, such land on or around the margin of said pond, not exceeding five rods in width, as may be necessary for the preservation and purity of said waters; and requiring the mayor to file in the registry of deeds "a description thereof sufficiently accurate for identification," and the city to pay the damages caused by such taking; the city took certain land, and filed in the registry of deeds a certificate, which described the land as "a lot commencing at the southwest corner of land owned by Charles H. Trask on Walnut Street," and running by four courses and distances, 1896 feet in all, by the northerly line of that street: thence by four successive courses and distances, each except the last terminating at a cedar post, amounting in all to 1703 feet, "to a point on the Downing road (westerly line) at its intersection with Elm Street;" thence by three courses and distances on "westerly line of road," 2496 feet in all; thence by nineteen courses and distances, each except the last terminating at a cedar post, and amounting

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all, "to starting point." The names of the owners of the land taken tioned, nor the town or city in which the land was situated, and no rred to in the description or filed with it. At the trial of an action rought by the owner of land so taken, against the city, no monu- oved except along about two thirds of one side of the tract of land e taken; it appeared that a very small portion of it was within the a plan was introduced, subject to the plaintiff's objection, of the f land taken, and a surveyor testified that the lot could be traced made certain by the plan; but there was no evidence that the land tified by the description filed without the aid of the plan or of a sur- did not appear that all of the cedar posts, called for by the descrip- h, or how many of them, had been set up. *Held*, that the certificate nt, and that the defendant was a trespasser.

. J. This is an action of tort in the nature of tres- reaking and entering the plaintiff's close, digging up rting the soil, carrying away large quantities of earth and inundating thirty acres of land.

fendant justifies its acts as having been done for the f supplying the city and its inhabitants with pure water, St. of 1871, *c.* 218.

rst section of that statute authorized the city for that " to take, hold and convey into and through said city the f Breed's Pond, so called, in said city, and the waters ow into and from the same, and any water rights con- therewith, and the streams running into Beaver Brook Breed's Pond;" and to "take and hold, by purchase or se, such land on and around the margin of said pond, not ng five rods in width, as may be necessary for the pres- n and purity of said waters."

ection 2, "the mayor of said city of Lynn shall, within ys after taking any of the land aforesaid, file in the reg- deeds for the county of Essex, southern district, a descrip- reof sufficiently accurate for identification."

ction 4, "said city shall be liable to pay all damages sus- y any person or corporation, by taking of any land, water, ghts or property, or by the constructing of any aqueduct, r or other works for the purposes aforesaid; and if any or corporation, sustaining damages as aforesaid, cannot ith the city upon the amount of such damages, he or it ve them assessed in the same manner as is provided by h respect to land taken for highways."

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It is admitted that no previous notice was given to the plaintiff or other landowner of any intention to take their lands, and no hearing was had upon the subject; and that no bounds or monuments were set up to distinguish the lots of the respective proprietors.

The certificate filed by the city in the registry of deeds,* de-

* "City of Lynn. In Common Council, October 8th, 1873.

"Ordered, that the following described lot of land, viz.: a lot of land commencing at the southwest corner of land owned by Charles H. Trask on Walnut Street and running upon a course N. 79° 15′ W. (magnetic) for a distance of 252 feet; thence upon a course N. 69° 30′ W. (magnetic) for a distance of 538 feet; thence upon a course N. 55° 22′ W. (magnetic) for a distance of 804 ft.; thence upon a course N. 56° W. (magnetic) for a distance of 802 ft.; (the above representing the northerly line of Walnut Street;) thence upon a course N. 34° E. (magnetic) for a distance of 150 ft., to a cedar post; thence upon a course N. 56° W. (magnetic) for a distance of 464 ft., to cedar post; thence upon a course N. 46° 50′ W. (magnetic) for a distance of 767 ft., to cedar post; thence upon a course S. 70° W. (magnetic) for a distance of 322 ft., to a point on the Downing road (westerly line) at its intersection with Elm Street; thence upon a course N. 33° 45′ W. (magnetic) being the westerly line of road for a distance of 988 ft.; thence upon a course N. 41° W. (magnetic) being the westerly line of road for a distance of 943 ft.; thence upon a course N. 16° 52′ W. (magnetic) being the westerly line of road for a distance of 565 ft.; thence upon a course S. 64° 10′ E. (magnetic) for a distance of 216 ft., to cedar post; thence upon a course N. 25° 50′ E. (magnetic) for a distance of 953 ft., to cedar post; thence upon a course N. 66° 50′ E. (magnetic) for a distance of 228 ft., to cedar post; thence upon a course S. 23° 10′ E. (magnetic) for a distance of 300 ft., to cedar post; thence upon a course N. 66° 50′ E. (magnetic) for a distance of 345 ft., to cedar post; thence upon a course S. 23° 10′ E. (magnetic) for a distance of 422 ft., to cedar post; thence upon a course N. 77° 30′ W. (magnetic) for a distance of 436 ft., to cedar post; thence upon a course S. 25° 40′ W. (magnetic) for a distance of 800 ft., to cedar post; thence upon a course S. 60° E. (magnetic) for a distance of 150 ft., to cedar post; thence upon a course S. 30° W. (magnetic) for a distance of 106 ft., to cedar post; thence upon a course S. 48° 40′ E. (magnetic) for a distance of 498 ft., to cedar post; thence upon a course N. 76° 15′ E. (magnetic) for a distance of 289 ft., to cedar post; thence upon a course S. 60° E. (magnetic) for a distance of 254 ft., to cedar post; thence upon a course S. 43° 10′ E. (magnetic) for a distance of 900 ft., to cedar post; thence upon a course S. 28° 30′ E. (magnetic) for a distance of 600 ft., to cedar post; thence upon a course S. 58° 30′ E. (magnetic) for a distance of 1110 ft., to cedar post; thence upon a course S. 6° 30′ E. (magnetic) for a distance of 500 ft., to cedar post; thence upon a course S. 56° 20′ E. (magnetic) for a distance of 528 ft., to cedar post; thence upon a course S. 16° 10′ E. (magnetic) for a distance of

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and taken as "a lot commencing at the southwest
d owned by Charles H. Trask on Walnut Street,"
by four courses and distances, 1896 feet in all, by
y line of that street; thence by four successive
istances, each except the last terminating at a cedar
ing in all to 1703 feet, "to a point on the Downing
ly line) at its intersection with Elm Street;" thence
ses and distances on "westerly line of road," 2496
hence by nineteen courses and distances, each except
ina ting at a cedar post, and amounting to 8985 feet
art ing point."

ntroduced by the defendant at the trial, which is not
the description and does not appear to have been
and to the admission of which in evidence the plain-
reason objected, shows a tract of land, marked by
g courses and distances, of irregular shape, more
long, and of width varying from a mere point or
h end to something less than a quarter of a mile at
part, containing about one hundred acres, and includ-
Brook, which is not named in the statute, but is a
f Beaver Brook, running into it below Breed's Pond,
as the report finds, substantially dries up in summer

rveyor who made the plan testified to its general cor-
, and that the lot could be traced and its limits made
by that plan. But there was no evidence that the land
be identified by the description filed, without the aid of the
n or of a surveyor; and it did not appear that all of the cedar
sts called for by the description, or which or how many of them,
d been set up.

---

50 ft., to starting point, — be and the same is hereby taken by the city of
ynn, for the purposes named, and in accordance with the provisions con-
ained in the 218th chapter of the acts of the General Court of Massachusetts,
r the year 1871, entitled "An act to supply the city of Lynn with pure wa-
r," and the mayor is hereby instructed to record said description of the land
taken in the manner required in section 2d of said act.
"Adopted and sent up for concurrence. S. Henry Kent, Clerk.
"In Board of Aldermen, October 14, 1873. Adopted in concurrence
nj. H. Jones, City Clerk."

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Even if the corner of Charles H. Trask's land, assumed as the starting point of the description filed by the city, is a monument capable of being identified; and if the subsequent boundaries on "westerly line of road" can be referred to the Downing road rather than to Elm Street which that road intersects; no monuments whatever are proved, except along about two thirds of one side of the tract of land intended to be taken, and no means are afforded of ascertaining the remaining boundaries except by courses and distances. No names of owners of the land taken are mentioned; nor even the town or city in which the land intended to be taken is situated; and it was admitted at the argument that but a small portion of the tract, near the starting point, is in the city of Lynn, and the rest in the town of Saugus.

The case differs from that of the location of a highway or railroad, in which the width of the land taken throughout the whole length of the way is stated and the terminus at each end clearly defined; and is wholly unlike the case of a deed made by the landowner himself, or the levy of an execution, of which he has distinct notice.

If the plan had been referred to as part of the description, it might have been sufficient. *Stone* v. *Cambridge*, 6 Cush. 270. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574. *Andover* v. *County Commissioners*, 5 Gray, 393. But without such reference, or any other notice to the owner of the land, the description before us cannot be held to be "sufficiently accurate for identification," as the statute requires.

The case, in our opinion, imperatively calls for the application of the rule stated by this court in *Glover* v. *Boston*, 14 Gray, 282, 288: "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by ambiguous or uncertain language. The presumption is in favor of the owner of the land, and any act done by public authority, which interferes with his rights, should be, as it always may be, clear and intelligible." See also *Hinckley* v. *Hastings*, 2 Pick. 162; *Jeffries* v. *Swampscott*, 105 Mass. 535 *Pinkerton* v. *Boston & Albany Railroad*, 109 Mass. 527, 538 *Housatonic Railroad* v. *Lee & Hudson Railroad*, 118 Mass. 391 *Lewiston* v. *County Commissioners*, 80 Maine, 19.

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A vessel sailed from Boston in March, 1856, and did not return to any port of this Commonwealth until July, 1871, when a petition was filed to enforce a lien for a debt contracted shortly before her departure. The vessel had in the mean time been in different ports of the United States, and her arrival there was announced in the usual manner, but there was no evidence that the petitioner had actual notice thereof. *Held*, under the St. of 1855, *c.* 231, § 1, declaring that the lien "shall continue until the debt is satisfied," that the petition was seasonably filed, although her ownership had been changed.

On a petition to enforce a lien on a vessel under the St. of 1855, *c.* 231, if interest is not due as part of the debt, but as damages only, it is to be computed from the filing of the petition, and not from the time of a prior demand; and the fact that before bringing the petition, proceedings were had in a court of the United States which were dismissed for want of jurisdiction, makes no difference.

PETITIONS to enforce liens under the St. of 1855, *c.* 231, on the ship Orpheus, for materials furnished for and used in her construction in 1855 and 1856. The cases were tried together in the Superior Court, before *Brigham*, C. J., without a jury. The facts found by him, so far as it is material to state them, were as follows:

In August, 1855, Mitchell & Rice, ship-builders, having their place of business in Chelsea, made an express contract with William F. Weld & Co. of Boston, to build for them a ship of about twelve hundred tons for a specified price. The petitioners in each case, under an oral contract with Mitchell & Rice, delivered to them, at various dates from September, 1855, to February, 1856, at a price agreed, several cargoes of lumber, all of which was furnished for and in relation to the construction of said ship, and was actually used in such construction, except a few thousand feet, in each of the first two cases, of which a small part, but how much did not appear, was used in launching the ship at Chelsea, and the rest amounting in value to $411.68, in the first case, and $22.50 in the second, was subsequently sold by the assignees in insolvency of the estate of Mitchell & Rice, and its proceeds appropriated to the use of that estate.

By the contract with the petitioners in the first case, Mitchell & Rice were to have a credit of sixty to ninety days on the price of the lumber, and the lumber was not furnished by the petitioners upon the credit of the ship exclusively, but principally upon the credit of Mitchell & Rice, in view, however, of an ulterior liability of the ship and its owners for the lumber, upon the failure of Mitchell & Rice to pay for the same, which they had

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unt of the demand claimed to be due to h
umber for and in relation to the construct
just credits; except in the first case, as t
ected by the credit of sixty to ninety da
; and in the second case that the footing
oneously stated at $462.83, when it shou
$362.83, as appeared upon the face of th
the items added up. Each certificate al
the persons with whom the contract unde
furnished was made, the names of the ow
ne name and description of the ship sufficie
in the first and second cases did not conf
g a just and true account with all just c
nd value of the lumber furnished as af
lly used in the construction of the *ship*,
er delivered as aforesaid under the contr
ve not been paid any part of the amo-
ective petitions.

Co., before these petitions were filed, eit
or by the discharge of liens claimed u
o Mitchell & Rice the full price agreed
aid ship, but none of such payments or c
been for the benefit of the petitioners,
harge the liens or pay any part of the su
these petitions.

the return of the ship to Boston, the fi
& Co. was dissolved, William. F. Weld a
etiring therefrom, and Richard Baker, J
of said firm, forming a new firm, under t
Weld & Co., consisting of Richard Bak
Weld, of Boston, and Frederick Baker,
dissolution and formation public notice w
apers, and thereupon the ship became t
firm, which defends these suits.

nd 1856, had piers or wharves for the loa
vessels, houses and stores, and a munici
ndependent of Boston, and by the U. S.
pector of customs, and was within the re
urposes of customs of the port of Boston.

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stores or other articles furnished for or on account of ' th

e words "or labor and materials furnished" were inserte
it clear that the statute covered the case of a person wl
himself perform the labor or own the materials, but o
abor or materials from third persons to carry out his c
th the owners or their representative. But the "l
erials furnished," as well as the "labor performed"
al used," must be "in the construction, launching
of, or for constructing the launching ways for" the s
ute does not allow labor and materials, as it does st
visions, to be merely furnished "on account of" the sh
difference in the language of the two clauses is signific
tute doubtless includes materials fitted and adapte
of the ship, and accepted as such by the other part
ract, even if they have not been put in place upo
But it gives no lien for materials which have neither
on or attached to her, nor been prepared and fitt
pose, and which have not been actually or construc
rt of her. *The Antarctic*, 1 Sprague, 206. *The Per*
154. *Rogers* v. *Currier*, 13 Gray, 129, 132. *B*
ason, 2 Allen, 605. *Jones* v. *Keen*, 115 Mass. 170

ows that the petitioners were entitled to liens for so
the lumber and plank furnished by them, as was act
the construction of the vessel. Although a small po
rest was used in launching her, it does not appear
amount or value was so used, and no lien can ther
ined because of such use.

ither the allowance of credit in one of the cases, nor
in that case, and in one of the others, the materials w
d primarily on the credit of the builders, defeated t
o note or security having been taken, and it being cle
neither case was it the intention to give exclusive cred
builders personally. *The Nestor*, 1 Sumner, 73. *T*
2 Story, 455. *The Guy*, 9 Wall. 758. *The Patapsc*
. 329. *Jones* v. *Keen*, 115 Mass. 182.

e St. of 1855, *c.* 231, § 2, does not (like the St. 1851,
, under which the case of *Lynch* v. *Cronan*, 6 Gray, 58

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e statute provides that the lien shall continue un
atisfied. St. 1855, *c.* 231, § 1. Gen. Sts. *c.* 151,
titions, having been filed upon the first return
in the jurisdiction of the Commonwealth, were s
ituted. *Foster* v. *The Richard Busteed*, 100 Mas
extent of the lien depends upon the terms of the s
ates it. In each of these cases, interest was not
he debt under the original contract between the pe
he builders, and can only be claimed as damages f
pay. Such damages are not mentioned in the st
no part of the claim secured by the lien agains
her owners. Interest is therefore to be computed
filing of these petitions, being the first lawful de
nforcement of the liens against the vessel. *Bars*
, 2 Allen, 605. It was held in that case that in
be computed, in a petition against the vessel to e
from the time of a previous demand, although,
referring to the original bill of exceptions, such de
made upon those who then were, and at the ti
petition continued to be, the owners of the ship, a
he contractors to whom the goods were furnished
promised to pay interest. The unsuccessful atte
he jurisdiction of the federal courts can have no gr
his respect than a demand in the country upon the
ested.

matter of interest, the practice of courts of admir
xercise of the discretion incident to their general j
an afford no guide to a court of common law, ad
new remedy conferred and limited by express sta
ay be doubted whether even a court of admiralty w
erest before the commencement of the suit in such a
now before us. See *The Isaac Newton*, Abbott A

Exceptions sustaine

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Granger v. *Ilsley*, 2 Gray, 521. *Bradford* v. *Tinkham*, 6 Gray 494. *Goss* v. *Austin*, 11 Allen, 525. ***Exceptions overruled.***

C. W. Bartlett, for the defendants.

T. S. Dame, for the plaintiff.

HARRIET B. HARDING *vs.* HENRY C. PRATT.

Suffolk. November 15. — 27, 1875. COLT, J., absent.

Where a declaration contains two counts for different causes of action, and the jury are instructed to return a verdict upon both, but return a verdict upon one only and the cause of action set forth in the other count is not determined by further trial, discontinuance or otherwise, the whole case is not finally disposed of, and exceptions to a ruling of the Superior Court cannot be entered in this court.

CONTRACT upon two counts: the first for moneys expended at the defendant's request upon premises leased to him by the plaintiff; and the second for use and occupation. Answer, to the first count, a general denial, and to the second count, payment of a part of the claim and tender of the rest.

The causes of action set forth in the two counts were separate and distinct, and at the trial in the Superior Court evidence was offered by the plaintiff and by the defendant upon both counts, the part payment set up in the answer to the second count was admitted, and the only question under that count was upon the tender.

The jury were instructed to return a verdict upon both counts; but returned a verdict for the defendant upon the second count only, and did not agree and brought in no verdict upon the first count.

The plaintiff moved to set aside the verdict, because it was upon one count alone and did not cover the issues presented to the jury. *Allen*, J., overruled the motion; and the plaintiff alleged exceptions.

B. W. Harris & P. E. Tucker, for the plaintiff.

J. L. Eldridge, for the defendant.

GRAY, C. J. A verdict having been rendered upon one only of the two counts upon which issue had been joined, and the

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defendants were the general agents for the New England
for the Pennsylvania Insurance Company of Philadelphia,
y, Morse & Company held three policies of insurance
insurance company in August and October, 1872,
om its agency in Boston, upon their stock of fu
ed in their store.
e occurred on May 30, 1873, during the continuance
, by which the furniture insured was destroyed.
& Co. made claim on the insurance company for t
n the defendants, and made and delivered to them
proofs of loss on June 18, 1873. On or about Au
Haley, Morse & Co. called on the defendants, w
ed to them the three drafts sued upon. These dr
d by Haley, Morse & Co., and deposited by them i
ection, on August 18, 1873, and the amount the
to the credit of Haley, Morse & Co., and by the
to Philadelphia for collection. The insurance c
entment declined to pay the amount of the draft
thereof, and they were protested and returned at
nk with protests attached, and the bank promptly
Morse & Co. of the fact. The plaintiff, at the
r the accommodation of Haley, Morse & Co.,
to the bank and received the instruments decl
he bank, with the protests annexed.
defendants contended that the action could not b
on the ground that the instruments were executed
nts merely, and that there was not any personal
r part, whether in the hands of a *bonâ fide* holder o
he plaintiff was not entitled to recover upon thes
ent was to be for the defendants; otherwise judgm
intiff.

D. Hyde & M. F. Dickinson, Jr., for the plaintiff.

T. Russell & C. T. Russell, Jr., for the defendants.

RY, C. J. Each of these drafts, upon its face, purpo
ed by the New England agency of the Pennsylvania
nce Company, and shows that Foster & Cole are the
gents of that corporation for the New England State
that the draft is drawn in payment of a claim against
ation. It thus appears that Foster & Cole, in drawing

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resided or had a usual place of business in W
and they had no agent in said county. No not
on the plaintiffs, or their attorney, who resided i
unty, and had their usual places of business in
but notice was served upon the officer, who ma
half-past nine in the forenoon, on the last of the
ifying the plaintiffs that Sinnott desired to ta
he relief of poor debtors, and that the time and
xamination was at eleven o'clock on the forenoon
e office of the said master in chancery, in Wor
me the notice was served on the officer he was
f the place appointed for the examination. No o
r the plaintiffs, at the time appointed for the exa
ott was discharged.

Hardy, for the plaintiffs, contended that the noti
t, as no time was allowed for travel, commensur
ce between the place of the examination and the
ce or business of the plaintiffs and their attorne
y v. *Carlisle*, 13 Allen, 398; *Smith* v. *Randall*, 1
y *Bank* v. *Fullerton*, 11 Met. 73; *Jacot* v. *Wy*
6.

Verry & F. A. Gaskill, for the defendants.

s, J. Neither the plaintiffs, nor any agent or a
residing in the county of Worcester, or havi
e of business therein, service of the notice of in
he poor debtor's oath was properly made upon
had arrested the debtor; and unless a longer ti
the examination is necessary where notice is thus
ld have been required if service had been made a
e and place upon the plaintiffs or their attorney.
as also in these respects sufficient. Gen. Sts. *c.* 12
t v. *Wyatt*, 10 Gray, 236.

the allowance of time is fixed by the clause of *c.*
ch provides for service of the notice upon the plai
or attorney, and there is no express direction in re
in the clause in which provision is made for ser
officer, the reasonable interpretation of the statut
ch case the time is to be computed as in the cas
on a plaintiff or his attorney. Unless this is so,

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N NORTON & others *vs.* CITY OF BOSTON & anoth

Suffolk. November 18.—29, 1875. COLT, J., absent.

town is annexed to a city by a statute which entitles the city to rec re
cted taxes, and makes it liable for all the debts and obligations of th of t
urt has no jurisdiction in equity to restrain the city from selling land an
rment tax illegally assessed thereon; the landowner having a pla pl
nd complete remedy at law.

IN EQUITY, filed March 6, 1875, against the
and Michael Norton, to restrain a sale of certain
intiffs in Brighton, for nonpayment of a betterm
l thereon for the widening of Market Street in B
he annexation of that town to the city of Boston.
bill alleged that Market Street was not a town
way but a county way, which the town of Bright
l power or right to widen, and for the expenses of
ich the town could not assess betterments; and th
nt Norton, describing himself as "treasurer and co
late town of Brighton," had advertised the land f
nent of the tax.

defendants demurred to the bill on the ground th
fs had a plain, adequate and complete remedy a
J., sustained the demurrer; and the plaintiffs app

I. Kingsbury, for the plaintiffs.

Healy & H. W. Putnam, for the defendants.

KCOTT, J. The plaintiffs seek to restrain the defen
elling their land for a betterment tax, assessed f
ng of Market Street in Brighton before the annexat
wn to Boston. By the act of annexation, St. 1873,
ston is entitled to receive all uncollected taxes, and i
and liable for all the debts and obligations of the to
on. The plaintiffs contend that Brighton had no a
ssess the tax upon their land, because Market Street
y, and that Boston has the right to collect only legal
he act.

ming that the tax was illegal as alleged in the bill,
ien on the land, and the sale would pass no title; a
intiffs should pay the betterment, their remedy at

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Complaint to the First District Court of Bristol, alleg
e defendant, at Mansfield, on August 14, 1875, "unl
l sell to one William Tilson, also to one William G.
o to one Curtis M. Brown, also to one Charles Jam
one Alden Fuller, also to one Willard A. White,
e Enos L. Williams, also to one Harvey H. Barrows,
ting liquor, he the said John Holmes not having th
ere any license, authority or appointment according
make such sale, against the peace of said Commo
d contrary to the form of the statute in such case ma
ovided."

The defendant moved to quash the complaint on the fo
ound: "More than two separate and distinct offences
rth in the same count in the complaint. Two or more
scribing different offences are set forth in the same co
t depending upon the same facts or transactions, and t
averment that they are different descriptions of the
t."

This motion was overruled, the defendant was tried and
ilty, and appealed to the Superior Court.

The record of the District Court, after reciting the alle
the complaint, and stating that the defendant plead
ilty, proceeded as follows: "And now, after a full heari
amination in said case, it appears to said court that sai
olmes is guilty. It is therefore considered and ordered b
urt that said defendant, for the offence aforesaid, pay a
ty dollars to the use of the county of Bristol, and costs o
cution taxed at eighteen dollars and five cents, and t
and committed until said sentence be performed. From
ntence the said John Holmes appeals to the Superior C
xt to be holden at Taunton, within and for the county of B
l, on the second Monday of September next, and recogn
ith sufficient sureties in the sum of two hundred dollars
rosecute said appeal there, as the law directs."

At the trial in the Superior Court, before *Wilkinson*, J., t
strict attorney entered a *nolle prosequi* as to all the allegati
the complaint of sales to other persons than White, and t
fendant was tried only upon the allegations of the sale t
hite.

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The motion to quash the complaint was renewed in the Superior Court, and was overruled; and the defendant filed a motion in arrest of judgment, on the following grounds:

"Because his motion to quash, regularly filed in the court below and made a part of this motion, was overruled by this court after the district attorney had entered a *nolle prosequi* as to all the allegations of sale to the several persons named in the complaint except as to the sale alleged to have been made to Willard A. White; and he says that it does not appear from the record of judgment of the court below which is made a part hereof, that he was in said court convicted of the offence of making a sale to Willard A. White, or to which of the several persons named in said complaint to whom he is alleged to have made a sale of liquor he was convicted of making a sale, neither does the complaint allege a joint sale. And that, therefore, the record as it stood did not warrant a trial upon the question of a sale to Willard A. White alone, it not appearing by the record what particular sale or sales he was convicted of making, and from a conviction on which he had appealed.

"Because said record of judgment from the court below is irregular and insufficient to show for which or on what offence he was convicted in the court below, and would not warrant a confining of the evidence to that particular act alone, and because his said motion to quash should have been allowed."

This motion was overruled; and the defendant alleged exceptions.

J. Brown, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. When one count in an indictment charges two offences, distinct in kind and requiring distinct punishments, the objection of duplicity has been allowed in arrest of judgment. *Commonwealth* v. *Symonds*, 2 Mass. 163. *State* v. *Nelson*, 8 N. H. 163. *People* v. *Wright*, 9 Wend. 193. But when the two offences are precisely alike, the only reason against joining them in one count is that it subjects the accused to confusion and embarrassment in his defence; the objection is not open after a verdict of guilty of one offence only, but must be taken by motion to quash, or to compel the prosecutor to confine himself to one of the charges; and the fault is cured by his electing to pro-

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and both being attested by him as true copies. *Held*, that no error appeared upon the papers.

Irregularity in the proceedings upon a complaint in a Municipal Court is no ground for dismissing the complaint on appeal.

The St. of 1875, *c.* 99, authorizing the granting of licenses by the municipal authorities to sell spirituous and intoxicating liquors and requiring the payment of a fee or excise therefor, is constitutional.

COMPLAINT under the St. of 1875, *c.* 99, to the Municipal Court of the Charlestown District, by J. B. Cotton, charging William Fredericks with unlawfully selling intoxicating liquors in said district, on August 10, 1875, "to a person whose name is to your complainant unknown, he, the said Fredericks, not being then and there authorized to sell the same in said Commonwealth for any purpose under the provisions of chapter ninety-n the acts of the year eighteen hundred and seventy-five Commonwealth, or by any legal authority whatever; agai peace of said Commonwealth, and the form of the statute i case made and provided."

In the Municipal Court the defendant moved to dismi complaint on the following grounds:

"1. The complaint is insufficient, and does not set for offence known to the law.

"2. It does not appear by any allegation that the defend not of the class of persons excepted under the provisions St. of 1875, *c.* 99, or that the intoxicating liquors that charged with selling are not of the kind permitted to be kept and sold without a license.

"3. The statute under which the complaint is brought is unconstitutional and void.

"4. The complaint charges William Fredericks with selling intoxicating liquors in violation of law; whereas the defendant's name is William A. Fredericks." This motion was overruled.

The defendant was tried, adjudged guilty and sentenced to pay a fine of $100 and costs, and appealed to the Superior Court. The record of the judgment of the Municipal Court, transmitted to the Superior Court, recited that the defendant was brought before the court on the complaint of J. B. Cotton, setting forth that "he the said Fredericks, on the tenth day of August eighteen hundred and seventy-five, at Boston aforesaid, and in said Charlestown District, was guilty of the crime of unlawfully selling in-

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introduced by the government, if the jury believed it, would warrant a verdict of guilty. The jury returned a verdict of guilty.

The defendant filed a motion in arrest of judgment on the following grounds:

"1. There is no description in the complaint, judgment, or any of the papers transmitted to this court, of any offence known to the law of the land.

"2. There is no copy of any conviction of the defendant upon any offence at law, or any proper judgment of the court appealed from, or any issue raised there, transmitted to this court by the justice of the Municipal Court of the Charlestown District, or by the clerk thereof.

"3. The proceedings of the court appealed from, and the record of its proceedings in this case transmitted to this court, as appears of record, are irregular, informal and defective; so that no judgment ought to be rendered thereon.

"4. The law, for the violation of which the defendant has been convicted, is unconstitutional and void." This motion was overruled, and the defendant alleged exceptions.

G. W. Searle & J. W. Mahan, for the defendant. 1. The court erred in overruling the motions to dismiss and in arrest. The second motion was seasonably made, and is to be presumed to have been received and acted on without objection on the score of time of filing. The complaint is insufficient, indefinite, and, in due form, charges no crime. The St. of 1875, *c.* 99, § 1, is not a general prohibitory law, but with exceptions distinctly expressed; it does not apply to sales of cider or native wines by the makers, or to sales by law. There can be no correct charge of an offence, which does not negative these exceptions, even though the exception is in the same section as the enactment. Where the exception constitutes an absolute ingredient, its denial must be distinctly averred. The general terms of the denial do not reach or cure the difficulty. They were manifestly intended only to negative the statutory words, or to apply to a defendant's liability to prove a license.

2. The motion in arrest should have been granted.

3. The St. of 1875, *c.* 99, is unconstitutional and void, both in its general outline and in its detail. There is no lawful authority to punish the vices of men, or to regulate trade and business

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The provisions which are ambiguous and uncertain are so frequent that only a few are referred to. Section 6 provides that no spirituous or intoxicating liquors, except those the sale of which is allowed by the license, shall be kept on the premises described in the license. Is this to be construed to mean, that each license shall specify in quality and kind the specific liquors to be kept; or generally, that brandy, whiskey, &c., shall not be kept unless the license gives the right to do so? Section 1 provides that no person shall sell or export or keep for sale. Which provision of law is violated if a person is found to have on his premises certain spirituous and intoxicating liquors, but no specific allegation is made, in the complaint, of sale or exposure for sale? Section 6 also provides that the licensee shall not keep a public bar, and shall hold a license as innholder or common victualler. What is a public bar? And what is a private bar? Can the court judicially take notice of the meaning of the term "a public bar"? The act says, "shall hold a license as an innholder or common victualler." From whom? And, if a person holds a license as either for 1875 or a part of the year, why is not that sufficient under the law? And who is to grant this license which the licensee is to hold? A forfeiture is also provided for under the law. Which punishment is to take place, or both? The law in its entirety is a law inoperative and void, and contrary to the Constitution and the Declaration of Rights. See *State* v. *Weir*, 33 Iowa, 134; *Santo* v. *State*, 2 Iowa, 165, 203; *Geebrick* v. *State*, 5 Iowa, 491; *Ex parte Wall*, 48 Cal. 279; *Parker* v. *Commonwealth*, 6 Penn. St. 507.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. There is no plausible ground for sustaining any of the exceptions taken and argued in this case.

1. The complaint distinctly and sufficiently negatives all authority of the defendant to sell intoxicating liquors, whether derived from the St. of 1875, *c.* 99, or from any other source. *Commonwealth* v. *Lafontaine*, 8 Gray, 479. *Commonwealth* v. *Gilland*, 9 Gray, 8. *Commonwealth* v. *Dunn*, 14 Gray, 401. *Commonwealth* v. *Costello*, 118 Mass. 454.

2. The alleged misnomer of the defendant, not being apparent on the record, cannot be availed of by motion to dismiss, but only by plea in abatement. *Commonwealth* v. *Dedham*, 16 Mass. 141

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COMMONWEALTH *vs.* THOMAS CURRAN.

Suffolk. November 22. — 27, 1875. COLT, J., absent.

A complaint which alleges that the defendant "unlawfully did expose and keep for sale intoxicating liquors," with intent to sell the same in this Commonwealth, charges but one offence.

Under the St. of 1864, c. 121, § 1, if a person charged with keeping intoxicating liquors for sale in violation of law is proved to have kept them for sale, the burden of proving that he had a license or authority so to do is upon him.

On the trial of a complaint under the statute of 1875, c. 99, charging the defendant with unlawfully exposing and keeping intoxicating liquors with intent to sell the same in this Commonwealth, the defendant requested an instruction to the jury that the burden of proof was on the government to prove that the liquors exposed and kept for sale were intoxicating, and that the jury must acquit if the evidence left them in doubt as to that fact. The judge gave this instruction with the modification that if the liquors exposed were ale, or distilled spirits, called whiskey, they must convict, if the same were kept for sale. *Held*, that the modification was correct.

COMPLAINT under the St. of 1875, *c.* 99, to the Municipal Court of the city of Boston, averring that Thomas Curran, on July 3, 1875, "at Boston aforesaid, and within the judicial district of said court, unlawfully did expose and keep for sale intoxicating liquors, with intent unlawfully to sell the same in this Commonwealth, the said Curran not having then and there any license, authority or appointment, according to law, then and there to expose, keep for sale, or sell said liquors, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

In the Superior Court, before *Bacon*, J., on appeal, before the jury were empanelled, the defendant filed a motion to quash the complaint on several grounds, the only one of which not covered by the case of *Commonwealth* v. *Fredericks*, *ante*, 199, was that "it is void for duplicity, charging two offences in one count; and the complaint does not contain any sufficient allegation or description of any offence at law, and is defective both in form and substance." This motion was overruled, and the defendant was then tried.

The government introduced evidence tending to show that the defendant kept a place of business, in which ale and other liquors were exposed and kept for sale. The defendant requested the judge to give the following instructions:

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The jury returned a verdict of guilty; and the defendant filed a motion in arrest of judgment, alleging substantially the grounds stated in the motion to dismiss. This motion was overruled, and the defendant alleged exceptions.

G. W. Searle & J. W. Mahan, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. Most of the exceptions in this case are disposed of by the judgment in *Commonwealth* v. *Fredericks*, *ante*, 199, and the others are equally unfounded.

1. The allegation in the complaint that the defendant did expose and keep for sale intoxicating liquors, charges but a single offence, and is not bad for duplicity. *Commonwealth* v. Ni... 10 Allen, 199.

2. If the defendant was proved to have kept intoxi... liquors for sale, the burden of proving that he had a licen... authority so to do was upon him. St. 1864, *c.* 121, § 1. *monwealth* v. *Kennedy*, 108 Mass. 292. *Commonwealth* v. ... 110 Mass. 414. *Commonwealth* v. *Shea*, 115 Mass. 102.

3. The jury were instructed, in accordance with the de... ant's fourth request, that the burden of proof was on the go... ment to prove that the liquors exposed and kept for sale ... intoxicating, and that the jury must acquit if the evidence ... them in doubt as to that fact. The addition made by the ... to this instruction was clearly correct; for § 18 of the ... 1875, *c.* 99, provides that ale as well as distilled spirits sha... deemed intoxicating liquors, within the meaning of the statu...

Exceptions overrule...

COMMONWEALTH *vs.* JEREMIAH A. GREENLAW.

Suffolk. November 22. — 27, 1875. COLT, J., absent.

Under the Gen. Sts. *c.* 115, § 7, if exceptions are not presented to the pre... judge, or application made to him for an extension of the time for prese... them, before the final adjournment of the court, they cannot be allowed wi... the consent of the adverse party, although they are filed within three days afte... verdict.

INDICTMENT for subornation of perjury. At the trial in the Superior Court, before *Bacon*, J., at July term 1875, the de...

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COMMONWEALTH *vs.* DOMINGO CARDOZE.

Bristol. Oct. 26. — Dec. 4, 1875. MORTON, J., absent.

On the trial of a complaint for keeping a disorderly house, the evidence tended to show that the defendant kept a dance hall, which was resorted to by men and women of bad repute, and the government was permitted, against the defendant's objection, to introduce evidence that women of bad repute, resorting to the hall, had frequently while there solicited men to leave the building and go away with them for the purposes of prostitution; that the men went away with them, and that the defendant was then present in the hall. *Held*, it not appearing by the bill of exceptions that this was all the evidence offered at the trial, that the evidence was rightly admitted.

COMPLAINT to the Police Court of New Bedford, charging that the defendant, at a time and place mentioned, "a certain common, ill-governed and disorderly house unlawfully did keep and maintain; and in the said house for his own lucre and gain, certain evil disposed persons, as well men as women, of evil name, fame and conversation, to come together on the days and times aforesaid, there unlawfully and willingly did cause and procure; and the said persons, in the said house, at unlawful times, as well in the night as the day, on the days and times aforesaid, there to be and remain, drinking, tippling, cursing, swearing, quarrelling and otherwise misbehaving themselves, unlawfully did permit and suffer, to the great injury and common nuisance of all the peaceable citizens of said Commonwealth there residing, inhabiting and passing, and against the peace and dignity of the Commonwealth aforesaid." Trial in the Superior Court, before *Wilkinson* J., on appeal, who allowed a bill of exceptions, in substance as follows:

The evidence tended to prove that the defendant was the proprietor and keeper of a certain room or hall used by his authority as a dance hall; and which was resorted to, on the evenings when dancing was carried on therein, by women and men of bad repute. Evidence was offered by the government to prove that these women of bad repute, so resorting to said hall, had frequently while there solicited men to leave the building and go away with them for the purposes of prostitution; and that thereupon the men so solicited frequently would leave the hall in company with the women so soliciting them, and go away with

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portion of the dwelling-house of the defendant's wife, and that the defendant was seen in the shop or place where the liquors were found; but there was no evidence of sales by the defendant or of his doing anything except being present in the shop and helping the officers to uncouple the pipe from a beer barrel and helping roll it out.

The defendant testified that the premises in question were owned by himself and wife jointly, but that he did not know how to read or write, and that his wife carried on the business of the shop on her sole and separate account, buying the articles kept in her own name, and selling them and receiving the pay and keeping the profits to her own use. The defendant's wife being called as a witness testified that the premises were owned by herself and husband, both names being in the deed, and that she on her own account carried on the business since May 1874 in the shop buying and selling in her own name the articles in the store or shop, and that her husband, the defendant, had no interest or ownership in the things bought and sold, nor in the profit that they belonged to herself. On cross-examination she fied that she and her husband owned other real estate tog and on being asked by the district attorney, "Then you and husband put your money together, do you?" she answered, in building the other house."

It was admitted that no certificate had been filed in the clerk's office, either by herself or husband, under the St. of c. 198.

This testimony was not controverted as to the ownersh the premises, or as to the ownership of the articles including liquors in the shop, or as to the fact that the wife bought sold and carried on the business in her own name.

The defendant's counsel requested the judge to instruct jury, "that if the jury are satisfied that the place was kept the stock owned by the wife and not by the husband, and she was carrying on the business on her own separate acco her husband having no interest in the profits or ownership of articles bought or sold, nor profits, the presumption of law unless there is an express agreement to the contrary, that the business is presumed to be on her separate account, and that herself and not her husband would be liable for the illegal keeping

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COMMONWEALTH *vs.* JOHN F. COSTELLO.

Suffolk. Nov. 27. — Dec. 6, 1875. COLT, J., absent.

ial of an indictment, charging the defendant in the first count with t
a bond to dissolve an attachment, and in the second count with know
g the forged bond, the government proceeded upon the ground tha
nt fraudulently presented to a master in chancery a bond to dissol
ent purporting to be signed by S. and J. as sureties; that at the same
duced before the master two accomplices, who falsely represented them
. and J., and testified to their sufficiency as sureties; and that the nam
J. were fictitious names signed or procured to be signed by the defen
vernment also offered evidence that no such persons as S. and J. cou
The defendant offered to show, in explanation of the absence of S. a
esses in his behalf, that the prosecuting officer had openly threaten
te them for perjury, and that they thereupon fled the Commonwealth
returned, and that he had made efforts to procure their attendance a
Held, that the exclusion of this evidence gave the defendant good gr
ption.

TON, J. We are of opinion that one of the excep
by the defendant must be sustained. As this ma
al necessary, we have not considered the other ques
because if they arise upon another trial they may be
in a different aspect.

indictment contains two counts: the first for forg
o dissolve an attachment, and the second for know
g the forged bond. The government proceeded upo
that the defendant fraudulently presented to a mast
y a bond to dissolve an attachment, purporting t
by William P. Schell and Isaac Judson, as sureties;
e same time produced before the master two accompl
sely represented themselves to be Schell and Judson,
l as to their sufficiency as sureties; and that the name
and Judson were fictitious names signed or procured t
by the defendant. The government also offered evid
to show that no such persons as Schell and Judson c
d.

defendant, in explanation of the absence of Schell
as witnesses in his behalf, offered to show that the pro
officer had openly threatened to prosecute them for
nd that they thereupon fled from the Commonwealth

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Binghamton, N. Y., April 11, 1873. Six months after date we promise to pay to the order of Roxie M. Blodgett and Susan A. Martin twenty-six hundred dollars, value received, payable at any bank in Boston, Mass."

The second action was by Albert Palmer against the same defendants, on the following promissory note, signed "James B. Weed & Co.": "$3000. Binghamton, M. Y., April 5, 1873. On demand after date, we promise to pay to the order of John Hill & Co. three thousand dollars, value received, with interest at 10 per cent., payable at No. 3 Tremont St." This note was indorsed, "Pay to the demand of Albert Palmer, waiving demand and notice. John Hill & Co."

The third action was by George Hinman against the same defendants, on the following promissory note, signed "James B. Weed & Co.": "$5000. Boston, January 16, 1873. On demand, with interest, rate 12 per cent., after date, we promise to pay to the order of John Hill & Co. five thousand dollars, for value received, payable at No. 3 Tremont Row." This note was indorsed, "Pay to the order of George Hinman, waiving demand and notice. John Hill & Co."

The cases were tried together in the Superior Court, before *Brigham*, C. J., without a jury, and the following facts were found by him:

On September 1, 1871, the defendants, by a contract in writing, formed a partnership under the name and style of James B. Weed & Co., for the purpose of tanning, manufacturing and selling leather, for the term of five years from that date. In this contract Hill, Geary and Fuller, as they were copartners doing business at Boston under the name and style of John Hill & Co., constituted the party of the first part, and James B. Weed and Frederick M. Weed, of Binghamton, in the State of New York, constituted the parties of the second and third parts, and the contract was signed, not by John Hill & Co., but by the said Hill, Geary and Fuller, severally. The 6th article of agreement in said contract provided that "said parties or firm agree to contract no debts or liabilities, except by mutual consent, on account of said firm." Under the contract, James B. Weed and Frederick M. Weed, under the style of James B. Weed & Co., conducted the business of tanning, manufacturing, and more or less of sell-

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the summer of 1873, after the notes declared
arly signed, had all been signed and payment
d been demanded of James B. Weed & Co at

ature, "James B. Weed & Co.," upon the severa
, were all made by the defendant John Hill, a
ts of the signatures, "John Hill & Co.," upon th
es, were all made by the defendant Daniel W.
found that the firm of John Hill & Co. was in f
n financial embarrassment, but not reputed to
romissory notes declared on were made; and th
made exclusively for the private and separate us
John Hill & Co., or of Hill, Geary or Fuller,
conducted by them in the name of James B. W
ating to the sale of leather, tanned and manufa
B. Weed & Co., at Binghamton, or to the tann
e of the same, or to the business for which the
s established, and not authorized by the contr
, or consented to or known by said Weeds, or th
. Weed & Co., as represented by said Weeds.
Co. had no advertised place of business in B
re any sign upon John Hill & Co.'s place of bu
hat the business of James B. Weed & Co. in B
transacted, but the fact that Hill, Geary and
ers of the firm of James B. Weed & Co. was m
in Boston by means of their transactions.

ntiffs, Roxie M. Blodgett, and her sister, Susa
d the sum of $2600 in consideration of the not
y them, after a deduction of six months' intere
the rate of ten per cent. per annum, and this
id by them, by the advice and procurement of
usband of Roxie M. Blodgett, to whom the defend
lied for a loan of that sum, alleging that he acted
e firm of James B. Weed & Co., in which firm he h
told Caleb Blodgett that he, Hill and Geary we
th said Weeds, and said Blodgett knew of his havi
nember of the firm previously. The judge found th
fs, Roxie M. Blodgett and Susan A. Martin, and the
Caleb Blodgett, in the matter of lending said $260

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ing the promissory note declared on for that sum in con-
on of said loan, acted in good faith, understanding that
re dealing with the firm of James B. Weed & Co., through
er of that firm, and that neither of them had any actual
lge, suspicion or cause of suspicion of any fraud affecting
3. Weed & Co., on the part of Fuller, or of John Hill &
procuring the loan or in making the note; or that the
ius loaned was not borrowed and received by James B.
Co., and the note declared on in legal effect not made
or of any purpose of Fuller, or of John Hill & Co., to
id money and make said note for their private uses; or
er Fuller or John Hill & Co. were authorized, as part-
firm of James B. Weed & Co., to make the note.
ntiffs, Albert Palmer and George Hinman, lent, sev-
ums of $3000 and $5000, and received in considera-
the promissory notes declared on by them; and in
making these loans and taking these notes, they had
egotiations with either of the defendants; but were
ke the loans and take the notes by Halsey J. Board-
ney at law, and partner of said Caleb Blodgett, who,
citation of the defendant Fuller, that Boardman
a loan to the firm of James B. Weed & Co., hav-
old him that he, Hill and Geary were members of
he having known them to so act, negotiated with
Palmer and Hinman, the loans aforesaid, and in-
ered to them the notes declared on. The judge
linner, Hinman and said Halsey J. Boardman, in
he lending of said sums of $3000 and $5000, and
promissory notes declared on, for those sums in con-
aid loans, acted in good faith, understanding that
ing with the firm of James B. Weed & Co., through
that firm, and that they had neither of them any
dge, suspicion or cause of suspicion of any fraud af-
ames B. Weed & Co., on the part of defendant Ful-
n Hill & Co., in procuring the loans, or in making
r, that the money thus lent was not borrowed and
James B. Weed & Co., and the notes declared on and
mer and Hinman, not in legal effect, made by James
Co.; or of any purpose of Fuller, or of John Hill &

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rrow the sums of $3000 and $5000, and make the
refor, for their private uses, or that neither Full
& Co. were authorized as partners in the firm of
& Co., to make said promissory notes.
he foregoing facts, the judge ruled that the
were entitled to recover, and ordered judgme
d the defendants alleged exceptions.
Staples, for the defendants.
n, for the plaintiffs.

J. The several notes of the firm of Weed & Co., .
its members, were given to the several plainti
t. It is found as a fact that the plaintiffs unde
were dealing with the firm through a member of
tual knowledge, suspicion or cause of suspicion
ctised upon the partnership in the transaction b
f it; or that the money was not borrowed by th
notes in suit not given by its authority; or that
urpose on the part of any member or members
tain the money for private use.
he facts thus found by the judge, the plaintiffs ar
maintain their several actions. The cases fall
ed principles governing the liability of copartners
gs of the judge were fully justified by all the evi
. *French*, 6 Allen, 317. *Hayward* v. *French*, 12

s nothing in the form of the notes, in the rate of
ed, or the time when payable, which alone can be
the plaintiffs with constructive notice of fraud.
gs of the court negative the existence of all notice, a
ctive, all suspicion or cause of suspicion.

Exceptions overrul

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GEORGE F. HEWETT *vs.* GEORGE SESSIONS.

ester. October 7. — December 11, 1875. AMES, J., absent.

tion to recover for the conversion of a part of the furniture in a hotel, it ap that the defendant was the owner of the hotel, and that the plaintiff had led to the title to the furniture, which C., who carried on business in the ad. One witness testified that he bought all the property in the hotel; that it, and told C. that he could take away a certain portion of the furniture, hing else. It appeared that no obstacle was put by the defendant in the ths removal of all the furniture in suit. *Held*, that in the absence of evi- at the witness acted as the agent of the defendant, or bought the property he defendant was not liable.

for the conversion of furniture. Trial in the Superior fore *Dewey*, J., who after verdict reported the case to in substance as follows:

ndant was the owner of a hotel, and one Camp carried e from May 12, to September 13, 1869, and the prop- to have been converted was the furniture in the hotel. f claimed title to the same under a mortgage given p, On September 13, 1869, and subsequently fore- was admitted that whatever title Camp had on that d in the plaintiff.

was referred to an auditor, who made his report, property into four classes, marked schedules C, D, finding the value of the property in each schedule, as to the value was agreed to be correct. At the tiff did not claim to recover for the property enu- hedule C. As to the property in D, each party the title was in himself.

property in schedule G, the defendant denied that he verted it to his own use. The evidence as to the the property contained in this schedule was as fol- testified that he left the hotel September 13, 1869 er he left, two schedules of the property therein were defendant and one Roberts that the schedules pur- ontain all the property in the hotel; that they were and D; that C contained that which the defendant did and D that which the defendant did claim as his own; property in G of the auditor's report was not contained

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in either of the original schedules; that in July, 1870, he sent a letter to Roberts, then in occupation of the hotel, notifying him that he should attend on July 5, 1870, to take away the property in the hotel belonging to him; that he did so attend with teams; that the defendant and Roberts went away after he got there that day, were gone about an hour, and when they came back said he might take away what was contained in C.

On cross-examination he said that no obstacle was put in his way to taking any of the property not contained in the original schedule D; that he picked out the property not claimed by the defendant, and carried away three or four loads; that he went for the purpose of taking away all the property that he left in the hotel that he put in; that he designated in his letter to Roberts all the property he put in; that Roberts gave him leave to take all the property he claimed. "Roberts said he was willing we should take out what Sessions did not claim. Our intention was to carry off the property Sessions did not claim as his. There were no obstacles to our taking away anything that was not in Sessions's schedule D."

James Roberts, called by the plaintiff, testified, that he bought all the furniture in the hotel and gave his notes for it all. That contained in C he bought conditionally, and used it all; that soon after September 15, 1869, he gave notice to Camp that he was at liberty to take all the property he claimed away from the hotel; that he assisted in making the original schedules; that he received from Camp the notice in July, 1870, referred to in Camp's testimony; that he told him when he came that he could take away all that was contained in C, and nothing else; that no obstacle was put in Camp's way to prevent his taking all not contained in D.

The defendant testified that when Camp came to take away the furniture he gave him liberty to take all his (Camp's) property; that he never exercised any control over any part of the property, except what was in D.

Waldo Sessions, son of the defendant, testified that his father told Camp in July, 1870, when he came to take away the property, to take all that belonged to him, but to be careful and not take anything else.

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defendant requested the judge to rule that there was no
e to authorize the jury to find the conversion of the prop-
ntained in G. The judge declined so to rule, and submit-
question to the jury, reserving the question as to the
ess thereof; and instructed the jury: "That, as to the
in schedule G, the plaintiff cannot recover, even if he
hem, unless there is evidence that satisfies you that the
it made claim to those articles, or hindered the plaintiff
oving them. The fact that Sessions leased the building
ts would not make Sessions liable for the conversion of
rty therein."

ry found for the plaintiff for the property included in
F and G. If there was not sufficient evidence of con-
the property in G. to authorize the jury to find the
the sum of $199.25 was to be deducted from the ver-
lgment rendered for the balance; otherwise judgment
ct.

ry & *F. A. Gaskill*, for the defendant.
lding, for the plaintiff.

The only question is as to the sufficiency of the evi-
a conversion of the property named in schedule G.
ence which shows interference with the property
On the part of anybody except the plaintiff and
amp, comes from the testimony of Roberts, who
ught all the property in the hotel; that he used it
amp that he could take away all which was con-
ale C, but nothing else.

ty is that there is no evidence that Roberts was
agent of the defendant, or had authority to speak
t he bought the property of him, or that he in any
any act of ownership or control over it. On the
ppears that no obstacle was put by the defendant in
e removal of all the property in question. There is
y which it can fairly be inferred that the defendant
ivered the property to a third person and received

s to the terms of the report the value of the property
n the schedule in question is to be deducted from the
d judgment rendered for the balance only.

Judgment accordingly.

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ELLIOTT E. CUNNINGHAM *vs.* W. A. WASHBURN & another.

Worcester. October 6. — December 28, 1875. AMES, J., absent.

A. agreed in writing, for a round sum, to move a house, do certain work upon it, and "to finish said house ready for occupancy." In an action by A. on this contract, it was admitted that if the contract required A. to build a water-closet, he had not completed the contract. *Held*, that the court could not say, as a matter of law, that the omission of a water-closet was a failure to perform the contract; and that it was a question of fact for the jury to determine whether the building of a water-closet was reasonably necessary and proper to make the house ready for occupancy.

In an action upon a contract under seal, by which a builder agreed with two owners of a house to move it, and "dig and stone a cellar to set it on," it is a question of fact for the jury whether the use of new stones in building the cellar wall, which were ordered by one owner, was assented to or ratified by the other.

CONTRACT against W. A. Washburn and Frederick E. Abbott, upon an instrument under seal, dated October 15, 1871, and signed by the plaintiff and the defendants, reciting that the defendants were the owners of certain land in the city of Worcester, with a cottage standing thereon, which the defendants desired to remove to another part of the land, and providing as follows:

"Now, therefore, said Cunningham, being a practical carpenter and building mover, in consideration of four hundred and fifty dollars being paid to him, promises and agrees to move said building back upon the rear part of the lot, turn it half around, and front it on Barclay Street, dig and stone a cellar to set it on, and to finish said house ready for occupancy, doing the work well even to all the rooms, painting the house one coat of good oil and lead paint on the outside, and two good coats of oil and lead on the inside, and putting blinds on the windows outside, furnishing and finding all the stock and materials."

The declaration also contained a count upon an account annexed for stone and sheathing boards furnished, these not being included in the contract.

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

The defendant Washburn testified that he went to the house at the time one Pike, the plaintiff's agent, was building the cellar wall and using the new stones; that he asked Pike why he was using new stones instead of the old, and Pike said that Ab-

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ordered them to be put in, and he, Washburn, then said
bbott had ordered them he might pay for them.
laintiff testified that he asked Washburn to pay for the
eeks after it was finished, and he told him he was not
pay for those new stones anything extra; that as Abbott
red them he might pay for them.
fendants asked the judge to rule that the plaintiff could
ain his action on the written contract, it being admitted
intiff that he had not completed the contract if it re-
n to build a water-closet. The plaintiff admitted that
to put a water-closet into the house, and left the
out putting one in; the defendants requested the judge
the contract as a matter of law required that a water-
ivy should be built. The defendants also asked the
that the claim for extra stone could not be main-
t the defendants jointly.
declined to give either of the rulings requested, but
jury as follows: "In relation to the defendants'
plaintiff wilfully abandoned his contract before it
and that the defendants were therefore not liable,
e of law, where wilfully, without cause, a party
plete and abandons his contract. If the plaintiff
ndoned the work, leaving the house not finished
contract, he could not recover. But if a party
ceeds under a special contract, and doing what
pposes is required, and substantially completes
party accepts the benefit of the work, although
ay not have done all that was really his duty, or
er required, still he may maintain an action for
terials, but he cannot necessarily recover the cost
or the ordinary price of labor. The party for
was done is entitled to have deducted from the
the difference between the value of the work as
alue if it had been done in accordance with the

to the proper construction and interpretation of
is a question of law for the court to decide. The
ides that the plaintiff should 'finish the house ready
y,' and then proceeds to state the details as to a por-

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tion of the work; as far as the manner of doing the work and the kind of work is specified, it is to be done as thus specified; the only difficulty arises as to the work not specified, but which is required by the provision 'to finish said house ready for occupancy;' the court cannot, as a matter of law, give you the details the parties have omitted, but instructs you that the plaintiff would, under this provision of the contract, be bound to do all things that would be reasonably necessary and proper to make the house ready for occupation, taking into consideration, in determining what should be done, the character of the house he was to finish; and if the jury find that he omitted anything specified in the contract, or omitted any other thing that was reasonably required to have such house as is referred to and described in the contract ready for occupancy, then he has not performed his contract and cannot recover upon it."

The judge also instructed the jury, that "In order to entitle the plaintiff to recover for the stone furnished, you must be satisfied that Abbott had authority from Washburn to make a change from the agreement as to the stone, and that if Abbott was acting for both in relation to the building and carrying out the contract, with a general authority from Washburn to make such changes as he deemed best, and he made the change as to the stone, Washburn would be bound thereby, or if Washburn, having knowledge of Abbott's acts, subsequently ratified the same."

The jury found for the plaintiff; and the defendants alleged exceptions.

C. A. Merrill, for the defendants.

J. R. Thayer, for the plaintiff, was not called upon.

DEVENS, J. The legal interpretation of a contract is for the court, which is to determine, where the words are unequivocal in their meaning, what it imports, and what are the obligations imposed by it. As, however, words and phrases are often used, which are technical or ambiguous, and sometimes, also, those which, although not in themselves unintelligible, require knowledge of the subject, in connection with which they are used, to apply them intelligibly, it may become necessary to resort to extrinsic evidence to ascertain thereby the intent of the parties in using them, in order that the contract may be construed in the light of the information thus acquired. The facts thus to be

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into are determined by the jury under the direction of
, which instructs them as to the construction to be given
ntract according to the various aspects in which such
present themselves. *Eaton* v. *Smith*, 20 Pick. 150.
v. *Allen*, 1 Gray, 496. *Smith* v. *Faulkner*, 12 Gray,

er the phrase "to finish said house ready for occupancy"
hich would require the building of a water-closet, de-
pon certain extrinsic facts. The defendants do not
he instructions given, in themselves, but contend that
hould have received the evidence of carpenters, and
such evidence, have decided the matter without sub-
o the jury. This, however, would have taken from
right to find the facts, and have trespassed upon
It is for the court only to decide the law upon
ey have been, or as they may be, ascertained; and
e contract requires to be done is a question of law,
n of the case to the jury to find the facts, with
ions as to the various aspects in which they may
lves, gives to the court the construction of the
pletely as if the jury found the facts specially
ter wards interpreted the contract in view of them

Medical Institution v. *Harding*, 11 Cush. 285,
e defendants, it was held by the court, as a mat-
ruction of the peculiar contract in that case, that
of the wall, there contracted for, was not neces-
ch completion thereof as would be necessary for
putting on the roof of the building; and as the
to this were admitted, there was nothing for the
esent case, what the contract required to be done
ermined as matter of law, except by determining
t what was reasonably necessary and proper to be
g the character of the building to be erected.
upon the remaining question was also correct.
written contract required the plaintiff to furnish
or the cellars, yet it was competent for the parties
to agree for stone of an extra quality. Under the
iven, the jury must have been satisfied that Abbott

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had authority from Washburn to make this change, or that Washburn, with a knowledge of Abbott's acts, subsequently ratified them, and in either case both would be liable.

Exceptions overruled.

MARY TRACY *vs.* CHARLES HOWE & others.

Bristol. October 27. — December 4, 1875. MORTON, J., absent.

A person charged under the bastardy act with being the father of a bastard child, executed a bond, payable to the plaintiff, conditioned that he should appear at the next term of the Superior Court, answer to the complaint, and abide the order of the court thereon. The defendant duly appeared and answered, and was defaulted at the trial. *Held*, that there was a breach of the bond.

CONTRACT against Charles Howe as principal, and Andrew Riley and Patrick B. Wallace as sureties, upon a bond, dated December 5, 1873, payable to the plaintiff, and conditioned that the defendant Howe should appear at the next December term of the Superior Court at New Bedford, and answer to a complaint made by the plaintiff on her examination on oath before the Municipal Court of Taunton, charging him with being the father of a bastard child of which she was pregnant, and that he should abide the order of the Superior Court thereon. The answer of the defendants admitted the execution of the bond, but denied each and every other allegation in the plaintiff's declaration.

At the trial in the Superior Court, before *Wilkinson*, J., without a jury, the plaintiff introduced the record on the clerk's docket of her complaint, under the bastardy process, against Charles Howe, the principal named in the bond, by which it appeared that her complaint was entered at December term 1873 of the Superior Court; that the respondent appeared by his attorney at that term; that the supplementary complaint was filed June 9, 1874; that an answer, containing a general denial was filed August 5, 1874; that trial by jury was demanded September 8, 1874; that the defendant was defaulted May 10, 1875, and the order of affiliation was passed May 13, 1875. The plaintiff then rested her case.

The defendants declined to offer any evidence, and requested the judge to rule, as matter of law, that the evidence of the plain-

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insufficient to warrant a finding that there had been a
f the condition of the bond, or such a breach as to au-
judgment for the plaintiff.
udge refused so to rule, but found for the plaintiff, and
judgment for the penalty of the bond, and execution to
the sum due to September 30, 1875. The defendants
xceptions.
Townsend, for Howe and Wallace.
Williams, for Riley.
n, for the plaintiff, submitted the case without argu-

. The difficulty with the defence relied upon is that
ts the record of the court. By the terms of the bond,
l obligor was bound to appear and abide the order of
He does not fulfil this obligation by merely entering
e and filing an answer, denying the charge against
ound to be in court when the case is in order for
default, as entered of record, is conclusive proof of
although solemnly called, he did not appear. In
he case, it was impossible that the court could do
rule that there had been such a breach of the con-
ond as to authorize a judgment for the plaintiff.
ey, 116 Mass. 360. As this is the only ques-
e defendants, the result must be that their

Exceptions are overruled.

OMAS LUCE *vs.* JACOB B. HADLEY.

ber 28. — December 18, 1875. MORTON, J., absent.

vessel, who is in possession, and to whom supplies for the use of
een furnished, under such circumstances that he is liable for them,
ibed as owner in the declaration in an action to recover for the

The first count of the declaration was as follows:
laintiff says the defendant was in June, 1868, and is
of bark Ocean Steed, of New Bedford, and the plain-

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tiff, at the request of the defendant, furnished casks for said bark, in shooks, for her outfit for a whaling voyage, (a schedule of which appears by the account hereto annexed,) and the defendant owes the plaintiff the sum of $781.15, according to said account."

The second count was as follows: "And the plaintiff says the defendant owes him $781.15, according to the account hereto annexed.

"Jacob B. Hadley, owner of Ocean Steed,

To Thomas Luce, Dr.

"(1.) June 30, 1868 — 8554 gallon casks in shooks for Ocean Steed, at 6½ cents $556.01

"(2.) Interest to date of writ 175.14

$781.15"

The answer contained a general denial, and alleged payment.

At the trial in the Superior Court, before *Pitman*, J., it appeared in evidence, and was not disputed, that the shooks mentioned in the declaration were furnished to the bark Ocean Steed, a British vessel, but sailing from New Bedford; that the defendant, with others, held the vessel under a mortgage from the legal owners, who were British subjects, and a power of attorney from them authorizing him and his co-mortgagees to sell and dispose of the vessel; that the defendant and his co-mortgagees fitted her for the whaling voyage in which these shooks were used and for which they were furnished; and that the defendant never had any other title to the vessel.

Upon these facts, the judge ruled and instructed the jury, against the defendant's objection, that for the purposes of the case the defendant was an owner, so far as to enable the plaintiff to maintain his action upon the first count of his declaration. The jury returned a verdict for the plaintiff for the amount claimed, and the defendant alleged exceptions.

H. M. Knowlton, for the defendant.

G. Marston, for the plaintiff.

BY THE COURT. The only question, which arises on the bill of exceptions in this case, is whether the mortgagee of a vessel who is in possession, and to whom supplies for the use of the vessel have been furnished, under such circumstances that he is

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them, is properly described in the declaration as owner
ssel.

well settled law of this state, a mortgage of a chattel
title and property in the mortgagee, which, although
ute, is only defeasible upon a condition subsequent; and,
ere is an agreement to the contrary, the right of posses-
ws the right of property. The mortgagee is therefore
described as owner. *Pratt* v. *Harlow*, 16 Gray, 379.
Clark, 3 Cush. 399, 401. *Esson* v. *Tarbell*, 9 Cush.
Dean v. *M'Ghie*, 4 Bing. 45, 49. *Dickinson* v.
Ei. & Bl. 789. *Brown* v. *Tanner*, L. R. 3 Ch. 597,

Exceptions overruled.

AMES M. MOTLEY *vs.* CYRUS SARGENT.

ovember 19. — December 28, 1875. COLT, J., absent.

ounded by a way conveys the soil to the centre line of the way,
intention appears by the other parts of the deed, or by the char-
y to which the description is to be applied.
bounded northerly on a street, seven feet four inches; easterly
thirty-five feet four inches; southerly on the land of C., seven-
and "westerly on a passage way," thirty-four feet ten inches,
ise bounded, with the buildings thereon standing, and the free
of said passage way in common with myself, my heirs and as-
vin g to myself, my heirs and assigns forever, a mutual privilege
nd standing at the northwesterly corner of the above described
ae deed the grantor conveyed his interest in a strip of land ad-
d of the land above described, which had been taken by the
treet. By a plan afterwards prepared, the accuracy of which
the northerly line varied from that given in the deed, the
lot was only fifteen feet three inches, excluding the passage
e way at that point was four feet wide. *Held*, that the grantee
e of the passage way.

reaking and entering the plaintiff's close, being a
bout four feet wide, bounded northerly on Elm
ton, and lying between other land of the plaintiff
nd land of the defendant on the east.

al in the Superior Court, before *Wilkinson*, J., the
mitted acts done by him on the land, not authorized
ent in the passage way, and the only issue was whether

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the plaintiff was the owner in fee of the whole of the passage way, or whether the defendant was the owner in fee of one half thereof.

In 1812, Zebulon Clapp was the owner of the parcels of land now owned by the plaintiff and by the defendant, with the passage way in question lying between them. The plaintiff claimed title through the following conveyances:

In 1818, Clapp's executor conveyed to William W. Motley a parcel of land bounded northerly on Elm Street, twenty-two feet; easterly on a passage way, thirty-seven feet eight inches; southerly on land of the heirs of Isaac Cutter, twenty-one feet ten inches; and westerly on land late of Andrew Oliver, there measuring forty feet; with the free use of the well and pump on land conveyed by Zebulon Clapp to Amos Binney, on the east side of said passage way, paying one half of the expense of keeping the same in repair. It was admitted that said deed duly conveyed the estate described therein; and that by a subsequent conveyance the estate came to one Mary Motley.

In 1853 and 1855, the heirs of Zebulon Clapp quitclaimed their right, title and interest in and to said passage way to Mary Motley, whose heirs, in 1864, conveyed the passage and the lot on the west, by one description, to the plaintiff.

The defendant claimed title to the fee of one half of the passage way through the following conveyances:

In 1812, Zebulon Clapp conveyed to Amos Binney a parcel of land "bounded northerly on Elm Street, seven feet four inches; easterly on Brattle Street, there measuring thirty-five feet four inches; southerly on land of the heirs of Isaac Cutter, seventeen feet five inches; and westerly on a passage way, there measuring thirty-four feet ten inches; or however otherwise bounded, with the building thereon standing, and the free use of said passage way in common with myself, my heirs and assigns, reserving to myself, my heirs and assigns forever, a mutual privilege in the well and pump standing at the northwesterly corner of the above described land, which well shall never be built upon without the consent of me the said Clapp, or my heirs and assigns; hereby also granting unto said Binney all my right, title and interest in or to a small strip of land adjoining the north end of the land above described, taken by the town to widen Elm Street."

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In 1848, the heirs of Binney conveyed to Atkins A. Clark
hat lot of land bounded northerly by Elm Street, seven feet
en inches; easterly by Brattle Square, thirty-four feet; south-
by a line through the centre of the brick partition wall,
en feet three inches; and westerly by a passage way, thirty-
feet ten inches, be all or any of said measurements more
s, together with the free use and privilege of said passage
. . . Said lot of land is shown on a plan made by Alex-
Wadsworth, March 10, 1848, a copy whereof is hereon in-
" This plan corresponded to the measurement in the

58, Clark conveyed to the defendant by the same descrip-
the deed of the heirs of Binney to him.
dge ruled that the defendant was the owner of the fee
lf of the passage way, and ordered judgment for the
; and the plaintiff alleged exceptions.
Train & F. S. Hesseltine, for the plaintiff. The intent
ties, that the grant of the lot on the east of the pas-
hould extend only to the side of the way, appears by
and minute description, in feet and inches, of the
the lot on Elm Street, between Brattle Square and
his measurement indicates that a great degree of
sought and used by the parties to the deed. The
he line, seven feet four inches, which takes in no
sage way, precludes the idea that it was the inten-
nine feet eight and three fourths inches to the
way; and where the measurement, by feet and
great care, and the line is as short as this, it is
reat a mistake could not have been made. The
at when known monuments are referred to as
must govern, yields when it is evident that no
measurement can reasonably be supposed to have
ris v. Rainsford, 17 Mass. 207. Tyler v. Ham-
1 93. Brainard v. Boston & New York Central
y, 407. Cole v. Haynes, 22 Vt. 588.
Convey only to the side of the passage way also
words following the description of the lot, "and
privilege of said passage way in common with
and assigns forever." By necessary implica-

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tion, this grant of an easement over the way excludes any greater title to it, and makes clear the intention to reserve the fee.

It also appears in the words "reserving to myself, my heirs and assigns forever, a mutual privilege in the well and pump," &c. This makes clear the intention to grant the fee of land on the east of the way, reserving an easement in it as to the well there situated, and to retain the fee of the passage, and grant an easement over it. The grantor grants the fee of one, reserving an easement, and grants an easement over the other, reserving the fee. *Codman* v. *Evans*, 1 Allen, 443.

It still further appears in the words, "hereby also granting unto said Binney all my right, title and interest in and to a small strip of land adjoining the north end of the land above described, taken by the town to widen Elm Street." This clearly indicates that it was understood that "the land above described" was limited by the description to the side lines; and to grant the fee of a small strip within and on the edge of the highway "adjoining." It was necessary to particularly include it by the additional words.

It further appears in the words, "the well and pump standing at the northwesterly corner of the above described land." These words indicate the limit or northwesterly corner of the land described in the conveyance to be on the east of the passage way.

C. A. Welch & F. Woodside, for the defendant.

DEVENS, J. The only question necessary here to be determined is, what was the legal effect of the deed of Clapp to Amos Binney in 1812, so far as it concerns the conveyance of the easterly half of the passage way. If it failed to convey this, the plaintiff has shown title to it, and may maintain this action, the defendant having done acts therein not authorized by a mere right of passage, which it is conceded he has. If, on the other hand, the easterly half of the passage way was thus conveyed, it is unimportant whether it has been since conveyed by the heirs of Amos Binney, to whom the estate descended, and under whom the defendant claims, as the plaintiff claims no rights under them.

The estate conveyed to Binney was bounded "westerly on a passage way" for the distance of thirty-four feet and ten inches, and it is a general rule of construction that where there is

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upon a fixed monument which has width, as a way, wall, even if the measurements run only to the side of le to the land conveyed passes to the line which would ed by the middle of the monument. *Newhall* v. *Ireson*, 95. *Boston* v. *Richardson*, 13 Allen, 146, and author- This rule of construction is adopted, however, only is deemed that the true intent and meaning of the thus carried out; and the deed is always to be construed tent as indicated by its various parts, or by the char- the locality to which its description is to be applied. must therefore depend, to a greater or less extent, wn peculiar circumstances, and by these it must be de- ther the general rule is to be controlled. *Codman* v. Allen, 443. *Boston* v. *Richardson*, *ubi supra*. intiff contends that the intent of the parties that the to Binney should extend only to the side and not to of the passage way, fully appears; that the careful description in feet and inches of a line so short as Elm Street, which was the front line, precludes the ere could have been any mistake, or that it could have d to convey to the centre of the way. It is true that ule, that monuments govern rather than courses and t yield, when an adherence would lead to a result d, or when the intent to exclude them appears. ford, 17 Mass. 207. *Brainard* v. *Boston & New Railroad*, 12 Gray, 407. *Wilson* v. *Hildreth*, 118 But no such case is here presented. Even this lusive of the passage way, when a plan (the ac- ch has not been questioned) is afterwards pre- n to vary in length from that called for by the the length called for is given to the rear line, the ald at the rear include the half of the passage laimed by the defendants to have been conveyed e deed giving seventeen feet five inches as the line, while the rear line of the lot as surveyed has of fifteen feet three inches, if the passage way be

monument be disregarded on account of the grant ase and privilege of said passage way in common

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with myself, my heirs and assigns." Such a grant was necessary to enable him to use the whole way as a passage. There has been occasion to construe similar words, and it has been held that a similar grant would not show that the grantor had not already granted the fee in half the passage way if, by the usual construction of the deed, it was to be deemed to have been included. *Stark* v. *Coffin*, 105 Mass. 328, 330.

The reservation of a right to use the well and pump on the granted land was of course necessary, if the grantor desired to retain that privilege; but it cannot be deemed, as the plaintiff argues, that because he grants a fee in the land conveyed, retaining an easement therein, he therefore retains the fee in the passage, granting there only an easement. The well and pump are indeed spoken of as "standing at the northwesterly corner of the above described land;" but this would be a sufficiently accurate description of the locality of two such objects, if they stood within two feet of the corner, as they would do if the description included the half of the passage. From the nature of the objects, they could not be exactly at the angle which made the northwesterly corner.

Nor is it to be inferred, from the grant of all the right, title and interest which the grantor had in the small strip "taken by the town to widen Elm Street" from the north end of the "land above described," that therefore his grant was to be limited by the side lines as they would be measured. This strip was not in his possession except subject to the purpose for which it had been taken by the town, and he sees fit therefore to describe it separately. But such a description would not be inconsistent with his having conveyed, on the side of the lot described, to the centre of the passage way.

The plaintiff has sought to invoke the principle that where lines are laid down on a plan or map and referred to in a deed, the courses, distances and other particulars appearing on such plan are to be as much regarded as if they were expressly recited in the deed. *Codman* v. *Evans*, 1 Allen, 443. This has, however, no application. No such plan or map existed or was referred to, when the deed to Binney was made. Such a plan was indeed used and referred to when the Binney heirs, many years after conveyed to the defendant's grantor; but, as before suggested, it

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immaterial here whether they have conveyed the half of the passage or not, if their ancestor received a conveyance of it. Much reliance has been placed upon the case of *Codman* v. *Jenkins*, *ubi supra*. Without discussing that case in detail, it may properly be said that there is here no such exclusion of the passway as there appeared, nor a description of any of the lines as was found of the southerly line of the lot there described, which necessarily must have been rejected if the grant of the entire had been held to extend to the centre of the passage

the whole case, the plaintiff has failed to show any intent, passed by the deed to Binney, or indicated by the localities, should take the construction of it out of the general rule, middle of the monument must be the boundary line.

Exceptions overruled.

WILLIAMS & wife *vs.* INHABITANTS OF LEYDEN.

Sept. 22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

Action a town to recover for injuries occasioned by a defective highway, evidence tending to show that, at the time of the accident, the plaintiff was in a carryall; that suddenly the horse stopped, jumped aside, cramped the wheels, and began to back; that the plaintiff jumped out and was injured, that he fell over an embankment; that the horse driven by him was one of a pair of horses, and had been accustomed to draw on the nigh side in double harness, but had never been driven in the same carryall, but had been almost always usually driven in double harness and on the nigh side, and, in backing, taking the nigh rut, turned to the left and cramped the wheel, and the plaintiff jumped out instantly upon the cramping of the wheel. The plaintiff cannot recover for any injury sustained from the jumping out, if he jumped declined to give this instruction except with the qualification, as he did, done under a reasonable apprehension that the carriage would overturn. *Held*, that the defendant had no ground of exception.

Action of tort for personal injuries alleged to have been received in a highway in the defendant town. Trial in the Superior Court, before *Allen*, J., who allowed a bill of exceptions as follows:

The evidence tended to show that they were driving from a one horse carryall, on a highway which it

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was admitted the defendant town was bound to keep in repair; that they were going in a southerly direction, up a hill, on a smooth road about fourteen feet wide; that on the easterly side of the road there was a bank wall about three feet and a half high, without a railing; that suddenly the horse stopped, refused to draw, jumped aside, cramped the nigh wheel and began to back; that both the plaintiffs jumped from the carryall, and George E. took the horse by the head, and instantly the horse backed the carryall over the embankment, taking George E. along with him; and that both the plaintiffs sustained injury from what immediately followed the jumping out.

It was a question on which there was conflicting evidence as to the character and fitness of the horse for travelling on the highway at the time of the accident; also as to the care and skill of the driver; and the usual instructions, not objected to, were given on both points.

There was also evidence tending to show that the horse was one of a span of team horses, and had been accustomed to draw on the nigh side in double harness, and that he had never before been driven in the same carryall, though he had been driven in single harness; and in the closing argument the plaintiffs' counsel suggested, as a theory of the accident, that the action and conduct of the horse might be explained by his habit of working in double harness on the nigh side, which might have led him to travel out of the centre of the road in the nigh rut, and, in so starting to the left, cramped the wheel and in some way made the backward movement which caused the plaintiffs to jump from the carryall and the backing off the embankment.

In relation to this part of the case the defendant asked the judge to instruct the jury as follows: "If the horse was most usually driven in double harness and on the nigh side, and, from the habit of taking the nigh rut, turned to the left and cramped the wheel, and began to back, and the plaintiffs jumped out instantly upon the cramping of the wheel, the plaintiffs cannot recover for any injury sustained from the jumping out." The judge declined so to instruct the jury, except with this qualification, "unless the act was done under a reasonable apprehension that the carriage would go over the bank."

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To this ruling, instruction and refusal to instruct, the defendant alleged exceptions.

C. Delano & C. G. Delano, for the defendant.

C. C. Conant, for the plaintiffs.

Morton, J. The only question presented by this bill of exceptions is whether the presiding judge properly refused to give the instruction requested by the defendant.

There was evidence tending to show that, at the time of the accident, the plaintiffs were driving in a carryall; that the horse driven by them "was one of a span of team horses, and had been accustomed to draw on the nigh side in double harness, and that had never before been driven in the same carryall, though he had been driven in single harness;" and the defendant asked the judge to instruct the jury that "if the horse was most usually driven in double harness and on the nigh side, and, from the habit of shying the nigh rut, turned to the left and cramped the wheel when attempting to back, and the plaintiffs jumped out instantly upon the shying of the wheel, the plaintiffs cannot recover for any injury sustained from the jumping out." The court declined to give the instruction except with this qualification, "unless the plaintiffs jumped out under a reasonable apprehension that the carriage would go over the bank." The instruction requested is open to a double meaning. It may be construed as asking the court to direct a verdict for the defendant upon the ground that the injury to the plaintiffs was caused by their jumping out, rather than by the defect of the road, in which aspect the qualification given by the court was a correct statement of the law. Spaulding v. Winslow, 105 Mass. 310. Or it may be construed as asking the court to direct a verdict upon the ground that the injury was caused by a vicious habit of the horse; and the town was entitled upon this ground to the instruction without the qualification. But it was for the jury, and not for the court, to determine whether the horse had any vicious habit which contributed to the injury. It appears by the exceptions that the jury were properly instructed as to what the plaintiffs must prove as to the character and fitness of the horse for travelling on the highway at the time of the accident. Upon this question, the facts, so far as they were proved, that the horse was most usually driven in double harness, on the

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nigh side, and had the habit of taking the nigh rut, were properly submitted to them; but the court could not rule, as matter of law, that these facts showed a vicious habit of the horse which rendered him unfit to be driven in single harness. We are therefore of opinion that the instruction requested was properly refused. *Exceptions overruled.*

FRANKLIN SAVINGS INSTITUTION *vs.* CENTRAL MUTUAL FIRE INSURANCE COMPANY.

Franklin. Sept. 22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

Where a building is insured against fire by a policy which provides that "if the assured shall vacate the property in whole or in part, this policy shall be void; this company will not insure unoccupied property," and an indorsement is made upon the policy by which it is to be payable in case of loss or damage to mortgagees of the insured property "as their mortgage claim may appear," and the property is afterwards destroyed by fire, when unoccupied, the policy is void both as to the original assured and the mortgagees.

MORTON, J. The policy of insurance, upon which this suit is brought, contains the provision that "if the assured shall vacate the property in whole or in part, this policy shall be void; this company will not insure unoccupied property." It appears by the agreed statement of facts that the premises were vacated by the occupant before the fire and remained unoccupied up to the time of the fire. It is clear, therefore, that the policy was void as to Kelliher, the original assured, and that he could not maintain an action upon it. *Harrison* v. *City Ins. Co.* 9 Allen, 231. *Keith* v. *Quincy Mutual Ins. Co.* 10 Allen, 228.

But the plaintiffs contend that by the indorsement upon the policy a new contract of insurance was made with them, and that they are not affected by the acts of Kelliher in vacating the property insured. The plaintiffs held a mortgage of the property, and on the day after the policy was issued, an indorsement was made upon it that it was to be payable in case of loss or damage to them "as their mortgage claim may appear."

It has been repeatedly held by this court that such an indorsement does not operate as an assignment of the policy, nor as a

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ontract to insure the interest of the mortgagees, but that they an claim only what the party originally insured is entitled to re- ver under his contract. *Fogg* v. *Middlesex Mut. Ins. Co.* 10 sh. 337. *Hale* v. *Mechanics' Mut. Ins. Co.* 6 Gray, 169. *Lor-* v. *Manufacturers' Ins. Co.* 8 Gray, 28.

he case at bar falls within these decisions, and is clearly dis- uishable from *Foster* v. *Equitable Ins. Co.* 2 Gray, 216, upon h the plaintiff relies. In that case the assured assigned his to the mortgagee, who, as required by the company, gave osit note, promising to pay all assessments thereafter made said policy. The court held that the effect of this was to a new contract of insurance, by which, for a new consid- the company agreed to insure the interest of the mort- nd therefore that he would not be affected by the subse- ts of the party originally insured. But in the case at was no assignment of the policy, and the plaintiff did any deposit notes. The only new contract entered into he defendant should pay to the plaintiffs any loss to her might be entitled under his policy, not in full, but t of their claim as mortgagees.

reasons, without considering the other objections defendant, we are of opinion that the plaintiffs are o recover. *Judgment for the defendant.*

3, for the plaintiffs.

lopkins, for the defendant.

NATIONAL BANK *vs.* DWIGHT JEWETT.

22, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

s, hanging on poles in process of curing and in such condition ved without great damage to it, is subject to attachment.

123, § 57, providing that in the attachment of articles of per- by reason of their bulk or other cause cannot be immediately d copy of the writ and the return may be filed within three the city or town clerk, it is sufficient if the property cannot great damage to it.

of curing, and in such condition that it could not be removed ge to it, was attached under the Gen. Sts. c. 123, § 57, and

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erwards, at the time when it required to be stripped and packed, was stripped
d packed by the defendant in boxes so that it could be transported without in-
y. No arrangement was made between the defendant and the attaching office
regard to the stripping and packing, and the officer did not see the tobacco un
er it was packed, when he locked up the boxes containing it in a building up
defendant's premises. The defendant afterwards mortgaged it to a pers
o had no knowledge of the attachment. The key to the building was kept
officer for several months, and then given to the defendant's assignee in ban
otcy to enable him to examine the property, and by him lent to the defen
a special purpose, without the knowledge of the officer. The mortgagee a
rds took possession and placed a keeper in charge of the property, from w
d against whose protest it was taken by the officer. *Held*, that there wa
h misconduct or neglect shown on the part of the plaintiff or the office
uld dissolve the attachment.

ONTRACT. Writ dated September 20, 1873. The case
nitted to the Superior Court, and, after judgment for
ndant, to this court, on appeal, on an agreed statement
s in substance as follows:

appeared by the officer's return that on September 20, 1
ttached all the tobacco then hanging in the barns o
nises occupied by the defendant, namely, the crop of
on September 22, 1873, deposited an attested copy o
, without the declaration, and of his return thereon, i
e of the clerk of the town of Deerfield.

n June 6, 1874, the defendant filed a petition in bankru
afterwards made a composition with his creditors, which
oved by the court, and recorded, and became binding t
plaintiff in this action, except so far as his rights ma
ified by the attachment.

he tobacco, when attached, was hanging upon poles, in
ess of curing. Tobacco in that condition cannot be t
n or removed without great damage. This was the only
why the property could not have been immediately re
ne time of the attachment, and it was on this account th
er adopted the mode of attachment set out in his
acco, after hanging a sufficient length of time upon p
r to properly preserve it, needs to be taken down fr
s, stripped and packed in boxes, after which it goes th
rocess which is called a sweat, before it is fit to be un
sed. The work of taking down, stripping or packing
one during the first winter after the tobacco is cut, by p

aving some skill and experience in such business and in weather
lapted by its temperature to the work. The attaching officer
ving taken no measures for the stripping and packing of the
bacco, and the time having arrived when it needed to be done,
defendant, with the assistance of other persons employed by
, on or about December 20, 1873, took it down, stripped and
ed it in boxes, after which it could be easily transported
place to place without injury.

April 15, 1874, the defendant made a mortgage thereof to
ll P. Crafts, which was duly recorded, Crafts having no
dge of said attachment. No arrangement or contract was
etween the defendant and the attaching officer in regard
tripping and packing, nor did the attaching officer see the
or give any directions about it until about April 1, 1874,
took the cases containing it and locked them up in a
upon the defendant's premises. The tobacco remained
some months, when the key, which had been in the cus-
e officer up to that time, was given into the possession
ndant's assignee in bankruptcy to enable him to exam-
perty, and by him lent to the defendant for a special
hout the knowledge of the officer, and the defendant
without objection and without the personal knowledge
, in his possession for several weeks, during which he
o the place where the tobacco was, and during this
ame to the place and claimed to take possession of
under his mortgage, no one hindering him, and put
k upon the door, and left a keeper in charge of it,
k having been taken off. Subsequently the officer
t away the tobacco, against the protest of Crafts's

reGoing facts, such judgment was to be rendered as
d direct.
for the plaintiff.
& *M. P. Knowlton*, for the defendant.
The defendant contends, upon the facts agreed, that
lid subsisting attachment of personal property,
ei nce the bankruptcy of the original defendant, a
t can now be rendered; first, because, the prop-
e writ was, from its nature and situation, exempt

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from attachment, next, because the mode adopted by the officer in this case did not constitute a valid attachment; and, lastly, because the lien, if any, thereby created, has been since lost by the neglect or misconduct of the attaching officer.

The property attached was tobacco stored in barns, hanging on poles, in process of curing, and in such condition that it could not be moved without great damage.

In this Commonwealth all personal property liable to be taken on execution is subject to attachment, except such as, from its nature or situation, has been considered as exempt according to the principles of the common law here adopted and practised on. Gen. Sts. *c.* 123, § 32. In *Bond* v. *Ward*, 7 Mass. 123, it was accordingly held that hides in a vat for tanning could not be attached, because they could not be returned in the same plight. And the same rule was said to apply at common law to sheaves of corn or hay in a cock or barn, "because they would be injured, as the grain of the sheaves would be shattered." This rule was affirmed in *Campbell* v. *Johnson*, 11 Mass. 184, but was held not to apply to hay in a barn, because on account of the changed condition of husbandry, the reason of the rule "has ceased with us." It has long been held in this state that corn or other growing products of the soil, when ripe and in a fit state to be gathered, could lawfully be attached or taken on execution, and that the officer might enter, cut down, seize and sell the same as personal estate. *Penhallow* v. *Dwight*, 7 Mass. 34. *Heard* v. *Fairbanks*, 5 Met. 111. *Mulligan* v. *Newton*, 16 Gray, 211.

An exception to the old rule which forbids the attachment of property which cannot be returned in the same plight, is thus established by our decisions, which embraces all annual products of the soil when ripe and fit for harvest, and includes tobacco when in the condition here described. In the application of this exception, it would be impracticable to distinguish tobacco from other annual crops simply on the ground that the successful harvesting and curing of it require more time and care. And the objection that the duties required to secure the crop are such as do not properly belong to the attaching officer, applies equally to all crops which require harvesting.

As to the validity of the attachment on other grounds, the case comes within the provisions of the statute which authorize a

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turn to the town clerk's office when an attachment is made of
rsonal property which, by reason of its bulk or other cause, can-
t be immediately removed. Gen. Sts. c. 123, § 57. It is true
only reason here given for not removing the tobacco at the
e of the attachment is, that it could not be then removed
out great damage. But that is one way of stating that the
erty was not in a condition for immediate removal within
ir meaning of the statute. In determining that question,
bility of the property to injury, as well as the expense and
y attending its removal, are to be considered. *Polley* v.
Iron Works, 4 Allen, 329.

fficer acquired a special property in the tobacco attached
e of his attachment in this form, which was good, at least
as the difficulty of its removal remained, as against all
nterfering, and which remained good until some title
ired which could be set up as valid against the attach-
efore any such title was acquired, the sheriff took actual
of the property and placed it under lock and key.
thing to show a voluntary surrender or abandonment
hment on the part of the officer or the plaintiff in this
tage of the case. And we do not find any such neg-
art of the officer, after actual custody was taken by
uld defeat the creditor's lien upon this property.
Clemence, 10 Cush. 269. *Shephard* v. *Butterfield*,

Special judgment for the plaintiff.

PARSONS *vs.* WILLIAM E. TOPLIFF.

29, 1875.—Jan. 4, 1876. AMES & DEVENS, JJ., absent.

gnee in bankruptcy to recover the value of personal property
t it was transferred to the defendant in fraud of the bankrupt
, more than four months before the filing of the petition in
the creditors of the bankrupt brought suits against him and
y in question, which was placed by the officer in the charge of
receipted therefor in the usual form. The bankrupt afterwards
le of the attached property to the defendant, who sold a part
e proceeds to the satisfaction of the executions in the suits of the

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attaching creditors. The jury were instructed that if the arrangement between the defendant and the bankrupt was to the effect that the property should be sold and the proceeds applied towards the payment of the debts of the attaching creditors, without regard to attachments, and without a demand perfected in execution, that would be a preference, and in that case the defendant could claim no protection under the attachments; but if the understanding and intent was that the proceeds of the property should be held by the defendant as security against his liability on his receipts and applied on the debts only upon demand duly made on execution, and the sales were in good faith and the proceeds in fact applied on the executions, the defendant could claim protection under the attachments, unless it appeared that the parties intended a preference, or a fraud to prevent the property from distribution under the bankrupt act. *Held*, that the instruction was sufficiently favorable to the plaintiff, and that he had no ground of exception.

In an action by an assignee in bankruptcy to recover the value of personal property upon the ground of a fraudulent preference, the plaintiff requested the court to instruct the jury "that the transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him, in such a case, and not on the assignee." This instruction was not given, and the jury were instructed that the burden of proof throughout was on the plaintiff, but that the intent of the parties might be inferred from their acts, and that, if the conveyance to the defendant was out of the usual and ordinary course of business, the statute made it *primâ facie* evidence of the fraudulent intent of the parties. *Held*, that the instruction given was correct; and that the plaintiff had no ground of exception.

MORTON, J. This is an action, brought by the assignee in bankruptcy of George and Philo Pomeroy, to recover the value of certain personal property, upon the ground that it was transferred by the bankrupts to the defendant in fraud of the provisions of the bankrupt law.

It appeared that more than four months before the filing of the petition in bankruptcy, two of the creditors of the bankrupts brought suits against them and attached the property in question. On the same day on which the attachments were severally made, the defendant receipted for the property attached, in the usual form, agreeing to keep the property safely and to redeliver it to the officer, so that it might be taken on execution. The effect of these receipts was to make the defendant the agent of the officer to hold the property. The attachments still continued, and as they were not dissolved by the bankruptcy proceedings the assignee could not hold the receiptor liable to him for the property

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its value, but the latter was liable to the officer. *Ives* v. *Sturgis*, 12 Met. 462.

But it also appeared that after the defendant had given the eipts the bankrupts executed to him a bill of sale of the at- ed property, and that he sold a part of it and applied the eeds to the satisfaction of the executions taken out in the cf the attaching creditors.

e plaintiff contended that this bill of sale was in fraud of ankrupt law, and the defendant claimed that it was given merely for the purpose of securing him as receiptor. is part of the case, the court, against the objection of the instructed the jury "that if the arrangement between ndant and the Pomeroys was to the effect that the prop- ld be sold and the proceeds applied toward the payment bts of the attaching creditors, without regard to attach- d without a demand perfected in execution, that would rence, and in that case the defendant could claim no under the attachments; but if the understanding and that the proceeds of the property should be held by nt as security against his liability on his receipts, and he debts only upon demand duly made on execution, were in good faith and the proceeds in fact applied ions, the defendant could claim protection under the unless it appeared that the parties intended a pref- aud to prevent the property from distribution under act."

pinion that this instruction was sufficiently favor- intiff. In order to avoid the transfer to the de- aud upon the bankrupt law, it was incumbent upon Prove that the defendant, when he took the trans- the transfer was made by the Pomeroys with a t the property from coming to their assignee in to evade some of the provisions of the bankrupt 1 1867, *c.* 176, § 35. U. S. Rev. Sts. § 5129. structions given them, the jury must have found ex was not made with the intent to evade any of f the bankrupt law, but merely as security for the fendant on his receipts.

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bankrupt law does not render such a transfer, made in good
oidable by the assignee. It is not tainted with any fraud-
tent to evade the provisions of the law, and its effect can-
either to give a preference to creditors, or to prev
y from going to the assignee to which he is entitl
ere valid attachments not dissolved by the bank
gnee, after his appointment, had no interest in t
ess there was more than enough to satisfy the liens
attachments. If there had been a surplus in the
nds, after satisfying such liens, the assignee mig
titled to it, but under the instructions the jury m
hat the property and its proceeds were applied
ons, so that there was no surplus.

other exception remains to be considered. Up
whether the parties to the bill of sale knew
ble cause to believe that the Pomeroys were in
ended to give a preference, or to prevent the p
proceeds from coming to the assignee, the plain
the court to give the following instruction to th
ransfer in any case by a debtor of a large portio
y, while he is insolvent, to one creditor, without
n for an equal distribution of its proceeds to all hi
ecessarily operates as a preference to him and m
conclusive evidence that a preference was intend
debtor can show that he was at the time ignorant
cy, and that his affairs were such that he could reas
o pay all his debts. The burden of proof is upon
ase, and not on the assignee." The court refused t
truction, and instructed the jury "that the burd
roughout was on the plaintiff, but that the intent
might be inferred from their acts, and that if the co
the defendant was out of the usual and ordinary
ess, the statute made it *prima facie* evidence of the
tent of the parties." This instruction was correct.
plaintiff had the affirmative upon each of these pro
nd the burden rested upon him to prove them. *For*
02 Mass. 427.

e plaintiff proved that the transfer to the defendan
de in the usual and ordinary course of business o

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ankrupts, this fact would be *primâ facie* evidence of fraud; but
e burden of proof would not be changed. *Blanchard* v. *Young*.
Cush. 841. *Central Bridge Corporation* v. *Butler*, 2 Gray.
0. *Wilder* v. *Cowles*, 100 Mass. 487.
The instruction requested by the plaintiff was inconsistent with
e principles, and was therefore properly refused. The plain-
relies upon the case of *Toof* v. *Martin*, 13 Wall. 40; but the
dication in that case is not in conflict with the rule we have
. Some of the language of the opinion countenances a dif-
rule; but in the later case of *Wager* v. *Hall*, 16 Wall. 584,
rt have interpreted the decision to be in conformity to the
ablished principles adopted in the instructions in the case

Exceptions overruled.

lano, for the plaintiff.
Bassett, for the defendant.

M. WALKER & others *vs.* JOSEPHINE L. HILL.

pt. 29, 1875. — Jan. 3, 1876. AMES & DEVENS, JJ., absent.

a written contract with B., by which B. agreed to build a house and
nd do all the carpenter's work, and furnish all the material for a
afterwards ordered of C. in his own name, the windows and doors
e house and barn, and, after some of them were delivered and placed
A. called at C.'s shop to get the rest of the windows, and was told
d doubts of B.'s solvency, and had concluded not to trust him for
r that reason had withheld the remaining windows, and A. there-
e plaintiff to send the goods to B. and charge them to A., and
n for them. C. afterwards gave no credit to B., but wholly to A.,
or B. of the conversation, and afterwards delivered the goods to
ing them. *Held*, in an action by C. against A. that the jury were
t a that the promise sued on was a promise to pay the defendant's
promise to answer for the debt of another within the statute

goods sold. At the trial in the Superior Court,
., the jury found for the plaintiffs, and the de-
xceptions, the substance of which appears in the

d, for the defendant.

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M. P. Knowlton & C. L. Long, for the plaintiffs.

GRAY, C. J. The plaintiffs' right to recover is not disputed because the defendant is a married woman, or upon any other ground but that the contract sued on is a promise to answer for the debt of another, within the statute of frauds.

The evidence at the trial tended to show the following state of facts: In February, 1873, the defendant and one Warren entered into a written contract, by which Warren agreed to build a house and barn for the defendant, and to do all the carpenter's work and furnish all the material, for a gross sum. During the following summer, Warren ordered of the plaintiffs, in his own name, the windows and doors necessary for this house and barn. After most of these had been finished and delivered to Warren and placed in the buildings, the defendant's husband, acting in her behalf, called at the plaintiffs' shop to get the rest of the windows, and was informed by them that they had doubts of Warren's solvency, and had concluded not to trust him for the goods which he needed for the defendant's house, and for that reason had withheld the remaining windows; and the husband thereupon directed the plaintiff to send the goods to Warren and charge them to the defendant, and promised to pay for them. The plaintiffs, after this conversation, gave no credit to Warren, but wholly to the defendant, but did not inform Warren of the conversation, and afterwards delivered the goods to Warren as he called for them. The plaintiffs seek to recover the value of the goods so delivered after this promise of the defendant.

These facts warranted the jury in finding that the promise sued on was an express promise to pay the defendant's own debt, and not a promise to answer for any debt of Warren; and the case was submitted to them with appropriate and sufficient instructions.

Upon the facts which the evidence tended to prove, and which must have been found by the jury under the instructions of the court, the goods in question were sold directly to the defendant, and exclusively upon her credit. Even if the plaintiffs had previously agreed to deliver the goods to Warren, Warren had acquired no title in the specific goods, nor any interest in them which would prevent the plaintiffs from making a valid sale of them to another person. The plaintiffs could not indeed rescind their

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Warren without his consent. But if they utterly
e contract with him and sold the goods to another,
ommitted a breach of that contract, such breach,
n or unknown to Warren at the time, would render
damages to him and prevent their maintaining
inst him upon the contract. The fact that by their
h the defendant the goods were to be delivered
Warren was still their debtor for the price, and that
rges on their books were in the name of Warren,
usively showed that the defendant's promise was
ute, than in the ordinary case in which goods pur-
person are by him ordered to be delivered to an-
h case it is well settled that the seller may recover
rson ordering the goods, upon proof that they were
ered upon his exclusive credit and that any charge
r's books to the other person was made by mistake.
defendant is still liable to Warren under his build-
does not appear, and has no bearing upon this case,
nent in which Warren's right as against either party
way affected, except so far as the plaintiffs' recovery
on may afford Warren an additional protection. The
either party took by his own act, of further liability
n, affords no reason why the defendant should not be
e to the plaintiffs on the direct promise which she made
ficient consideration and with knowledge of all the cir-
nces. *Allen* v. *Leonard*, 16 Gray, 202. *Swift* v. *Pierce*,
en, 136. *Sinclair* v. *Richardson*, 12 Vt. 33 *Warnick* v.
olz, 3 Grant, 234. *Kutzmeyer* v. *Ennis*, 3 Dutcher, 371.
ett v. *Bates*, 4 Ala. 390, 392. *Exceptions overruled.*

JOEL KENDALL *vs.* AMELIA E. JENNISON & another.

npden. Sept. 27, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

ere a wife, whose husband has left the Commonwealth and remained absent therefrom, is sued as a *feme sole*, upon a debt afterwards contracted by her, the burden of proof is on the plaintiff to establish her liability.

husband left the Commonwealth remained absent therefrom, and six years after obtained a decree of divorce from his wife, for desertion, from a court of competent

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jurisdiction in the state where he then resided, and after due notice to her. The wife was afterwards sued, as a *feme sole*, for debts contracted after the husband's departure, and for others contracted after the divorce, and the case was submitted to the court upon an agreed statement of facts, with a provision that the court might draw such inferences from the facts as a jury might draw. There was some evidence tending to show an intentional abandonment of the wife by the husband at the time of his departure, but the wife did not appear in the divorce suit against her, and it did not appear that she made any objection to it. *Held*, that this court could not say, as matter of law, that the court below was not justified in finding as a fact that, up to the time of the divorce, there had been no such abandonment by the husband as would entitle the wife to be treated as a *feme sole*, and that she was liable for all debts contracted after the divorce.

CONTRACT against the members of the firm of Kendall & Jennison. The first count was on a promissory note signed by the defendants, dated September 11, 1869, and payable on demand. The other counts were on notes and accounts of a later date. Writ dated July 24, 1873. The defendant Jennison set up in her answer that, during the whole period of time wherein the alleged indebtedness was contracted, she was a married woman, the wife of one Edwin S. Jennison, and could not be held as a copartner. The other defendant was defaulted.

The case was submitted to the Superior Court on an agreed statement of facts, providing that the court might draw such inferences as a jury might draw, and being in substance as follows:

Amelia E. Jennison was married to Edwin S. Jennison at Keene, New Hampshire, about January 9, 1855. They lived together as husband and wife at Springfield, in this Commonwealth, for several years, until November, 1866, when said Edwin S. Jennison left Springfield and went to Charleston, South Carolina, where he has since remained in business, and most of the time as an officer in the custom house. He left Springfield on account of no dissatisfaction with his wife, but because he knew that she discovered evidence of his infidelity; he had private diseases, and she refused to cohabit with him longer Since leaving Springfield, he has contributed nothing to her support, and has never furnished funds for her to come to Charleston or elsewhere, and has made no request for her to do so.

The defendant, with her son, went by land to Charleston, and being detained outside the limits of the city by reason of fever or other disease, demanding quarantine, she communicated with

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husband, and he answered, refusing to come to them, on she returned to Springfield, after an absence of a few This visit was in August, 1871, and otherwise the defend- not been in the State of South Carolina.

S. Jennison, on February 22, 1872, filed a libel in a South Carolina, and on April 9, 1872, obtained a decree e from the defendant, for the cause of desertion. The as made by a competent court of said state, and Amelia notice of the application.

court was of opinion that the coverture was no bar to n, judgment was to be entered for the sum of $6674.98, erest from the date of the writ. If the court was of the that, by reason of the coverture, the plaintiff could re- nly for the indebtedness contracted subsequently to the the divorce, then judgment was to be entered for the sum 7.63, with interest from the date of the writ; otherwise, defendant.

ham, C. J., ruled that the plaintiff was entitled to recover said Amelia E. Jennison for that indebtedness only which ntracted after said divorce, and thereupon ordered judg- or the plaintiff against her in the sum of $1247.63, and ; and the plaintiff alleged exceptions.

Soule, for the plaintiff.

McIntire, for the defendant.

, J. This case was submitted to the court upon an agreed nt of facts, with a provision that the court might draw ferences from the facts as a jury might draw. The ques- fact to be decided was whether the husband of the defend- en he left this Commonwealth, intentionally and actually ed his marital rights and duties, and so far deserted and ed his wife that she was thereafter entitled to make con- s a *feme sole*. The general rule being that a married cannot make a contract or be sued, in cases where the ns of the statute having reference to her own property pply, it follows that the burden of proof is on him who charge her by reason of the exception here relied on.

e case at bar, there is some evidence tending to show an nal abandonment of the wife by the husband at the time eparture from the state in 1866. On the other hand, the

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case finds that in 1872 the husband obtained a decree of divorce from his wife for desertion, from a court of competent jurisdiction in the state where he then resided, and after due notice to his wife. It does not appear that she appeared in said proceeding, or made any objection to it. We cannot say, as matter of law, that the court below was not justified in finding as a fact that, up to the time this divorce was obtained, there had been no such abandonment by the husband as would entitle the wife to be treated as a *feme sole*, and that after the divorce she was liable for all debts contracted. *Gregory* v. *Pierce*, 4 Met. 478.

Exceptions overruled.

JOSEPH SHAW *vs.* LEVI HITCHCOCK.

Hampden. Sept. 28, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

A. and B., the owners of adjoining lands, entered into an indenture under seal, whereby either was to have the right to build a party wall one half on the land of each. The indenture also provided that "the adjoining party may at any time use as much of the wall as he may choose for the erection of any building, but before he or they may use any or all of said wall, he shall pay the other party an appraised value of so much of said wall as he shall thus use." At the time the contract was entered into, B. had a building, one story high, on his land, with three sides of brick and the fourth side of wood, resting, by permission, on A.'s land. B. took down the wooden side of his building, and A. built the wall four stories high, leaving spaces for the timbers of B.'s building, and B. adjusted the timbers into these spaces, and so fitted his building and used the party wall, but did not otherwise use it. *Held*, in an action by A. against B. to recover for the value of the wall so used, that B. had not used the wall in the erection of any building, and that the action could not be maintained.

CONTRACT to recover one half the value of a party wall, which it was alleged the defendant had used, and which had been built by the plaintiff under an indenture under seal executed by him and by the defendant on January 17, 1873, the material parts of which are as follows:

"This indenture witnesseth, that the said Shaw and the said Hitchcock, in consideration of one dollar, and in consideration of the benefits to be derived from the mutual agreements and covenants of each hereinafter contained, do hereby covenant and agree each with the other, that either party or their legal repre

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es may build a partition wall on the line between their
ve properties on Main Street, in said Springfield, as fol-
wit: Said wall shall be built one half on each side of
, the whole to be a solid wall with the exception of flues."
followed a description of the manner in which the wall
be built.] "Said wall shall extend in height above the
or in front on Main Street at least forty-five feet, and for
ce back from Main Street at least forty feet, at least the
ight, and to be thoroughly capped with stone or metal,
adjoining party or his legal representatives may at any
as much of the within described wall, as he or they may
or the erection of any building, but before he or they may
or all of said wall, he or they shall first pay the other
his legal representatives an appraised value of so much
all as he or they shall then use." [Then followed a pro-
regard to appointing appraisers.]

e trial in the Superior Court, before *Rockwell*, J., the
read the contract to the jury, and stated that he should
t the plaintiff built the wall described in the contract,
ally as therein required, one half upon the land of the
and one half upon the land of the defendant, four stories
ve Main Street; that the plaintiff and the defendant
oining owners of lands upon Main Street, the plaintiff
he piece of land formerly owned by the North Church;
defendant had upon his lot a store at the time the con-
made, which was constructed of brick on three sides,
able stone foundations, but upon the side adjoining the
it was framed of wood, and rested upon the land of the
the defendant having leased the right of the church,
e purchase of the land by the plaintiff, to construct said
the land of the church; that being thus situated it was
e for the plaintiff to build said partition wall and locate
vided in the contract, without destroying so much of the
t's building as rested upon the land of the plaintiff and
width of one half the location of the partition wall upon
he defendant; that said side and so much of the building
ecessary to locate the partition wall according to the con-
taken down by the defendant, and the rest of his build-
propped and sustained by him during the erection of the

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partition wall; that as the wall was erected, spaces were left for the defendant to adjust his building into the partition wall, and the defendant did so adjust his building and entered said wall with his timbers, and so fitted his building as to make and use the partition wall the south side of his building; that the defendant was present during the building of said wall, and made suggestions as to how the same should be built, which were complied with; that the plaintiff asked the defendant to pay him for one half the partition wall as named in said contract, used by the defendant as aforesaid, and the defendant refused to pay the same, or to submit to or have any appraisal; that the building of the defendant was one story high above Main Street at the time the contract was entered into, and the defendant has not made any additions to or alterations in said building except as hereinbefore related.

Upon this statement of the plaintiff's case the defendant asked the judge to rule that the plaintiff could not maintain his action, and the judge so ruled; but by consent of both parties reported the case, before verdict, for the determination of this court. If the ruling of the judge was correct, judgment was to be entered for the defendant; otherwise the case to stand for trial.

G. M. Stearns, for the plaintiff. The question is what is meant in the contract by the provision concerning the "use" "of the within described wall" "for the erection of any building." Either party had the right to build the wall one half upon the land of each. Whenever that was done it became, when used, one of the sides of any structure then on the premises or thereafter put on. It constituted, when used, as much a part of the erection of any building upon the premises as it would if a building of three sides had been moved by either party upon the land and affixed to the wall as its fourth side. It was so understood by the defendant, and he made but a temporary side to his store where the wall would be laid. He, before the wall was built, took down the south side of his building, leaving it incomplete as a building and made it into a complete building by using the partition wall as part of the erection. It is the clear intent of the contract that either party may build the wall and the other party shall pay for as much as he uses for the purposes of a building. If the defendant's construction is correct, he can put three more stories

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of his one story, assert that he is not erecting a
nly enlarging it or raising the roof, and pay noth-
pay nothing for the part included in this contro-
the support and chief expense of the whole.
or the defendant.
he contract which is relied on to support the plain
cover one half the value of the partition wall, must
by the actual condition of the property of the par-
the agreement was made. They owned adjoin-
plaintiff's lot was vacant. The defendant's lot
a building one story high, which was of brick on
the one next the plaintiff's lot. On that side it
and rested, by permission, on the plaintiff's land.
purpose was to erect a building on his own land
be four stories high. In doing this, it would be
move the wooden side of the defendant's building,
room for the partition wall located one half on each
rties thereupon agreed that either might build the
t the other might at any time use as much of it as
ose "for the erection of any building," paying to the
g the wall the appraised value of so much of it as
n use. This is followed by a clause restricting the
any building to be erected on either lot.
in interpretation of the contract is that the defendant
liability to pay for the value of the wall until he makes
of it in the future erection of some building, or of some
to the old one. He has erected no building since the
t was made. *Judgment for the defendant.*

HENRY M. GUILD *vs.* B. B. BELCHER & others.

pden. Sept. 28, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

promissory note, signed by one member of a partnership in the firm name, is
en in payment of debts, some of which were contracted before another mem-
came into the firm and the rest thereafter, and an action thereon by the payee
the note is defended by such other member alone, the plaintiff, in the absence

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of evidence of actual fraud on his part, or of knowledge when the party defending entered the partnership, is entitled to recover for such debts covered by the note as were contracted after he became a member.

COLT, J. The action is against a partnership upon a promissory note payable to the plaintiff, and signed by Henry Comstock, one of the members, in the partnership name. The answer is a general denial; and the plaintiff was required, as part of his case, to prove the consideration of his note. *Davis* v. *Travis*, 98 Mass. 222. Belcher, the only one who defends, relied on the fact that the note declared on was given by another partner in part for a debt contracted before he became a member of the firm.

The judge was asked by the plaintiff to rule, that if a specific part of the consideration was a debt contracted while Belcher was a member, for which Comstock was authorized to give a note, then the plaintiff could recover that part. The judge declined to give this instruction, and instructed the jury that if the defendant was a partner, yet if the note was given without the knowledge or authority of the defendant, partly for a debt of the partnership, and partly for the debt of the other partners before he went into the partnership, the plaintiff could not recover on the note. The plaintiff was entitled to the ruling requested by him.

There is nothing in the case to charge the plaintiff with actual fraud, or to show that he knew the time when Belcher became a member of the firm, and no evidence that Belcher was not a secret partner. The defence, upon the evidence, amounted to partial want of consideration. The ruling asked for assumes that the note was rightly made and delivered, so far as it was founded on a valid consideration; and the case is presented of a promise founded on two distinct considerations, only one of which is good, where there is no difficulty in making the apportionment. In such case the plaintiff is entitled to recover to the extent of the valid consideration. This was held in *Parish* v. *Stone*, 14 Pick. 198, where it was also held that the holder in such case recovers on the note and not on the original consideration, because otherwise the right to recover *pro tanto* would not pass to the indorsee by the transfer of the note. And an indorsee without notice recovers the full amount of the note against all who are members at the time it was given. *Loring* v. *Sumner*, 23 Pick. 98. *Hodg*

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, 100 Mass. 309. *Wintle* v. *Crowther*, 1 Cromp. *Lson* v. *Lewis*, 2 Man. & G. 197.

Exceptions sustained.

the plaintiff.

s & *M. P. Knowlton*, for Belcher.

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vs. HARTFORD FIRE INSURANCE COMPANY. HANOVER FIRE INSURANCE COMPANY. NGFIELD FIRE AND MARINE INSURANCE COMPANY.

29, 1875. — Jan. 4, 1876. AMES & DEVENS, JJ., absent.

ace against fire, which provided that it should be void if any in the title or possession of the property, whether by sale, trans- e, legal process or judicial decree, was made to the owner of an tion, payable in case of loss to the "mortgagee, as his interest The mortgagor afterwards conveyed his interest in the premises by to the mortgagee, and at the same time took back a bond for a re- he same to him, his heirs and assigns, upon the payment of a sum was the amount then due on his mortgage. The bond was not ac- recorded, and the insurer had no notice of the existence of either e bond until after the premises were destroyed by fire. After the de- deed and bond, and until the fire, the mortgagor occupied a part of without payment of rent, paid taxes, made repairs, controlled the oc- the other tenants, and until four months before the fire collected the paid them over to the mortgagee. After that the mortgagee collected but had nothing else to do with the premises. The debt secured by the mortgage had not been paid. The mortgagee brought an action to re- the loss by fire. *Held*, the Gen. Sts. c. 89, § 15, providing that an abso- veyance shall not be defeated or affected by an unrecorded defeasance "as any person other than the maker of the defeasance or his heirs or devisees, sons having actual notice thereof," that there was an alienation within the ng of the policy.

TIONS OF CONTRACT upon three policies of insurance on the building. The cases were tried together in the Superior t before *Colburn*, J. The jury returned a verdict for the tiff in each case; and the defendants alleged exceptions, so of which as is material to the point decided appears in the ion.

L. Soule, for the defendants.

P. Knowlton, for the plaintiff.

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COLT, J. All the policies upon which these actions are brought contained, in substantially the same words, a provision which makes them void if any change takes place in the title or possession of the property, "whether by sale, transfer or conveyance, legal process or judicial decree." They were made to Pomeroy, who was then the owner of the equity of redemption, and were "payable in case of loss to F. E. Foote, mortgagee, as his interest may appear."

After the policies were issued, Pomeroy conveyed his interest in the premises by quitclaim deed to Foote, the plaintiff, and at the same time took back a bond for a reconveyance of the same to him, his heirs and assigns, upon the payment of a sum named, which was just the amount then due on his two mortgages. The bond was not acknowledged or recorded, and the defendants had no notice of the existence of either the deed or the bond until after the fire.

After the delivery of the deed and bond, and until the fire, in November, 1873, Pomeroy occupied a part of the building without payment of rent, paid taxes, made repairs, controlled the occupation of the other tenants, and up to June, 1873, collected the rents and paid them over to the plaintiff. After that the plaintiff collected the rents, but had nothing else to do with premises.

The debts secured by the original mortgages had not been the securities were not taken up, and were not discharged, wise than as affected by the giving of the quitclaim deed and bond.

We are of opinion that Pomeroy's deed effected a change title and possession in the property insured, within the meaning of these policies. The absolute record title passed by it to plaintiff. He could convey the land, and give a good and feasible title as against Pomeroy. It was subject to attachment for his debts. He had all the rights, and was subject to all liabilities, of owner as to all persons but Pomeroy. In these respects, the plaintiff's power over the land was greater than that which he had before the deed, as mortgagee. On the other hand, Pomeroy parted with all power to convey as mortgagor, and all right to enforce or defend his title against a stranger. In these and other respects, he had not the same title which a mortgagor

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in equity under a recorded mortgage. The deed also a legal change of possession, notwithstanding ained in the occupation of part or the whole of

these considerations is not controlled by the sug- on the production of the unrecorded bond of de d would not in equity, as between the parties to o change the existing relation of mortgagor and s to give an absolute title to the grantee. The o the effect of the transaction upon a party with- has an interest in the property by virtue of a rance, and who has stipulated that no change of ade. The statute declares that an absolute con- not be defeated or affected by an unrecorded de- gainst any person other than the maker of the de- heirs or devisees, or persons having actual notice . Sts. *c.* 89, § 15; and it has been decided that one der such a conveyance, but who has given an unre- of defeasance under which his grantor remains in liable, as owner, to be proceeded against for damages ill act. *Hennessey* v. *Andrews*, 6 Cush. 170. The put solely upon the ground that by the statute the de- wholly inoperative and void against any person but r and his heirs or devisees, or persons having actual nd shows that the provisions are not to be restricted to ho are in some sense parties to the deed, or can claim nder it. And under a similar statute in Maine it was at a policy, which provided that any change in the title to operty should avoid it, was made void by the absolute deed e assured, though he took back a bond to reconvey which not recorded. *Tomlinson* v. *Monmouth Ins. Co.* 47 Maine,

Exceptions sustained.

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JOSEPH BRAINARD *vs.* GEORGE FOWLER.

Hampden. Sept. 29, 1875.—Jan. 4, 1876. AMES & DEVENS, JJ., absent.

A judgment of a court of general jurisdiction in another state may be proved by a duly certified copy of the "transcript of judgment," which simply contains a copy of the summons to the defendant to answer in a plea of trespass on the case in assumpsit; a return of the officer thereon, showing personal service on the defendant; a copy of the plaintiff's declaration and statement of his claim; a copy of the "continued docket entry," showing, under the names of the parties, the issuing of the summons, filing of the plaintiff's declaration and statement, and entry of judgment; and a copy of the "judgment docket entry," showing, under the names of the parties, the date of the judgment, the amount of the debt, and the amount of the costs.

In an action on a judgment obtained in another state, in which the record shows that the defendant was duly summoned to appear, evidence that the defendant did not owe the plaintiff anything is not competent on the issue whether service was made on the defendant, nor on the issue whether the claim in the other state was fraudulent; and the evidence is not made admissible by the fact that the officer, who appeared by the record to have made the service, testified that when he made the service the defendant said the claim was a just one.

CONTRACT upon a judgment recovered by the plaintiff against the defendant in the Court of Common Pleas of Luzerne County in the State of Pennsylvania.

At the trial in the Superior Court, before *Colburn*, J., the plaintiff offered in evidence a copy of the proceedings in an action brought by him against the defendant in said court, entitled "transcript of judgment," which contained the following: A summons to the defendant to answer in a plea of trespass on the case in assumpsit; a return of the officer thereon, certifying that he had served the writ upon the defendant by delivering to him a true and attested copy of the writ, and by making the contents known to him; the plaintiff's narr. or declaration, and statement of his claim, which was for whiskey sold and delivered to the defendant; a copy of the "continued docket entry," under the names of the parties, as follows: "Summons in trespass on the case in assumpsit, Exe't. 29 July, 1869. Same day narr. and statement filed. Summoned, 23 Aug. 1869. Judg't Sec. Reg. J. D. No. 18;" also a copy of the "judgment docket entry," under the names of the parties, as follows: "Date of Judg't, 23d Aug. 1869. Debt, $176.32. Costs, $12.10."

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dant objected to the introduction of said transcript ecause it was not properly authenticated; but as was waived at the argument, it is unnecessary to of the certificate annexed. He further objected, ained no sufficient record or statement of a judg- ication against the defendant. The judge over- ctions and admitted it in evidence.

e of the defendant was his own testimony alone, f a denial that he was ever served with any process the plaintiff in Pennsylvania. He testified that hotel keeper, and, at the time this alleged judg- vered, kept a hotel in Carbondale, Luzerne County, and continued so to do until May, 1870, and to ntil March, 1871, when he removed to Massachu-

ant offered to show, upon the issue of service, that ad no occasion to sue him, that he did not owe him the circumstances and details of the business he e plaintiff concerning the whiskey named in the mplaint in the Pennsylvania action; and that the d no claim upon him, and must have known such to The judge excluded the evidence, but permitted the to testify that he had had no dealings with the plain- h was the fact, but the defendant could not so testify. efendant then offered the same evidence upon the issue ulently procuring the judgment, and the judge again ex- the evidence. He also offered to show that while he ed in Pennsylvania, he had property in his own name could have been reached to satisfy a judgment, and that no pt was ever made to collect this judgment. The judge ex- d the evidence.

fter the defendant had testified, the plaintiff put in the depo- n of the officer named in the judgment record above named, e answer to the fourth interrogatory was as follows: "I met Fowler at that time and served a copy of a writ I had against in favor of one Joseph Brainard, and after I had served the t on him, said Fowler, he (Fowler) said the claim of Brainard for a bill of liquors, and that the claim was all right, and that ntended to pay for it."

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The defendant was then recalled, and testified that he had no such conversation with the deponent. He then offered to testify that in fact Brainard had no bill for liquors against him, and the claim was not in fact all right. The judge excluded the evidence. This was all the evidence in the case.

After the evidence was all in, the defendant asked the ju
rule that the introduction of said transcript or copy did n
a *primâ facie* case for the plaintiff, but the judge ruled tha

The jury found for the plaintiff; and the defendant all
ceptions.

G. M. Stearns, for the defendant. 1. The whole evi
stated, and it appears that the laws of Pennsylvania wer
the case. The effect of the record is to be judged, there
our own law, and it must show a "final judgment of the
and contain such statement as to imply "action of the ju
not merely of the clerk." *Knapp* v. *Abell*, 10 Allen, 4
the case at bar, the papers show no trial or default, or ass
of damages, or adjudication. It was, therefore, error to r
such a record made a *primâ facie* case for the plaintiff.

2. The court should have admitted upon the issue of
the evidence offered. The defendant is not "confined to
denial of the fact that service was made on him." He ma
"his relation to the parties and cause of action." *McDer
Clary*, 107 Mass. 501.

3. The evidence offered was competent upon the issue of
ulently procuring the judgment. The fact that the claim
which the judgment was obtained was groundless and fict
tended to show that the judgment was obtained by imposition
and misrepresentation. *Wilkinson* v. *Hall*, 6 Gray, 568.

4. It was competent to prove, in reply to the officer's deposition, what the facts were as tending to show which version of the disputed conversation was correct. *Commonwealth* v. *Howe*, 9 Gray, 110. The testimony of the officer was the narration of a confession of the existence of facts that bore upon the question of service. The defendant was entitled to prove that those facts did not exist, and to show that the bill was not all right and one that was a fair cause of action. *Commonwealth* v. *Howe*, 2 Allen, 158.

H. B. Stevens, for the plaintiff.

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J. It is not now denied that the record of the mmon Pleas for Luzerne County in the State of offered in evidence by the plaintiff, was duly acording to the statutes of the United States and of wealth. U. S. Sts. 1790, c. 11; 1804, c. 56. Gen. 1. It is not extended with the formality and accuin the records of our own courts, but it is sufficient nd contains all the essential requisites of a judicial ows the parties to the suit, the subject matter of diction over the parties, a final judgment of the l sums in damages and costs and the date of the Knapp v. *Abell*, 10 Allen, 485. It was therefore ed in evidence.

at the trial in the Superior Court, that at the time nnsylvania was commenced and at the time judgwas rendered, both parties were residents of that ject to the jurisdiction of its courts. The record of uit shows that personal service was made upon the As the court had jurisdiction of the subject matter parties, the judgment was conclusive against the dePennsylvania, and it is difficult to see how he could, g to another state, acquire the right to impeach it by no service was made on him, or that it was fraudulently *Carleton* v. *Bickford*, 13 Gray, 591. *Ewer* v. *Coffin*, 23. *Hall* v. *Williams*, 6 Pick. 232. But it is not necesdecide that question. The Superior Court ruled that the made a *primâ facie* case for the plaintiff, and permitted fendant to introduce evidence upon the issues of service of riginal writ upon him, and of fraud in obtaining the judg-. Upon those issues, the defendant offered to show that he ot owe the plaintiff anything, and the court properly rejected evidence. It has no tendency to contradict the return of the er, whose duty it was to serve the writ without any inquiry the justice of the claim. The ground that the defendant not owe the debt should have been taken in the former suit. on this the judgment is conclusive, and the defendant cannot try the merits of the case, by alleging that it was fraudulently ained

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Nor was this evidence made admissible by the fact that Barton in his deposition stated that when he served the writ upon the defendant, the defendant said that the claim was all right and he intended to pay it. This statement was upon a point which was collateral and immaterial, and does not give the defendant the right to prove that there was no cause of action upon which the judgment was founded. The other exception to the exclusion of testimony that the defendant had property in Pennsylvania which might have been taken on the judgment, is not insisted on, and is groundless. *Tracy* v. *Maloney*, 105 Mass. 90.

Exceptions overruled.

LEONARD C. STETSON *vs.* GEORGE E. CURTIS.

Plymouth. Jan. 6, 1875. — Jan. 4, 1876. AMES, J., absent.

The owner of a large tract of land fronting on a road, through which land an open space of irregular width, varying from forty-eight to fifty-three feet, bounded on the sides by trees, fences and buildings, extended from the road back to other lands of the grantor, and was used for access to these lands, conveyed one of them by a deed containing the following clause following the description in the deed: "I hereby covenant, for myself, my heirs and assigns, that a carriage way at least twenty-five feet wide shall forever hereafter be kept open and unobstructed from said lot easterly to" the said road. In an action of tort by the grantee of the lot for the obstruction of the way, the defendant did not deny that the plaintiff was entitled, under this clause, to an unobstructed way at least twenty-five feet wide, but contended that no location of the way had ever been made under it, and asked the judge to rule that if a way twenty-five feet wide had since his occupation been always left open, he was entitled to a verdict. The judge declined so to instruct the jury, and instructed them that if, when the deed was given, a carriage way defined by visible objects had been previously located by the grantor, they might find that such way was intended to be secured to the grantee, although it was forty-five feet wide. *Held*, that this instruction gave the defendant good ground of exception.

TORT for obstructing a right of way. At the trial in the Superior Court, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

B. W. Harris & P. E. Tucker, for the defendant.

J. White & C. S. Sumner, for the plaintiff.

COLT, J. The rights of the parties in this case depend upon the construction to be given to a clause in the deed given in

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n Wales to Bela Keith, under whom the plaintiff
provides for a way across land now owned by the
the land then conveyed, and now owned by the
is in the following words: "I hereby covenant for
irs and assigns, that a carriage way at least twenty-
sh all forever hereafter be kept open and unob-
said lot easterly to the Boston and New Bedford
clause follows the description in the deed, and is
h parties as having the effect of a grant of a right
enant to the lot conveyed. The question is as to
d width.
lenied by the defendant that under this clause the
ntitled to an unobstructed way at least twenty-five
he contended that no location of the way had ever
nder it, and he asked the court to rule that if a way
eet wide had, since his occupation, been always left
entitled to a verdict. But the court instructed the
ance: First, that, as the way was not located by the
y should find that it had never been otherwise defi-
ed, then the plaintiff could not maintain his action,
had been deprived of a way at least twenty-five feet
his lot to the street. But, secondly, if, when the deed
, a carriage way, defined by visible objects, had been
y located by the grantor, they might find that such way
nded to be secured to the grantee, although it was forty-
t wide. Or, thirdly, if the way was not thus located, and
antee or the plaintiff, after he became owner, had appro-
d to his own use, under this deed, a carriage way of defined
, with the knowledge and acquiescence of the defendant or
e under whom he claimed, which had remained open for a
period of time, even if such way was forty-five feet wide,
jury might find that the plaintiff was entitled to a way of
t width.

The accuracy of these instructions depends upon the nature
l limits of the right acquired under the deed by the grantee
l his assigns. The deed is to be construed by applying its
ms to the situation and condition of the property at the time.
e grantor then owned a large tract of land, fronting on the
w Bedford road, through which an open space of irregular

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width, varying from forty-eight to fifty-three feet, bounded on the sides by trees, fences and buildings, extended from the street back to the lot conveyed. This space was used for access to the grantor's other lands, including the lot conveyed. A right of way was to be secured to the comparatively small lot then sold. If it had been intended to create a right over a way of defined limits already in existence, or to give a right to the grantee to locate a way, the appropriate words for the grant of such way would have been employed. Instead of that, the right is secured in the form of a covenant, which is allowed to have the effect of a grant only in order that the intention of the parties may not be defeated. The form thus adopted must be regarded as important in arriving at the true meaning of the deed and determining the character of the rights secured. By the terms of this covenant, as we understand it, the grantor undertakes, for himself, his heirs and assigns, always to keep open and unobstructed a way suitable for the use of carriages, which, if reasonably required for such use, may be more than twenty-five feet wide, but shall never be less than that. This gives some force and meaning to the words "at least twenty-five feet wide," and is inconsistent with the supposition that the grantor intended to devote the whole of the forty-five feet in width to the use of the proposed way, even if the whole was then used as a way for access to his other land. He has performed the contract if he keeps open the way described, and has the right to restrict the grantee or those coming under him to such a way whenever he chooses. A defined easement was created which was subject to this right of the owner of the servient tenement. *Rowbotham* v. *Wilson*, 8 [illegible] Cas. 348, 362. Gale & Whatley on Easements, 47. *Spencer's Case*, Smith's Lead. Cas. (7th Am. ed.) 137, and notes.

The case is not like *Salisbury* v. *Andrews*, 19 Pick. [illegible] There a right was given to pass through Central Court, a [illegible] which was laid out, had acquired a reputation, and was [illegible] by that name. It was thought not to be a forced construction to regard the term Central Court as including all that had been previously laid out, paved and fitted for the use of the [illegible] upon it. And it was held that the grant was of a way [illegible] and defined, and not of a convenient way to be subsequently defined.

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familiar rule that, when a right of way is granted with-
ned limits, the practical location and use of such way by
ntee under his deed, acquiesced in for a long time by the
will operate as an assignment of the right. *Bannon* v.
2 Allen, 128. But this rule, which is a rule of practical
ction adopted to ascertain the intent of the parties, will
permitted to defeat an intention fairly expressed in the
f the grant controlling the future location.

ew of the law thus stated, the second instruction should
e been given. The fact that the grantor had laid out a
fined by visible objects, if that way was forty-five feet
ould not necessarily justify the jury in finding that such
s the way intended by the parties to the deed. This
lefeat, as we have seen, the plain intention of the deed.
trial must therefore be ordered, and it is not necessary to
the other instructions. *Exceptions sustained.*

JOSEPH SIMPSON & another *vs.* JOHN DAVIS.

tol. Oct. 28, 1875. — Jan. 4, 1876. MORTON, J., absent.

n upon a promissory note, in which the declaration alleges that the de-
made the note, and the answer denies this and alleges an alteration, proof
efendant's signature is *prima facie* evidence that the whole body of the
tten over it is the act of the defendant, but the burden of proof is on the
to show that the note declared on was the note of the defendant.

RACT upon a promissory note, of which the following is a
$400. Fall River, Dec. 29th, 1873. For value received,
se to pay Abel R. Davis or order four hundred dollars,
terest, six months after date. John Davis." Indorsed,
R. Davis." The answer contained a general denial and
that "there has been a material alteration in said note
was given, if it shall appear it was given by the defend-

e trial in the Superior Court, before *Pitman*, J., without
the signature of the defendant was admitted, and there

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dence tending to prove the genuineness of the indorse
The plaintiffs thereupon rested.
defendant then offered evidence tending to show that the
six months after date" were not in the note when signed
ivered by him, but had been added since, without his
lge or assent. Testimony to the same point was also in-
l by the plaintiffs in rebuttal. The plaintiffs contended
burden of proof was on the defendant to establish and
id alteration, but the judge ruled "that the proof of the
e of a party to a note is *primâ facie* evidence that the
ody of the note written over it is the act of said party;
t such proof is merely *primâ facie*, that when, as in the
case, proper pleadings present the issue, the plaintiffs are
o prove affirmatively that the note declared on and put
f is substantially the note made by the defendant; and
hen proof has been offered by the defendant tending
material alteration, the burden of proof is with the
satisfy the court, or jury, upon the whole case, that
declared on was in substance and effect the note of
nt."
udge found for the defendant; and the plaintiffs alle
ns.
atheway & H. K. Braley, for the plaintiffs.
Morton, Jr. & J. M. Wood, for the defendant.
COTT, J. The plaintiffs allege in the declaration that
nt made the note declared on. This the defendant de
s that there has been an alteration of the note since it
If an alteration was made after its execution and w
defendant's consent, the note declared on is not the n
defendant. The plaintiffs must establish that it is
nt's note, and on this proposition the plaintiffs have
of proof throughout. The plaintiffs rely upon the wo
, C. J., in *Davis* v. *Jenney*, 1 Met. 221, 224: "that an
of the time was a material alteration, and that the burd
was upon the defendant to show the alteration." Th
ds are not here used in their technical sense, is evide
e paragraph that follows: "or perhaps to state this l
ion with a little more precision, the proof or admission
ature of a party to an instrument is *primâ facie* evide

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instrument written over it is the act of the party; and *ima facie* evidence will stand as binding proof, unless the nt can rebut it by showing, from the appearance of the ent itself, or otherwise, that it has been altered." In *Armsby*, 6 Cush. 314, it was held that the burden of as on the plaintiff to show that an interlineation was made he instrument was executed. The same rule applies as want of consideration is relied on as the defence to a ory note; the burden of proof is on the plaintiff, upon the vidence, to establish that fact. *Delano* v. *Bartlett*, 6 Cush. *Morris* v. *Bowman*, 12 Gray, 467. *Powers* v. *Russell*, 13 9, 76. The ruling at the trial was correct.

Exceptions overruled.

NATHANIEL K. JOHNSON *vs.* IRA G. BEAN.

an. 28, 1875. — Jan. 4, 1876. AMES, J., absent. ENDICOTT, J. did not sit.

l of a writ of entry, the demandant claimed title to the land in question f a lot conveyed by A. to B., and by B. conveyed to him. At the time of hese conveyances, the land demanded was separated from the rest of the veyed by a substantial fence extending across the rear of the lot. The ten- elling-house stood upon it, and there was no fence between it and the ten- oining lot in the rear, but the whole was used as one house lot in the ex- and actual possession of the tenant, which was adverse, under a claim of n and notorious. The title which A. had in the premises was acquired by n deed from the tenant and by the foreclosure of a mortgage while in his hich had been assigned to him. At the time of the quitclaim deed, A. session of the premises to the tenant under an agreement of purchase, as soon given up, and possession was taken by A. of all except the strip of dispute. The mortgage was foreclosed before A.'s deed to B. *Held*, as- that the deeds included in their descriptions the land in question, that the in those deeds were disseised, and that nothing passed by them.

OF ENTRY to recover a parcel of land in Haverhill. *l disseisin*. At the trial in the Superior Court, *Wilkin-* ruled that the demandant could not maintain the action, the jury to return a verdict for the tenant, and reported for the consideration of this court. So much of the case terial to the point decided appears in the opinion.

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J. W. Perry, for the demandant.

N. C. Berry, for the tenant.

COLT, J. The demandant claims title to the land in question as part of a lot conveyed to one Carlton by one Stowell, and by Carlton conveyed to him. At the time of each of these conveyances, the land demanded was separated from the rest of the land conveyed by a substantial fence extending across the rear of the lot · the tenant's dwelling-house was in fact located upon it; and there was no fence between it and the tenant's adjoining lot in the rear, but the whole was used as one house lot, then in the exclusive and actual occupation and possession of the tenant. This possession the case shows was adverse, and under a claim of title, it was open and notorious, and must be presumed to have been known to the rightful owner. If it had continued for a sufficient time, it would have ripened into a good title by presumption of grant. *Samuels* v. *Borrowscale*, 104 Mass. 207. *Parker* v. *Proprietors of Locks & Canals*, 3 Met. 91, 100. *Boston & Worcester Railroad* v. *Sparhawk*, 5 Met. 469.

The title which Stowell had in the premises was acquired, as it is claimed, by quitclaim deed from the tenant, and by the foreclosure of a mortgage while in his hands, which had been assigned to him. For the purposes of this case, we assume, without deciding, that these deeds and the deeds under which the demandant claims title include the demanded premises in their several descriptions. And yet the demandant fails to show title, because, at the time of the delivery of the deeds under which he claims, the grantors were disseised, and, by a familiar rule, no title passed.

It is no answer to this, that, at the time of the tenant's quitclaim deed to him, Stowell gave possession of the premises to him under an agreement of purchase; for the uncontradicted testimony in the case shows that this arrangement for a repurchase was soon given up and possession taken by Stowell of all except the strip of land in dispute. The mortgage was foreclosed, and the alleged permissive character of the tenant's occupancy was terminated before Stowell's deed, which was a warranty deed, with full covenants of title. The rule that a mortgagor or one claiming under him cannot disseise a mortgagee is not to be applied, because Stowell had then become absolute owner by an

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ible title, and it is well settled that a grantor may dis-
grantee. *Stearns* v. *Hendersass*, 9 Cush. 497. *Barry* v.
3 Allen, 493.

disseisin on which the tenant relies derives its character
d was the necessary result of a mistake as to the bounds
ect of the several deeds; and although it would not be
t as against a mortgagee's title, or while a relation of ten-
isted, yet, when the mortgage title becomes absolute and
ancy is ended, there is no reason why it should not be held
l to defeat the title of the demandant.

hese reasons we see no ground for disturbing the ruling
Superior Court. *Judgment on the verdict*

GEORGIANA A. MONIES *vs.* CITY OF LYNN.

Nov. 3, 1875. — Jan. 3, 1876. COLT & MORTON, JJ., absent.

n against a city to recover for injuries occasioned by a defective highway, that a boy sixteen years old, who had been employed to light and extin- street lamps, and had received a general direction from his superior to the gas at midnight, was told of the existence of the defect just before the and as he was in the act of extinguishing the lights, and that, although he put out the lights and neglected to barricade the spot, will not warrant in finding that the city had notice of the defect.

an action against a city to recover for injuries occasioned by a defective , the issues are whether the defect had existed for twenty-four hours, and the city had notice of the defect, and the jury find specially that the de- existed for twenty-four hours, and return a general verdict for the plain- within the power of the judge to set the special finding aside, and to per- general verdict to stand.

for personal injuries occasioned by an alleged defect in
ay in the defendant city.

e trial in the Superior Court, before *Brigham*, C. J., it
d that a sidewalk caved in in the night-time, and that
n hour and a half afterwards the plaintiff, while in the
of due care, fell into the hole. The plaintiff claimed to
on the ground that the sidewalk had been undermined for
four hours, and also on the ground that the city had no-
the defect. The evidence on the last point appears in the

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opinion. The jury found specially that the defect had existed for twenty-four hours, and returned a verdict for the plaintiff. The judge set aside the special finding, but refused to set aside the verdict. The defendant alleged exceptions to the refusal of the judge to rule that the evidence of notice was not sufficient to entitle the plaintiff to a verdict, if the defect had not existed for twenty-four hours; and the plaintiff alleged exceptions to the order setting aside the special finding.

E. T. Burley, (*E. J. Sherman* with him,) for the plaintiff.

S. B. Ives, Jr., for the defendant, was not called upon.

AMES, J. Upon the assumption that the presiding judge, in the exercise of his discretion, had the right, if he thought justice so required, to set aside the special finding of the jury upon the question whether the defect in the street had existed for the space of twenty-four hours at the time of the accident, the only remaining ground upon which the plaintiff's claim could be maintained would be that the defendant city had had reasonable notice of the defect. The evidence upon this point was that a boy of the age of sixteen years, who had been employed to light and extinguish the street lamps, and who had received a general direction from his superior to shut off the gas at midnight, was told of the existence of the defect just before the accident, and as he was in the act of extinguishing the lights. The plaintiff does not claim either that there was notice to any proper officer of the city whose duty it was to attend to municipal affairs, or that notice to the city can be inferred in this case from the notoriety or long continuance of the defect. It is to be remembered that the defendant was under no legal obligation to cause its streets to be lighted for the security of travellers; *Randall* v. *Eastern Railroad*, 106 Mass. 276; and there is no complaint that a general regulation for shutting off the gas at midnight was unreasonable or improper. The lamplighter was merely a laborer, employed to do a specific thing, intrusted with no discretionary power, and under no responsibility except to act in obedience to orders. The case differs from one in which workmen are employed by the city to make excavations in a street for the construction of a sewer or the laying down of water or gas pipes, or for repairs of the way. In such cases, the act of breaking up the street or way is the act of the city, and the negligence of the

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n in placing suitable lights or barriers is the negligence
ity. There is no occasion to prove actual notice to a city
of its own acts, or of acts which are constructively its
Brooks v. *Somerville*, 106 Mass. 271.

is a mistake to say that the extinguishment of the light
particular time was the act of the city, in such a sense as
with it the responsibility for the accident which ensued.
ty authorities were not bound to keep a light at all, they
t wrongdoers in keeping no light after midnight. If they
t off the gas by closing a valve at some point remote from
e of the accident, it would not be claimed that they
became responsible for the injury that followed. The
the lamplighter was merely a part of the machinery for
ishing the same end. Nothing was left to his judgment
condition of the street, or the necessity of erecting bar-
taking any other precautions for the safety of travellers.
o him, therefore, was merely the same in legal effect as
any other casual passer-by, having no responsibility or
he matter.

ink that it was within the power of the judge to set
special finding of the jury as to the length of time that
t had lasted. He could, if he thought justice required
et aside the verdict entirely, and his refusal to do so was
concession to the plaintiff. He thereby left to her a
o stand upon the only ground upon which he believed
ict could be sustained. As the whole includes all its
e power to set aside the entire verdict must carry with
wer to set aside any specific finding upon any separate
submitted to the jury; and there is nothing to show
as erroneously exercised on this occasion.

iff's exceptions overruled; defendant's exceptions sus-
ed.

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LYDIA C. TUTTLE *vs.* CITY OF LAWRENCE.

Essex. Nov. 8, 1875. — Jan. 4, 1876. COLT & MORTON, JJ., absent.

In an action against a city for injuries occasioned by a defective highway, if it appears that the plaintiff was driving at the time, and that there is an ordinance of the city prohibiting the driving of a vehicle in the streets of the city at a greater rate of speed than six miles an hour, the burden of proof is on the plaintiff, upon the issue of due care, to show that at the time of the injury he was not violating the ordinance.

In an action against a city for injuries occasioned by a defective highway, one issue was whether the plaintiff's horse was going at an improper rate of speed. A witness for the plaintiff testified, on cross-examination, that the horse was short-gaited, and looked as if he was travelling faster than he really did go. The defendant then asked the witness "What was his speed?" not for the purpose of showing the specific speed at the time of the accident, but to show the horse's ability for speed, and to control the testimony of the plaintiff's witness in cross-examination. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception.

In an action against a city for injuries occasioned by a defective highway, a witness who saw the plaintiff driving in a sleigh at the time of the accident, was asked if it was possible for the sleigh, at the angle it was crossing a railroad track, to have gone into an excavation, which was the alleged defect. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception.

TORT for personal injuries occasioned by an alleged defect in a public street in Lawrence, called Essex Street, which the defendant was bound to keep in repair. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions, in substance as follows:

The defect complained of was caused by the Merrimack Horse Railroad Company having laid tracks, under its charter and with the consent of the city of Lawrence, through Essex Street, said defect consisting of an excavation in the snow, caused by ploughing out the snow over said tracks for the purpose of running the cars of said company.

The plaintiff offered evidence tending to prove that on December 26, 1872, she was driving in a sleigh, the horse attached to which was driven by her son-in-law down Broadway, a street at right angles with Essex Street; that she turned from Broadway into Essex Street, and near the corner crossed Essex Street diagonally, and while so crossing, the right hand runner of her sleigh sank into the excavation over the right hand rail of said

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, by means of which the sleigh was upset and she was
She also offered evidence tending to prove that the
as driven at a moderate rate of speed, not exceeding five
hour.

lefendant contended and offered evidence that the horse
ven at a very much higher rate of speed, namely, at the
ten miles an hour, and that the injury received by the
was occasioned by driving at a high rate of speed, and
sleigh was upset by coming quickly round the corner of
treet and Broadway.

f the witnesses called by the plaintiff, on cross-examina-
tified, that the horse was what is called a short-gaited
nd that in travelling he looked as if he was going much
an he really did go, and that he could not be possibly
ster than at the rate of a mile in four minutes. The de-
counsel thereupon proposed this question to the witness:
was his speed?" Upon the plaintiff's objection, the
uld not permit this question to be answered. This evi-
s offered, not to show the specific speed of the horse at
of the accident, but to show the horse's ability for speed,
ontrol the testimony of the plaintiff's witness in cross-
ion upon that subject.

efendant called two witnesses who saw the plaintiff as
e into Essex Street, and saw the course in which she
oss said Essex Street, and they were asked if it was pos-
the sleigh, at the angle at which it was crossing the
have gone into the excavation aforesaid. The ques-
objected to, as incompetent in substance, and was ex-

efendant put in evidence an ordinance of the city, pro-
the driving of any vehicle through any of its streets at
ster than six miles an hour, and offered evidence tending
that at the time of the accident the plaintiff was driving
d much higher than that allowed by the city under said
e. Upon the matter of this ordinance, the judge ruled, at
tiff's request, as follows: "The burden is upon the plain-
tisfy the jury, by a fair preponderance of the evidence,
he time of the accident the driver of the vehicle was in
cise of due care, that is, such care as a prudent man in

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like circumstances would exercise; but if the defendant claims that the plaintiff is barred of her right to recover, by the fact that the driver of the vehicle was violating an ordinance of the city of Lawrence, the burden is upon the defendant to show the facts necessary to show such a violation."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. Saunders & C. G. Saunders, for the defendant.

W. S. Knox, for the plaintiff.

ENDICOTT, J. A city ordinance, prohibiting the driving of any vehicle in the streets of the city at a greater rate of speed than six miles an hour, is binding upon all persons driving within the city, as any statute or other law of the Commonwealth; and to drive faster than the prescribed rate is a violation of law. *Heland* v. *Lowell*, 3 Allen, 407. It appearing in this case that the city of Lawrence had passed such an ordinance, it was incumbent on the plaintiff to show that she was not violating it. If at the time of the accident she was doing an unlawful act, and that unlawful act contributed to cause the alleged injury, she was not in the exercise of that due care which she is obliged to prove in order to recover. The allegation of due care implies not only that the plaintiff was not negligent, but also that she was not acting in violation of law when the alleged injury occurred. The fact of due care on the part of the plaintiff was directly in issue; it was alleged in the declaration and denied in the answer. On that issue the plaintiff had the burden of proof, and if she failed to sustain the burden, she must fail in her action. *Bosworth* v. *Swansey*, 10 Met. 363. *Jones* v. *Andover*, 10 Allen, 18. *Wright* v. *Malden & Melrose Railroad*, 4 Allen, 283, 290. *Worcester* v. *Essex Merrimac Bridge*, 7 Gray, 457. We are therefore of opinion that the learned judge erred in ruling that the burden of proof was on the defendant to show that the plaintiff was violating the city ordinance by driving more than six miles an hour when she met with the injury complained of.

We see no ground of exception to the rulings on the admissions of evidence. It was clearly within the discretion of the presiding judge to limit the inquiry as to the speed that the horse was capable of going. *Stone* v. *Hubbardston*, 100 Mass. 49. It was offered to contradict statements elicited on cross-examination, and

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appear to have had any necessary bearing upon the rate
the horse was travelling at the time of the accident.
as it proper to ask a witness, who saw the accident, if it
ble for the sleigh, at the angle at which it was crossing
railroad track, to have gone into the excavation. The
was not asked to state what he saw, but to give his
s to what would happen or be likely to happen under
cumstances.
ruling on the burden of proof was erroneous, the entry

Exceptions sustained.

CHARLES C. HARVEY *vs.* IRA HUNT.

Nov. 8, 1875. — Jan. 4, 1876. COLT & MORTON, JJ., absent.

by the payee against the maker upon a promissory note, there was evi-
, before the making of the note, the plaintiff agreed to take thirty-five
f his debt and sign a composition deed, and that he afterwards deposited
with an attorney, to whom the defendant, induced by fear of an attach-
s property, paid a part of the whole claim in cash, and the rest by the
it; that the plaintiff afterwards signed a composition deed, by which the
agreed to take thirty-five per cent. of their claims, which was signed by
ially all" the creditors, and was to be void unless the compromise was
n seven days after the date of the deed. The plaintiff's signature to the
affixed after the expiration of the seven days, and his signature preceded
majority of the creditors who signed. The presiding judge instructed the
if, after the plaintiff agreed to sign with other creditors of the defendant
f composition, the plaintiff's attorney, by threats of an attachment, col-
the defendant in cash a sum equal to or larger than the sum agreed in
to be taken in discharge, and obtained the note declared on and delivered
laintiff, who in consideration that he had thus received the full amount
t, affixed his signature to the deed, the jury would be warranted in find-
he note was without consideration; that if there was no relation between
iff's signing the deed and the giving the note, and if this was an indepen-
ract for the payment of the defendant's debt to the plaintiff, irrespective of
ise to sign the same and of the act of signing, the note was for a good con-
. *Held*, that the evidence justified the jury in finding that the note was
on the understanding that the deed should be signed. *Held*, also, that
action was correct. *Held*, also, that the validity of the consideration was
ed by the object with which the contract was entered into, and not by the
f persons actually deceived by the plaintiff's signature.

RACT upon a promissory note, dated Haverhill, May 20,
ayable sixty days after date, to the order of the plaintiff,

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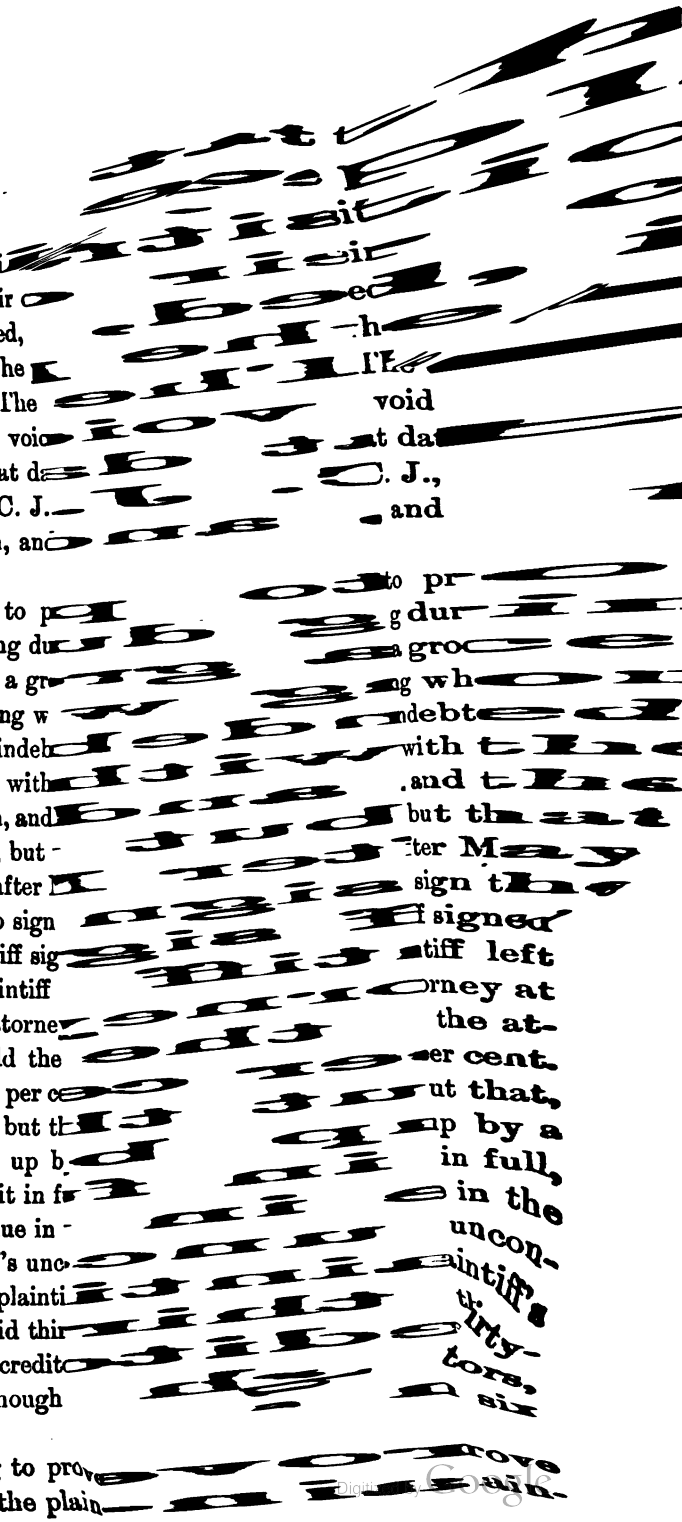
dant. The answer alleged that
on and fraudulent, and that the
rs who signed a deed of composi
cept thirty-five per cent. of their
f. By a copy of the deed annexed,
by forty-two creditors, and that the
inth in the list of signatures. The
and provided that it should be voi
paid within seven days from that d
perior Court, before *Brigham*, C. J.
he signed the note declared on, an
the jury and rested his case.
upon offered evidence tending to p
873, he became insolvent, having d
een engaged in the business of a gr
e proposed to his creditors, among w
ept thirty-five per cent. of his indeb
nent thereof; that the plaintiff with
fendant accepted this proposition, and
composition deed to this effect, but
was not affixed to the deed until after
e that time he orally agreed to sign
rs did so; that before the plaintiff sig
oral promise to sign it, the plaintiff
endant with H. N. Merrill, an attorne
llection; that the defendant told the
had agreed to receive thirty-five per c
m thus left, in payment thereof, but t
is grocery store would be shut up b
a suit upon said claim, he paid it in f
e half of it in cash, and the residue in
fterwards obtained the plaintiff's unc
deed in the place where the plainti
ein, and that the defendant paid thir
s indebtedness to all his other credit
ties to the composition deed, although
after May 14, 1873.
tal introduced evidence tending to pro
defendant's insolvency, he owed the plain



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e than $100, for flour sold him, through his selling agent,
ch; that when the defendant notified the plaintiff that
d not pay his debts, he referred him to Hatch, but did
ee conditionally or unconditionally to receive of him thirty-
cent. of his indebtedness to him, in full payment thereof,
gn the deed; that after May 24, 1878, the defendant came
laintiff, told him that he had received his pay in full, and
would oblige him if he would sign the said composition
r his accommodation, as the man who was to advance to
money to settle with his creditors would not do so, unless
is creditors signed the deed; that thus urged, the plain-
ed the same, having at the time the note declared on,
money paid by the defendant to Mr. Merrill, in his pos-

the foregoing evidence the case was submitted to the
here being no evidence beside the defendant's personal
y of the signing of the deed by the persons or partner-
ose names were affixed thereto, or of the agency of per-
earing to have signed the same as agents of persons or
hips, except the evidence afforded by the deed itself.
laintiff objected to all testimony of the parties as to con-
s prior to the execution of the deed by the plaintiff, ex-
as might refer to the note; and the testimony being in,
tiff suggested that there was no evidence connecting the
of the note with the execution of the deed, and moved
rdict be ordered for the plaintiff, and his motion being
d, thereupon requested the following instructions to the

That the execution of the composition deed set up in the
t's answer and produced in evidence, at any time after
ation of seven days from the date thereof, cannot bind
y so executing it to the terms thereof.
That said deed was null and void, unless all the creditors
unt had executed it, and had been tendered the several
presenting thirty-five per cent. of their respective claims
even days from and after the date thereof.
That the reception of the note before such execution could
fraud upon the other creditors, such as could defeat the
's recovery in this action.

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"4. The fact that one of the creditors never executed said deed, vacates the same as to all who have executed it, unless with knowledge of such fact they afterward ratified it.

"5. Unless the defendant made the note declared on, upon condition that the plaintiff would afterward sign the deed, there is no fraud on the part of the plaintiff that can vitiate the note.

"6. That no verbal promise that the plaintiff would take this five per cent. and sign the deed, if any such were made by is to be considered, unless such promise were made condi upon the making the note in suit.

"7. That the plaintiff having received this note several before he signed the deed, nothing short of an express prom his part to sign the deed after the receipt of the note can affect such note with fraud."

The judge refused to give these instructions, and instructed the jury as follows: "If after the plaintiff had agreed to sign, with other creditors of the defendant, the deed for the composition of the defendant's debts, the plaintiff's attorney, by threats of suit or attachment of his property, collected of the defendant in cash a sum equal to or larger than the sum agreed by said creditors in said deed, to be taken in discharge of their claims, and obtained the note declared on, and delivered the same to the plaintiff, and the plaintiff, in consideration of the fact that he had thus received the full amount of his debt in cash and notes, affixed his signature to the composition deed, the jury would be warranted in finding that the note was without consideration. *If* there was no relation between the plaintiff's signing the composition deed and the giving the note declared on, and if this was an independent contract for the payment of the defendant's debt to the plaintiff, irrespective of any promise to sign the same and of the act of signing, the note was for a good consideration. The fact that the deed was signed by substantially all, but not by every one, of the defendant's creditors, or that the plaintiff did not sign the same until after May 14, are not material facts affecting this question of consideration of the note declared on."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the instructions given, and to the refusa to rule as requested.

H. N. Merrill, for the plaintiff.

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Locke, for the defendant.

ENS, J. The presiding judge did not assume, as the plain- tends, but submitted to the jury the question whether the re of the plaintiff to the composition deed was obtained nent to him in full of his debt in cash, and by the note

If this question was answered affirmatively, they were l that they would be warranted in finding that the as without consideration, while they were cautiously in- l that if there was no relation between the plaintiff's sign- composition deed and the giving the note declared on, t if this was an independent contract for the payment of endant's debt to the plaintiff, irrespective of any promise the same and of the act of signing, the note was for a nsideration.

e was evidence of the previous oral agreement by the plain- ke thirty-five per cent. of his debt, and of the subsequent by him of his claim with the attorney, and of the pay- fifty per cent. cash, and the delivery of the note in suit by ndant, induced by fear of an attachment, and of the sub- signature of the composition deed by the plaintiff. This ly connected the execution of the deed with the making ote, and while there was no direct evidence of any under- or agreement between the parties that when it was so e deed should be executed, these circumstances, if they ved, justified the jury in finding its existence.

these facts the instructions were also correct. The t of money by a debtor to some of his creditors in order e them to execute a deed of composition is a fraud upon creditors who sign it, as they become parties upon the nding that all are to receive the same amount, and are ed each by the other to believe that the composition is a just one. A private arrangement by which the influence as expressed by his signature, is bought by promises of ge peculiar to himself, operates to deceive all others. No therefore to pay money, or to do any other valuable n such consideration, can be enforced, and however formal rument may be by which it is expressed, parol evidence s admissible to show the fraud and thus avoid it. *Case ish*, 15 Pick. 49. *Ramsdell* v *Edgarton*, 8 Met. 227.

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ing, 8 Cush. 382. *Partridge* v. *Messer*, 14

e instrument become void when the plaintiff
hose who had signed it previously to May 14
itled to be released from it, if they so dema
e failure to pay upon that day, it was entirely
m to waive this provision, and, as they receive
cent. provided for by it, it must be deemed
would operate to reaffirm their signatures.
ho signed after May 14, who were apparent
as shown by their signatures after that o
signatures would clearly indicate a waiver of
day.
he deed was not signed by all, but only by
the creditors, this cannot make the consider
od. Its validity is to be tested by the object
ntract was entered into, and not by the numb
ly deceived by means of it. *Gibbs* v. *Smith*,
ven if creditors might have been entitled, e
ayments were not made on May 14, or becau
the deed, to be released from the proposed
would not affect the case. It is shown, howe
was so largely signed that the composition was
the plaintiff's signature, which was obtained
rivate advantage which he sought to secure by
nt, was in fraud of the just rights of those who
uced either to enter into or to complete the tr

cussing each of the numerous rulings requested
of which do not seem to have been called for
h appear on the bill of exceptions, the conside
we have adverted require us to hold that no er
d in either those given or in refusing those wh

Exceptions overruled.

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H. PRESCOTT & another *vs.* GEORGE BATTERSBY & another.

Nov. 5, 1875. — Jan. 4, 1876. COLT & MORTON, JJ., absent.

ision of the Gen. Sts. c. 49, § 131, that cities "may from time to time establ-h ordinances as they deem expedient, with suitable penalties, respecting the ıment of surveyors of lumber therein," is not compulsory upon a city whose provides that it may establish such ordinances; and if such city fails to pass dinances, it still has the duty, under the Gen. Sts. c. 18, § 31, and c. 19, § 2, ointing surveyors; and if, such ordinances not being passed, surveyors of are yet appointed, and lumber is sold without being surveyed, numbered rked, as required by the Gen. Sts. c. 49, § 143, the sale is void.

of 1875, c. 153, applies only to sales of goods, wares and merchandise, by and measures, and not to sales of lumber.

RACT for goods sold and delivered. The case was sub-to the Superior Court, and, after judgment for the defend- this court, on appeal, on the findings of an auditor, ere to be taken as an agreed statement of facts, and were ance as follows:

laintiffs were, when the items set forth in their bill of ars were sold and delivered, dealers in lumber in Law- this Commonwealth. The sales declared on were made ence. A part of the items declared on are boards and on lumber sold and delivered by the plaintiffs to the de-. All of said boards and dimension lumber were brought state from other states of the Union by the plaintiffs for the city of Lawrence, and were sold by the plaintiffs to endants, as to quantity or measure, by the surveyor's so called, on the boards and lumber, put on before said and boards were brought into this state. Said boards ension lumber were not surveyed, measured or marked rveyor or other person in this state, or by any person hav- authority or appointment under the laws of this state.

on 15 of the city charter of the city of Lawrence provides e city council may make by-laws with suitable penalties inspection, survey, measurement and sale of lumber, wood, l bark, brought into the city for sale. The city council of of Lawrence has never made any by-laws under said sec- its charter, nor any by-law, regulation or ordinance what-

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ever for the inspection, survey, sale or measurement of lumber, but said city council has annually, for several years, in the manner and form provided by the city charter and by-laws for the election of officers generally, duly elected officers designated as surveyors of lumber in the city of Lawrence, who, after being sworn by the city clerk to faithfully and impartially discharge their duties as surveyors of lumber in the city of Lawrence, have acted as practical surveyors of boards and other lumber in said city when called upon so to do, and at the time of the sale of said boards and dimension lumber by the plaintiffs to the defendants there were such duly elected and sworn officers in the city of Lawrence.

If the above facts are a bar to the plaintiffs' claim, then at the date of the writ there was nothing due the plaintiffs from the defendants. If said facts are not a bar, there was due the plaintiffs from the defendants, at the date of the writ, the sum of $1577.48.

W. S. Knox, for the plaintiffs.

E. T. Burley, for the defendants.

ENDICOTT, J. Towns are required at their annual meetings to choose one or more surveyors of lumber. Gen. Sts. *c.* 18, § 81. The provisions of this section apply to cities, so far as they are not inconsistent with the general or special provisions relating to cities; and the city council of a city has the power of a town, subject to this restriction. Gen. Sts. *c.* 19, § 2. By the Gen. Sts. *c.* 49, § 131, cities, except those mentioned in § 126, "may from time to time establish" ordinances with suitable penalties respecting the appointment of surveyors of lumber. And the city charter of Lawrence, St. 1853, *c.* 70, § 15, also provides that the city of Lawrence may establish such ordinances.

It appears from the record that the city of Lawrence has never passed any ordinance on this subject, but that it has annually elected surveyors of lumber, who have acted in that capacity, and that, at the time of the sale in question, there were in Lawrence such officers duly elected and sworn.

The lumber for which the plaintiffs seek to recover in this action was not surveyed, marked or numbered as required by the provisions of the Gen. Sts. *c.* 49, §§ 132–144; but the plaintiffs contend, that, as the city of Lawrence had passed no ordinances

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ıbject, the sale does not come within the provisions of
ɔter.

his position is not tenable. It was evidently the object
egislature to establish, by general law, uniform regula-
pecting the sale of lumber, and to impose upon all cities
ns the duty of electing surveyors. The provision that
ay pass ordinances on the subject with suitable penalties
ɔmpulsory; and if a city fails to pass such an ordinance,
has the duty of electing surveyors, and the provisions
Gen. Sts. *c.* 49, apply to sales of lumber within its

one who sells lumber brought into the state for sale, and
is not surveyed, marked and numbered as required by the
e, is subject to the penalty imposed in § 143. This penalty
s a prohibition to sell except as provided in the statute, and
laintiffs cannot recover the price of the lumber sold in vio-
of these provisions. *Miller* v. *Post*, 1 Allen, 434. *Libby*
ney, 5 Allen, 299. *Sawyer* v. *Smith*, 109 Mass. 220.
St. of 1875, *c.* 153, has no reference to sales of lumber,
sales of goods, wares and merchandise by weights and
res; if it had, as contended by the plaintiffs, it can only
to sales made after its passage.

Judgment for defendants.

CHARLES P. BRIGHAM *vs.* TRUE W. TOWNSEND.

Suffolk. June 24, 1875. — January 4, 1876.

a contract, who agrees for a specified price to convey a good and clear
parcel of land, free from all incumbrances, except a mortgage of three
e fourth cents per square foot, cannot maintain an action at law upon the
for the refusal of the other party, who has agreed to buy the land on these
o complete the purchase, if it appears that the land is subject to a mort-
four and one quarter cents per square foot, although he tenders with the
e difference in money between the incumbrance mentioned in the agree-
ad that existing.

TRACT upon an instrument under seal, dated October 24,
and signed by the parties, whereby the plaintiff agreed to

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sell and the defendant to purchase five lots of land, for a price named, the land to be conveyed "on or before December 1, 1872, by a good and sufficient warranty deed, conveying a good and clear title to the same, free of all incumbrances, except a mortgage of three and three fourth cents per square foot on each of said lots, No. 27, 28 and 29," and certain specified incumbrances on the other lots.

At the trial in the Superior Court, before *Pitman*, J., the defendant testified that he gave the plaintiff notice that he should not carry out the trade before the time when it should have been consummated; but the plaintiff testified that the defendant never gave him any notice that he should not carry out the trade, and that he had no notice to that effect from the defendant; that he went to the defendant's place of business three times on Saturday, November 30, with deeds properly executed, and with money to tender the same to the defendant, and to request him to fulfil his contract, but did not find him in, and did not seek him elsewhere; that on Monday, December 2, he went to defendant's place of business, and found him in, and then tendered him the deeds and money; that the defendant refused to accept the same, and then told him, for the first time, that he should not carry out the trade, alleging false representations on the part of the plaintiff as the reason therefor.

The plaintiff admitted that there was a mortgage on lots 27, 28 and 29 amounting to four and one quarter cents per square foot, but testified that he took with him, and tendered to the defendant the difference between three and three fourth cents and four and a quarter in cash.

The defendant asked the judge to instruct the jury as follows: "1. That the plaintiff should have tendered the deeds on Saturday, November 30, December 1 being on Sunday, and he was bound to seek the defendant at his place of residence and make his tender there, and that it was too late for him to make his tender on Monday, December 2.

"2. That it was incumbent upon the plaintiff to establish his case, and to do so he was bound to prove that the premises were free from all incumbrances except those mentioned in the agreement, and that, as the incumbrance exceeded three and three fourth cents per foot on lots 27, 28 and 29, at the time he made

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the tender therefor, he did not comply with the terms of the agreement, and cannot recover in this action."

The judge refused so to rule, but instructed the jury that if the plaintiff went to the defendant's place of business on Saturday, November 30, in business hours, and was prepared to tender is deed, and the defendant was not in, he was not obliged to eek him elsewhere, and that a tender on Monday, December 2, as a good tender. Also, that, if the plaintiff tendered the dendant the deeds and the difference between three and three urth cents and four and a quarter cents per square foot in cash, was a substantial performance of the contract and he would be itled to recover.

The jury returned a verdict for the plaintiff; and the defend- alleged exceptions to these rulings.

C. H. Chellis, for the defendant.

L. W. Howes & *F. W. Kittredge*, for the plaintiff.

AMES, J. The objection that the tender of the deed by the intiff was not seasonably made cannot be sustained, and was not ied upon at the argument. But the discrepancy between the ual amount of the incumbrance upon a portion of the land ich the plaintiff was to convey and its amount as described in contract raises a more serious question.

A portion of the land which the plaintiff was to convey subject a mortgage of three cents and three quarters of a cent per foot oves to be subject in fact to a mortgage of four and one quarter nts per foot. It does not appear that the mortgage has become e, so that by paying the excess it would be in the power of the aintiff literally to fulfil his contract, and give the exact title hich he had bound himself to give. In a suit at common law, d in a case of mutual and dependent stipulations, where the aintiff is himself unable to fully carry out the contract on his wn part, he cannot compel the defendant to accept an equivant. The defendant is entitled to have what he contracted for. purchaser will not be compelled to take a doubtful title, or one ubject to incumbrances more onerous than those stated in the ontract. The equivalent which the plaintiff offers is the payment of a sum of money into the defendant's hands, under circumstances which might impose upon him the duty of holding it in trust, to be applied upon the mortgage at its maturity. But how

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ay be, the law will not compel him to acce
a substitute for the original contract; and i
t for the court, to decide whether the prop
atisfactory. *Exceptions susta*

ELIZA D. MAYO *vs.* URIAH K. MAYO.

SAME *vs.* SAME.

ovember 19, 1875. — January 4, 1876. COLT, J., a

a libel by a wife for divorce from her husband on the g
usband was permitted, without objection, to show in expla
at he had received an anonymous letter, but was not per
nts of the letter in evidence. *Held*, that he had no grou

a libel by a wife for divorce from her husband on the g
libellant contended that the husband had committed adult
evidence tending to show that he and A. were found togeth
a hotel in the night-time, under circumstances which just
dulterous intercourse. The husband contended and put in evid
w that he was at the hotel in his professional capacity as a det
bellant, A. and a private detective, had formed a criminal conspi
to the hotel and place him in an equivocal position with A. so
evidence of adultery. The husband called A. and asked her if
n spoken of as being in the hotel with him. She declined to an
that it would tend to criminate herself, and the judge instructed
ot obliged to do so. He then asked her a number of questions w
without objection, and which, so far as relevant, would furnish l
evidence tending to convict her either of adultery or criminal
then declined to answer further. The judge then instructed h
more fully than at first, and inquired of her if she had fully un
She replied that she had not. *Held*, that it was within the discre
ng judge to allow the witness then to claim her privilege, an
ence already given to be struck out of the case.

of a witness is struck out of the case, on the ground of her mi
her privilege as a witness, the party calling her cannot put in
r admissions to contradict her, under the St. of 1869, c. 425.

a libel by a wife for divorce from her husband on the ground
woman with whom the husband was charged with having had ad
urse was called by the libellee as a witness, testified, and her te
rwards stricken out on the ground of her misapprehension of
witness. She was then asked by the libellee, "Whom she had
n she had been in conversation since the adjournment of the cou
before. The judge ruled that the libellee might show any conv
he libellant or any agent of hers, but beyond this the question w

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immaterial. *Held*, there being no testimony of the witness in the case to be contradicted by such conversations, that the ruling was correct.

On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the woman with whom the husband was charged with having had adulterous intercourse was called by the libellee as a witness, testified, and her testimony was afterwards stricken out because of her misapprehension of her privilege as a witness. The libellee argued to the jury, without any adverse ruling being made, that he had done all he could to get the woman as a witness and to make her testify as to the facts. The judge in his charge stated that the case must be considered as if the woman had never been put upon the stand. *Held*, that this expression in the charge gave the libellee no ground of exception.

MORTON, J. The libellant brought two libels for divorce, one ging extreme cruelty, the other adultery, which were tried ether.

The only exception in the case for cruelty was to the exclusion the court of the anonymous letter offered by the libellee. fact that he had received an anonymous letter was put in by , without objection, in explanation of his conduct. The letter not evidence of the facts stated in it, and, whatever were its tents, could not justify abusive treatment of his wife. It was tly rejected.

The other exceptions apply only to the libel for adultery. The libellant claimed that her husband had committed adul- with one Mrs. French, and put in evidence tending to show t he and Mrs. French were found together in the same room hotel, in the night-time, under circumstances which justified inference of adulterous intercourse.

The libellee claimed, and put in evidence tending to show, t he was at the hotel in his professional capacity as a dentist, d that the libellant, Mrs. French and a private detective, had med a criminal conspiracy to entice him to the hotel and place n in an equivocal position with Mrs. French, so as to furnish se evidence of adultery.

The libellee called Mrs. French as a witness. He asked her she was the woman spoken of as being at the hotel with him. e declined to answer, on the ground that it would tend to iminate herself, and the court instructed her that she was not bliged to do so. He then asked her a number of questions, hich she answered without objection. Those answers, so far as hey were of any materiality or relevancy in the case, would fur- ish links in a chain of evidence which would tend to convict her

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either of adultery or of a criminal conspiracy. She then declined to answer further. The court then instructed her as to her rights more fully than at first, and inquired of her if she had fully understood them. She replied that she had not, and the court, being satisfied "that she had not fully comprehended her rights, and especially that she had not understood that if she answered upon any subject having any tendency to criminate herself, she must answer fully and minutely both on examination and cross-examination in relation thereto, ruled that she might then claim her privilege, and that the evidence heretofore given by her, having been given under this misapprehension, should be struck out of the case," to which the libellee excepted. We are of opinion that this course of proceeding of the presiding justice was not open to exception.

It is within the discretion of the court, and the usual practice, to advise a witness that he is not bound to criminate himself, where it appears necessary to protect the rights of the witness. If, after having advised him generally, it appears to the presiding justice that the witness intends to insist upon his privilege, but does not fully understand his rights, it is competent for him to instruct the witness fully as to them, otherwise the witness might be entrapped into a position where his privilege as a witness would be entirely defeated through his ignorance, and he would be obliged fully to criminate himself. *Foster* v. *Pierce*, 11 Cush. 437. *Commonwealth* v. *Price*, 10 Gray, 472.

In the case at bar, therefore, it was competent for the presiding justice, after the witness had made some answers tending to criminate her, if he was satisfied that she had answered ignorantly and in misapprehension of her rights and duty to the court, to instruct her more fully and to advise her that she was not obliged to answer further. And it necessarily followed that such answers already given should be stricken out. The libellant could have no right to cross-examine the witness in regard to them, and the only way to preserve the rights of all parties was to strike them from the case, as inadvertently and improperly admitted.

As the answers thus excluded embraced all the testimony of Mrs. French which had any bearing upon the case, the court properly directed that her whole testimony should be considered

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the case. This being so, it is too clear to need any dis
that the libellee could not put in her declarations or
ns, to contradict her, under the St. of 1869, c. 425.
rial consumed several days, and at a late stage of it the
sked the witness, Mrs. French, "whom she had met and
om she had been in company since the adjournment of
t on the Saturday previous." The court ruled that the
might show any conversations with the libellant or any
f hers, but beyond this the question was immaterial.
as correct. Any conversations the witness had held were
etent, unless they were with the libellant or some one
ed with her, there being no testimony of the witness in
to be contradicted by such conversations.

libellant excepted to an expresssion used in the charge to
y to the effect, that the case must be considered as if
ench had never been put upon the stand, claiming that
a right to have the jury consider that he had done all he
get her as a witness and to make her testify as to the
But the instruction fairly construed did not deprive him
ight.

pears by the bill of exceptions that he was permitted to
argue this claim to the jury, and that no adverse ruling
le in regard to it. The instruction is in substance the
if the court had said that the case was to be considered
rs. French had not given any evidence. It was not in-
o, and did not in fact, deprive the libellant of the right
that he had done all he could to procure her testimony.

Exceptions overruled

. *Ranney*, for the libellee.
. *Somerby*, for the libellant

PATRICK CARR *vs.* EDWARD DOOLEY.

Middlesex. Jan. 13, 1875. — Jan. 4, 1876. AMES & ENDI
absent.

Under the Gen. Sts. *c.* 48, § 5, providing that assessments for sewers and
constitute a lien on the real estate assessed "for one year after they
an assessment by the mayor and aldermen of a city of the expenses
sewer in a street of the city upon land abutting thereon and benefited
an incumbrance thereon from the time of the order for its construction
breach of the covenant against incumbrances in a deed of the premises
after such order, but before the assessment was laid.

At the time of negotiations for the purchase of land, a sewer was in proc
struction in the street on which the land abutted; the party proposing t
called the owner's attention to the sewer, and asked him who was to
sewer, to which the owner replied that he would, and that the other pa
not be called upon to pay a cent for it. A deed of the land was subseque
with the usual warranty against incumbrances, but no mention was ma
the sewer. The purchaser afterwards paid an assessment upon the la
construction of the sewer. *Held*, in an action by him against his grant
special promise to pay any assessment which should be laid on acco
sewer, in which the consideration was averred to be the purchase of the
evidence of the conversation and of the existing circumstances was su
prove the promise. *Held, also*, that the evidence was competent, and wa
to the objection that it varied or enlarged the written instrument; an
promise proved was not within the statute of frauds.

COLT, J. The first count in the plaintiff's declaration the covenant against incumbrances contained in the defe deed to him. It alleges that the plaintiff has been obliged to pay an assessment for a sewer, which was a lien on the estate when the deed was made. The deed is dated June 8, 1870. The sewer was constructed under the provisions of the St. 1869, *c.* 111, in pursuance of a resolution of the mayor and aldermen passed in May previous, directing "that a common sewer be laid in Cedar Street, from the Crosby Street sewer to Keene Street; the size of the sewer to be twelve inches in diameter." No question was made at the argument that this was not a sufficient location, and we must so regard it. *Bennett* v. *New Bedford*, 110 Mass. 433. The assessment was not made until after the deed was delivered.

It is objected that the liability to an assessment when the deed was made was not an incumbrance upon the land within the meaning of the covenant, because, by the terms of the Gen. Sts

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c. 18, § 5, assessments are only made a lien on the real estate "for one year after they are laid."

Upon this question, the construction to be given to the statute must be such as accords with the interpretation given by this court to similar provisions relating to the collection of taxes. By the Gen. Sts. c. 12, § 22, taxes assessed on real estate are declared to be a lien thereon for two years after they are committed to the collector; and yet, in *Cochran* v. *Guild*, 106 Mass. 29, in answer to the objection that they were not an incumbrance until so committed, it was held that they were so from the first May, the date of their assessment, because the land then became liable for their payment.

In *Jones* v. *Aldermen of Boston*, 104 Mass. 461, where the question was, whether the St. of 1868, c. 276, which repealed § 5 of the St. of 1866, c. 174, with a clause saving all rights and liabilities which had accrued under it, affected an existing liability to be assessed in proceedings for widening a street commenced before the repeal, but under which no assessment had then been declared, it was declared that the right of the landowner to damages, and his liability to assessment for benefit, accrued at the time of the widening, although the assessment of damages and the adjustation of the amount of benefit must of necessity be made afterwards. The act under which the proceedings for widening the street in that case were had provided that all assessments should constitute a lien on real estate, to be enforced in the manner provided for the collection of taxes; thus adopting the provision of the Gen. Sts. c. 12, which makes them a lien on the estate for two years after they are committed to the assessor. See also *Prince* v. *Boston*, 111 Mass. 226.

In *Blackie* v. *Hudson*, 117 Mass. 181, it was held, under the St. of 1866, c. 174, and 1868, c. 276, that the liability to an assessment of the expenses of widening a street was an incumbrance thereon from the time of the order of widening, and a breach of the covenant in a deed which was delivered before the assessment was made, but after the order for widening was passed.

The construction thus given to the betterment acts applies with equal force to the statutes which authorize sewer assessments. In both cases the elements necessary to ascertain the

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amount of the assessment must be ascertained after the work is done; and both are instances of local taxation for local improvements in which the estates immediately benefited are required to bear a proportional share of part at least of the whole cost of doing the work. The incumbrance, though not ascertained in amount until the assessment is made, is none the less an incumbrance, and attaches to the real estate benefited when a liability to assessment for the specific work ordered by the proper authorities first arises.

The first count in the declaration may, therefore, be maintained on the ground that at the time of the delivery of the deed the incumbrance had been created on the land for a share of the expense of the Cedar Street sewer, under the order of the mayor and aldermen of the city of Lowell.

The second count is upon an alleged special promise to pay any assessments which should be made on account of the sewer then being built. The consideration of this promise is averred to have been the purchase of the land. In proof of the promise, the plaintiff relied on a conversation had between the parties during negotiations for the purchase and while the sewer was in open process of construction in front of the premises. The plaintiff called the defendant's attention to the sewer, and asked, "Who is to pay for this sewer?" The defendant replied, "I will pay all that. You shall not be called upon to pay a cent for it." It is objected that this evidence, is not sufficient to prove the promise; but the language of the defendant, interpreted with reference to the subject matter and the existing conditi the work, is enough to justify the jury in finding a verd the plaintiff.

Upon the question of its competency, it is sufficient that a tendency to prove an independent agreement made with ence to a distinct and separate matter, and founded upon sideration embraced in the price of the land. The lan relied on was indeed part of a conversation which took while negotiations were pending which ended in a deed with ited covenants of warranty and against incumbrances, but not open to the objection that it is here used to vary or enlarge in any respect the contents of a written instrument, or that the

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proved is within the statute of frauds. *Preble* v. *Baldwin*, 549. *Howe* v. *Walker*, 4 Gray, 318.

Case to stand for trial on both counts.

Blaisdell, for the plaintiff.

Richardson, (*G. F. Richardson* with him,) for the de-

COMMONWEALTH *vs.* OWEN FILBURN & others.

Worcester. Oct. 5, 1875. — Jan. 4, 1876. AMES, J., absent.

tment on the Gen. Sts. c. 163, § 12, alleging the arrest for drunkenness of a time and place mentioned, by B., a constable of the town, and that the dant "did then and there unlawfully aid and assist the said A. in then and unlawfully escaping from the said lawful custody of the said B.," is insufficalthough it follows the words of the statute.

INDICTMENT on the Gen. Sts. c. 163, § 12, alleging that "Patrick ns of Clinton, in said county, on the thirteenth day of Sep-r, in the year eighteen hundred and seventy-four, at Clin- said county, was guilty of the crime of drunkenness, in a street in said Clinton, by the voluntary use of intoxicating and that the said Patrick Gibbons, at the time and place fence was committed, in manner and form aforesaid, to n the said thirteenth day of September, in the year afore- Clinton aforesaid, in a public street as aforesaid, was law-rrested for said offence by one Edward J. Plunket, he hen and there a constable of said Clinton, duly chosen, ed and qualified to discharge and perform the duties of ce, and also being then and there in the due and lawful n of the same, and also being then and there in the peace Commonwealth, and that Owen Filburn, Thomas O'Ma-lter Burke and Philip Filburn, all of said Clinton, did d there unlawfully aid and assist the said Patrick Gib-then and there unlawfully escaping from the said lawful of said Edward J. Plunket."

he Superior Court, before the jury were empanelled, the ants filed a motion to quash the indictment on the follow-ounds:

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"There is not set forth in said indictment any offence known to the law of this Commonwealth. There is not any offence plainly, formally and substantially described in said indictment. It is not alleged in said indictment that the defendant Gibbons was taken into the custody of Plunket.

"It is not alleged that the defendant Gibbons escaped from the custody of Plunket. It is not alleged that the defendants applied any force or made any threat or did any other thing to compel said Plunket to release said Gibbons. It is nowhere alleged in said indictment that the defendants knew that the said Gibbons was arrested by the said Plunket, that they knew that said Plunket was a constable, or that he was in the lawful discharge of his said office. All the allegations of said indictment may be true, and yet no offence have been committed, and the said indictment is otherwise defective, informal and insufficient."

Bacon, J., overruled the motion. The defendants were tried and found guilty, and after verdict filed a motion in arrest of judgment, assigning substantially the same reasons as in their motion to quash. This motion was also overruled; and the defendants alleged exceptions.

M. J. McCafferty, for the defendants.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The defendants are indicted under the Gen. Sts. c. 163, § 12, which provides a punishment for any person who "aids or assists a prisoner in escaping, or attempting to escape, from an officer or person who has the lawful custody of such prisoner." It is clear that it was not the purpose of this statute merely to prescribe a punishment for a common law offence. The intent of the Legislature was to define and describe the offence intended to be punished.

But we are of opinion that it is not within that class of statutes as to which it has been held that an indictment is sufficient which follows the words of the statute.

Construing it in the light of well known principles of the [illegible] inal law, there is no difficulty in ascertaining the intention o[illegible] Legislature. But the language used does not, *ex vi termin*[illegible] scribe all the ingredients of the offence intended to be pun[illegible] with the certainty required in criminal pleading. An indict[illegible] under it, therefore, must allege all the facts necessary to b[illegible]

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within the intent and meaning of the statute. *Common-*
. Barrett, 108 Mass. 302, and cases cited.

ne literal construction of the statute, any person who
lo any act, however innocent, the effect of which was to
isoner in escaping, would be subject to its penalty. For
, if a prisoner should escape, and a person driving in the
hould innocently give him a ride, or if a person should in-
y receive him in his house, and thus enable him to elude
sh pursuit of the officer, such persons would, within the
terms of the statute, aid the prisoner in escaping. But it
t be presumed that the Legislature intended to subject such
s to its penalty, and thus punish them for innocent acts
without any criminal intent.

such a case, if the act was done without any knowledge that
erson aided was an escaping prisoner, it would be innocent
ot punishable, but if done with such knowledge would be
nal and within the statute. The indictment should allege
cts done by the defendants. If they are unlawful in their
e, such as an assault upon or forcible obstruction of the offi-
may not be necessary to allege knowledge of the defendants
the prisoner was in custody. But if they are in their
innocent, and are only made criminal by a knowledge that
risoner was escaping, such knowledge should be alleged.
wise, the indictment fails to allege or show any unlawful
criminal intent, and does not state a case within the spirit
statute.

ted by these rules, the indictment in the case at bar is in-
nt. It alleges that Patrick Gibbons was lawfully arrested
vard J. Plunket, a constable, for the crime of drunkenness,
tember 18, 1874, and that the defendants "did then and
nlawfully aid and assist the said Patrick Gibbons in then
re unlawfully escaping from the said lawful custody of said
d J. Plunket." It does not allege what acts were done by
endants, nor that they knew that Gibbons was in custody,
erefore does not allege any unlawful act or criminal in
nich brings the case within the statute.

doubtful whether it alleges with sufficient clearness that
ns was in the custody of the officer when the acts were com-
l, but it is not necessary to consider this objection.

Exceptions sustained.

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COMMONWEALTH *vs.* DAVID B. TIFFANY.

Worcester. October 5, 1875. — January 4, 1876. AMES, J., absent.

A complaint under the St. of 1869, *c.* 384, § 19, which charges the defendant with fishing in a certain pond, "in which fishes are lawfully artificially cultivated or maintained, without the permission of B., the proprietor of the pond," is sufficient without further designating the nature of B.'s interest.

Under the St. of 1869, *c.* 384, § 9, authorizing the commissioners of inland fisheries to lease, in the name of the Commonwealth, any great pond, exceeding twenty acres in area, for the purpose of cultivating useful fishes, the commissioners have authority to lease a pond which exceeds twenty acres in extent in its natural condition, although it has been increased beyond that extent by a dam.

The provision of the St. of 1869, *c.* 384, § 7, that the proprietors of any pond or parts of a pond, created by artificial flowage, shall have exclusive control of the fisheries therein existing, does not deprive the commissioners of their authority, under § 9 of the statute, to lease any pond exceeding twenty acres in area in its natural condition, although the pond has been increased in extent by artificial flowage.

ENDICOTT, J. This is a complaint under the St. of 1869, *c.* 384, § 19, and it contains the charge that the defendant "in that portion of a certain pond, commonly known as Pratt's Pond, in which fishes are lawfully artificially cultivated and maintained, did unlawfully fish, without the permission of Daniel W. Batchelor, the proprietor of said pond." The defendant moved before the magistrate and in the Superior Court before the jury were empanelled, to quash the complaint, because it did not allege that Batchelor was the proprietor of the pond, or that the pond had been leased to any person by the commissioners of inland fisheries, which motion was overruled and the defendant excepted.

It appears by the report that Pratt's Pond was leased to Batchelor, under § 9, by the commissioners of inland fisheries. The lease was in proper form and duly delivered; the lessee had entered under it and complied with its provisions, and the defendant had fished in the pond as charged in the complaint. It was in evidence that the pond was at the date of the lease about forty acres in extent; and that its waters were in part restrained by an artificial dam, and were used for operating a mill. The owner of the privilege had the right to maintain the dam and raise the water, as appeared by certain deeds which were put into the case. Upon this evidence the defendant contended that the pond could not be leased by the commissioners. But the

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led that if the jury found that the pond was more than acres in extent before the erection of the dam, it could l by the commissioners. The defendant excepted to this and the jury found the defendant guilty.

questions are thus presented and have been argued by ndant: first, whether the complaint should allege more lly that Batchelor was the proprietor and the nature of rest; and, secondly, whether the pond in question could d by the commissioners under § 9.

is contended by the defendant, that there are three classes prietors who are entitled to the control of the fishery in under §§ 7 and 9; namely, the riparian proprietors of ond not more than twenty acres in extent; the propri- f any pond or parts of a pond created by artificial flowage; he lessee of any great pond, exceeding twenty acres in ex- under a lease from the commissioners for the purpose of ating useful fishes therein. And the defendant further con- that if any one fishes in any pond held by either class of ietors, he is subject to the penalty provided in § 19.

s provided in § 18, "that fishes artificially propagated or ained shall be the absolute property of the person propa- or maintaining them;" and § 19 provides that "whoever in that portion of a pond, ... in which fishes are law- rtificially cultivated or maintained, without the permission proprietors," shall incur certain penalties.

as been decided that a pond leased by the commissioners § 9, for the cultivation of useful fishes, and thereby set and held for that purpose, is a place where "fishes are y artificially cultivated and maintained" within the mean- § 19; and that the lessee of such pond has the ex- right of fishing in the whole pond. *Commonwealth* v. , 108 Mass. 441, 451. *Commonwealth* v. *Weatherhead*, ss. 175. The question has not been raised or decided, r the penalties imposed in § 19 can be enforced against fishing without the permission of the riparian propri- f ponds not more than twenty acres in extent, or of arti- onds mentioned in § 7; or what proof, if any, is required part of such proprietors, that fishes are lawfully artificially ated therein. In the view taken by us, it is not now neces-

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sary to decide that question; for assuming for the purposes of this case, as contended by the defendant, that every person is subject to the penalties named in § 19, who fishes in ponds not more than twenty acres in extent, or ponds created artificially, without having obtained the permission of the proprietors, who artificially cultivate or maintain fishes therein, we are of opinion that this complaint is not defective.

By referring to the words of the complaint, and to § 19, it appears that the complaint follows the language of the statute in describing the offence. It comes within the rule as stated by Mr. Justice Metcalf, in *Commonwealth* v. *Welsh*, 7 Gray, 324, that a charge in an indictment may be made in the words of a statute, without a particular statement of facts and circumstances, when, by using those words, the act in which an offence consists is fully, directly and expressly alleged, without any uncertainty or ambiguity. See *Commonwealth* v. *Barrett*, 108 Mass. 302. The offence here consists in fishing in a pond, called Pratt's Pond, in which fishes are lawfully artificially cultivated or maintained, without the permission of Batchelor, the proprietor of the pond.

It is immaterial and unimportant, so far as the defendant is concerned, or as bearing on the offence charged, how Batchelor obtained or held his title, or to which class of proprietors named in §§ 7 and 9 he belonged. That is a matter of evidence, involved in the proof which the government must offer to show that the pond was devoted to the artificial cultivation of fishes, and a particular statement of that fact need not be made in the complaint. Whether he was the riparian proprietor of a pond not more than twenty acres in extent, or the owner of an artificial pond, or a lessee under the commissioners, in either case, it was the same offence and subject to the same penalties. The lease was competent evidence to prove that the pond was set apart for the purpose named in the complaint, and that Batchelor was the proprietor, without whose permission the act complained of was done. Assuming therefore the construction contended for by the defendant to be the true construction, it is unnecessary to allege more particularly the proprietorship of Batchelor, or that he held the pond under a lease from the commissioners.

2. The remaining question to be considered is, whether the commissioners had authority to lease Pratt's Pond under the pro-

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of § 9, or in other words, is Pratt's Pond a great pond
the meaning of that section. The verdict of the jury
the decision, that before the erection of the dam it was
an twenty acres in extent, and the case finds that its area
n largely increased by the erection of the dam, and the
ent flowing back of the water. It is to be observed that
of 1869, *c.* 384, changes the law in regard to the size of
onds, in which the public may have the right of fishing.
ordinance of 1647, Anc. Chart. 148, 149, "no town shall
riate to any particular person or persons any great pond
ning more than ten acres of land." The uniform con-
ion of this ordinance has been, that the right of fishing was
in all ponds exceeding ten acres of land, unless appro-
d by the Legislature or the towns acting under the authority
e Legislature. *Commonwealth* v. *Vincent*, 108 Mass. 441,
Coolidge v. *Williams*, 4 Mass. 140. *West Roxbury* v. *Stod-*
7 Allen, 158, 166. The St. of 1869, *c.* 384, § 7, gives
e riparian proprietors of any pond, not more than twenty
in extent, the exclusive control of the fisheries therein exist-
and § 8 declares that any pond exceeding twenty acres in
shall be public, except such as may have been granted by
r leased as provided in § 9. As the law now stands the
have no right of fishing in any pond not more than twenty
n extent.

the term "great pond," as used in the Body of Liberties, Art.
3 Mass. Hist. Soc. Coll. 219; in the colony ordinance of
Anc. Chart. 148, 149; and in St. 1869, means a pond
tain area created by the natural formation of the land at
cular place. The verdict establishes the fact that Pratt's
a natural pond of this kind, and being in its natural state
an twenty acres in extent, it is within the description of
pond in § 9. It was not created by the dam, but by
ural formation of the land; and the fact that it has been
d by the dam, does not change its character as a great
more than twenty acres in extent.

the defendant contends that even if this construction is
the commissioners have no authority to lease this pond,
e it comes within the description of § 7, where it is pro-
that "the proprietors of any pond or parts of a pond,

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created by artificial flowage, shall have exclusive control of the fisheries therein." This class of ponds the commissioners have no authority to lease, and the defendant contends, that, as parts of Pratt's Pond were created by artificial flowage, the proprietors who own that part of the land so flooded have control of the fisheries therein, and so upon a strict construction of the statute the commissioners could not lease the exclusive right to the fisheries in the whole pond.

But this is not the true construction of that clause of § 7. The words do not bear the interpretation "any pond or parts of a pond," which pond or parts are created by artificial flowage; but "any pond or parts of a pond," which pond is created by artificial flowage. The word created refers to pond in each portion of the sentence. The provision has reference only to artificial ponds, artificially created, which may be owned in whole or in part by certain proprietors. What may be the extent of the rights of any proprietor of a part of such artificial pond, it is not necessary here to consider.

This gives a plain practical construction to the statute; and it was the evident intention of the Legislature in enacting it, that the riparian proprietors of ponds not more than twenty acres in extent, and the proprietors of ponds created by artificial flowage, shall have exclusive control of the fisheries therein existing; and that in great ponds which in their natural condition exceed twenty acres in extent, but which may have been increased by artificial flowage, the owners of land, covered by such increased or artificial flowage, have no control of the fisheries existing in such pond by reason of the provisions in § 7. Such ponds are public, as provided in § 8, unless specially granted by law or leased and, if leased, the lessee has the exclusive right to the fishery therein during the continuance of his lease.

Exceptions overruled.

J. Hopkins, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* ELLEN L. SMITH.

ol. October 26, 1875. — January 4, 1876. MORTON, J., absent.

rial of an indictment for burning a dwelling house there was evidence tend- show that the house was set on fire by some one, and there were facts and stances pointing to the defendant, a girl fourteen years old, as the probable ary. The government was permitted to introduce evidence that after her and while in custody, the defendant confessed to officers, when questioned , that she set the fire, and stated how she did it, but it did not appear that eats or promises were made by the officers. The jury were instructed that ould give no weight to the confession if it was induced by threats or prom t if it was not so induced, that such weight should be given to it as they t it entitled to; that threats and inducements might be by acts as well as and that mere fear on the part of the defendant did not render the confes- competent unless induced by some improper conduct on the part of the . *Held*, that the evidence was rightly admitted. *Held*, also, that the in- ons were correct. *Held*, also, that the confession, being supported by inde- nt evidence, would warrant a conviction.

DICTMENT for burning the dwelling house of Giles F. Allen, rtmouth, on June 28, 1874. At the trial in the Superior , before *Pitman*, J., there was evidence tending to show the ing facts:

the night of June 28, 1874, said Allen and his wife went to about nine o'clock. The rest of the family, consisting of g son of twelve, his sister-in-law, and two small children, o his hired man, Head, and the defendant, a colored ser- rl, between fourteen and fifteen years of age, employed for d and clothing, had all previously retired to bed between nd nine o'clock. Mr. and Mrs. Allen slept on the first floor house in a bedroom leading from the dining room, and the ve. At about quarter past ten o'clock, Mrs. Allen was ed by the smell of smoke. She aroused her husband who eep, went to the cellar door, opened it, and discovered a the basement. Her husband hurried down, and found ne shingles, which had been placed in a partitioned room g a washroom, were on fire; he extinguished the fire with uckets of water standing near, which had been drawn by and hired man the night before. Mrs. Allen aroused the and when Head got down there the fire was extinguished, ome portions of the door and casements of the building

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being slightly burned. The outside cellar door that led out doors from the washroom could be unbarred from the outside, by a person acquainted, by the removal of a stone between the mason work and the door frame. It had been fastened that night, but was then unbarred, so that it could be opened, the bar being dropped down on the floor at the bottom. It could not be opened and closed without a creaking noise by rubbing on the threshold. The sister-in-law and the children slept in the second story over the first floor, and Head and the defendant slept in the second story of the ell, her room being beyond his, and she usually passed through his room on going to or from her room. Upon the alarm being given she passed through his room in her night clothes before he had got out of bed, and at the request of Mrs. Allen, lighted some lamps, and then went with Mr. Allen's son to call in some neighbors. The family soon after retired.

The next morning, Mrs. Allen discovered a half-pint bottle about half full of kerosene, standing at the end of a wood box in the kitchen. She testified that it was not there the night before and she had never seen the bottle before, and that, though she had used a half-pint bottle to pour kerosene on her hens frequently, this was not the one she used. She showed it to her sister and husband, and to the defendant that morning, and inquired if they knew how it came there, and they all answered in the negative. They kept kerosene in a two gallon can, and another smaller can kept on a shelf under the sink in the kitchen. They used kerosene for light. That morning Mr. Allen discovered a considerable amount of kerosene on the shingles beneath where the fire occurred, which had not burned. He showed these shingles and the bottle of kerosene to officers Dayton and Dunham, of New Bedford, who came there on July 7, following. Mr. Allen had previously offered a reward of $200 for the detection of the incendiary. Dayton and Dunham caused the kerosene found in the bottle and also that kept in the cans in the house to be tested by an inspector or assayer who pronounced them the same in quality.

On July 10, the defendant, at about four o'clock in the morning, before the family was up, left Mr. Allen's, without his knowledge, and walked to New Bedford, a distance of about eleven miles, and to the house of G. W. Offley, a friend of her parents,

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d whom she had before frequently visited. Mr. Allen called re for her during the forenoon, and had some conversation ut her return and her clothing that she had left, she telling that she did not wish to return. She afterwards testified the reason of her leaving as she did was that she was afraid would not let her go, and that she wanted to live in the city wanted wages.

the forenoon of July 14, she remaining at Offley's, Dayton, lice officer of New Bedford, and Dunham, a state constable, d at Offley's house, not having a warrant, and found the de- nt shelling peas. Dayton said to her, "Ellen, I want you." got up, went up stairs followed by Dayton, got her bonnet, ame down. Mrs. Offley was then there and inquired what p. Dayton replied, "We want her to go down town." Mrs. y then said, "Tell the whole truth." They went with her carriage to the police station of New Bedford, a distance of t a mile and a half, and as she was going into a cell under charge of Dunham, and had just got inside when Dayton said unham, "Hold up, let us talk here." They then sat down the cell door, and Dayton asked her why she left Allen's, she said she was tired and wanted to live in the city. Dayton said, "Ellen, I suspect you of setting the fire," and asked f she did. The defendant objected to evidence of what she t that time in the nature of a confession, on the ground that she said was under intimidation in the nature of threats or ses, though there was no evidence of verbal threats or prom- The judge overruled the objection, and the evidence was ed. Dayton and Dunham then testified, substantially, that wer to their questions while sitting there, and no other per- esent, she said that on Sunday afternoon, (the day of the hen filling the lamps, she went down cellar where there ottles, took a bottle from there, filled it with kerosene from , and set it on the shelf in the kitchen, and at night, when ught they were all asleep, she came out through Head's down stairs, took the bottle, and went through the dining to the front entry and down the cellar stairs leading from nd she poured some of the kerosene on the shingles, put a to them, then took the bar from the outside cellar door, d it so it would look as if some one from outside had un-

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fastened it; that she did not open the door, as it would creak on the bottom; that she then came up stairs, and as she passed through the kitchen she set the bottle, being about half full, at the end of the wood box, where Mrs. Allen found it the next morning, and then passed up stairs to her own room, and had just got into bed when she heard Mrs. Allen give the alarm, and she came down, as has been stated. She was then shown the bottle by Dunham, and said she knew that it was the bottle by the dirt that was in the bottom. She was asked if she knew them (Dayton and Dunham) when they were at Allen's on July 7. She replied that she did, and if they had then asked her she would have told them the same; that she was sorry as soon as she did it.

She was then put into the cell, and shortly afterwards, within a few minutes, one Hammond, an officer, saw her in the cell crying, and asked her what she was in there for, and she replied, "For setting a fire."

Mrs. Allen testified that her bedroom adjoined the dining room, that her door that led into it was open, but the doors that led into the kitchen and front entry through which Ellen passed were both closed when she arose, and the cellar door leading from the front entry which was also fastened.

The defendant testified that the officers promised her that, if she would say she set the fire, they would clear her, and she would not be prosecuted, and that thereupon she told them she did set it on fire, but that she told none of the particulars in regard to the kerosene and manner of doing it, as detailed by them; that her confession was untrue; that she had nothing to do with setting the building on fire; that she told the story to effect her release from jail; that she pleaded not guilty to the complaint the next morning, and had been persistent in her denial of the charge ever since.

Both officers being recalled denied using the language attributed to them by the defendant, or any threats or promises. This was all the material evidence in the case. The defendant then asked that the evidence of the confession be excluded as improperly obtained. This was refused. The defendant then requested the judge to instruct the jury as follows:

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That if they were satisfied that the confession was made
ear or under menace, though not of words, they should

That a naked confession uncorroborated by circumstances
fficient to justify a conviction; that proof that the arson
mitted by some one is not in itself standing alone a cor-
on of the confession.
That the whole evidence as it stood would not justify a
on."
udge declined to give these instructions, and upon these
nstructed the jury as follows:
If upon the whole evidence in the case it appears to you
e alleged confessions were not induced by any threats or
s, they may be considered by you and allowed such weight
consider them entitled to; but if these statements appear
to have been induced by threats or promises, the state-
should not be allowed any weight or effect against the de-
t.
Threats and inducements may be by acts or conduct as
by words. But mere fear on the part of the prisoner,
induced by some improper conduct on the part of the offi-
ould not render the confession incompetent. So the fact
confession was made while the party was under arrest,
cell, or after the prisoner had been placed therein and
ken out, would not of itself render the confession inad-
.
A free and voluntary confession by a person accused of an
whether made before or after the arrest, if satisfactorily
nd there is independent evidence that the crime has been
ed by some one, is sufficient according to the common
arrant the jury in convicting if it leads their minds to
lt, without any other corroboration."
ury returned a verdict of guilty; and the defendant al-
ceptions to the several rulings and refusals to rule.
non, for the defendant. 1. The second and third instruc-
re objectionable. The judge should have given instead
the instructions requested, or, the instructions given on
nt should have been better guarded to protect the rights
defendant. While it is the province of the court to decide

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whether a confession is admissible in the first instance, and, in the absence of threats and promises, confessions are generally admissible, yet the jury have the right to judge as a matter of fact under proper instructions whether a confession is voluntary. If in their judgment it is not voluntary, there is no good reason why they should not have the right to reject it as well as the court, if a threat however slight had been made to induce the confession. In *Commonwealth* v. *Cuffee*, 108 Mass. 285, the court instructed the jury, in regard to the statements subsequent to the original confession, that if the first statement of the defendant was obtained by improper influence, statements made to the same officers afterwards were presumed to be; but whether subsequent statements to other officers were made under the same influence was a question for the jury, and, if they were, they should not be allowed any weight or effect against the defendant. Thus the court held that the question of improper influence was for the jury, though the statement or confession of the defendant was properly admitted as evidence for their consideration.

2. But, if this point is not tenable, injustice was done to the defendant by the instructions as given, without further explanation and caution. The ruling requested had no reference to the competency or admissibility of the evidence, for it was already in; and as the second instruction was intended to be responsive to the request, and no caution or explanation was given as to the effect mere fear would have upon its weight, the jury might fairly infer that they were bound to give it some weight at all events, however reprehensible they might deem the conduct of the officers, in arresting her without a warrant, and not furnishing a scintilla of evidence against her except the confession, and however they might deem the situation of the child, with no friend near, and in prison, might paralyze her mind, and drive her to desperate expedients to obtain her liberty. *Commonwealth* v. *Cullen*, 111 Mass. 435. *Commonwealth* v. *Putnam*, 2 Allen, 301.

3. There was no evidence that would warrant suspicion, much more arrest, before the confession. Her story was therefore uncorroborated in any material point. While courts have held that proof of the *corpus delicti* is sufficient corroboration to warrant conviction, the fact that the defendant admitted the existence of no facts, outside of her own acts, that were not known to every

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er of the family, as well as the officers, should at least have
d her to an instruction that such a confession, procured as
, should be received with great circumspection if not dis-

R. Train, Attorney General, for the Commonwealth, was
lled upon.

DICOTT, J. There was evidence that the dwelling house
een set on fire by some one, and there were facts and cir-
ances pointing to the defendant as the probable incendiary.
her arrest and while in custody, she confessed that she set
e, and stated how she did it. This evidence was objected
as it did not appear that any threats or promises were
on the part of the officers, it was properly admitted; and
t, that the defendant was but fourteen years of age, and
arrest, and made the confession to officers, does not render
mpetent. *Commonwealth* v. *Cuffee*, 108 Mass. 285. The
ant then testified that she made the statement under the
e that she should not be prosecuted, and to obtain her re-
and that the statement was untrue.

jury were instructed, that they should give no weight to
nfession if it was induced by threats or promises, but if
induced that such weight should be given to it as they
t it entitled to; and that threats and inducements might
acts as well as words. To this instruction the presiding
dded that mere fear on the part of the defendant did not
the confession incompetent unless induced by some im-
conduct on the part of the officers.

instruction is not open to the objections urged by the de-
To avoid the effect of this confession the hope or fear,
d the defendant to confess facts unfavorable to her, must
ced by the threats, promises or conduct of the officers to
e made the confession. *Commonwealth* v. *Morey*, 1 Gray,
mmonwealth v. *Taylor*, 5 Cush. 605. *State* v. *Grant*, 22
171. *Rex* v. *Row*, Russ. & Ry. 153. There was no evi-
promises or other inducements held out by other officers,
persons, whom she might presume had authority in the
. *Commonwealth* v. *Cullen*, 111 Mass. 435. Fear arising
er causes, and not induced by threats or promises, would
der the confession incompetent, or necessarily affect its
with the jury. See 2 Lead. Crim. Cas. (2d ed.) 570, 577.

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the facts presented in this case, and there
evidence that the crime had been committed,
ry confession by the party accused would warra
Commonwealth v. *Howe*, 9 Gray, 110. *Rex* v.
Ry. 440. *Exceptions ove*

MONWEALTH *vs.* LAWRENCE TOLLIVER & an

November 22, 1875. — January 4, 1876. COLT, J.

ial of an indictment for robbery, it appeared that the defendant
until the end of the third day after the robbery, and the evidence
whether he had been concealing himself during the whole or an
e. To show such concealment the government called as a witness
o assisted in the arrest, and asked him, How soon after the robbery
ce looking for the defendant? *Held*, that the question was rig
o be answered.

al of an indictment for robbery, the government offered to prove
ons by the defendant, which the judge excluded as having been obt
s and threats made to him by officers. The defendant afterwards
d testified in his own behalf, and upon cross-examination was aske
ent what statements he had made in the interview in which the con
de. The judge ruled that having made himself a witness, the
made whether he made statements inconsistent with his testimony
s affecting his credit. *Held*, that the instruction was sufficiently fa
efendant.

al of an indictment for robbery, the government introduced eviden
ndant had concealed himself to avoid arrest. The defendant offer
nding to show that instead of concealing himself, he was publicly w
e streets before his arrest. The government then offered to sho
alking about the streets for an hour or two previous to the arrest,
had assumed a disguised gait and manner. The defendant had intr
nce upon this point, and the judge ruled that such testimony could be
en, although no testimony had been given by him or question asked
on to any disguise adopted by him. *Held*, that it was within the disc
residing judge to admit the evidence, and that the ruling was correct.

ial of an indictment for robbery, the person robbed testified that sh
of a ten dollar bill, a five dollar bill, and three two dollar bills, but she
o say whether they were bank bills or not. When the defendant wa
hree days after the robbery, he was found to have in his possession two fi
ank bills, and two two dollar bills, one of which was a bank bill, and th
t. The person robbed had testified that in the struggle with the robbers s
inger of one of them so as to cause a wound, and when arrested there w
upon the corresponding finger of the defendant's hand. There was a sta
of the two dollar bills which the government contended was a blood stai

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here was no evidence that it was such except what appeared on inspection, here was no evidence of the identity of the money other than this. The per- obbed could not identify the money found upon the defendant as hers, or any nd there was no other evidence as to what she was robbed of. *Held*, that estion was rightly submitted to the jury whether any of the bills found on ndant were taken from the person robbed.

TMENT charging Lawrence Tolliver and Cornelius Ran- the robbery, on September 1, 1875, from the person of e Byron, of "three bank bills, each of the denomination llars and each of the value of five dollars; three bank h of the denomination of two dollars, and each of the two dollars, and one bank bill of the denomination of rs, and of the value of ten dollars, of the goods and of said Catherine Byron."

e trial in the Superior Court, before *Wilkinson*, J., the e of the government tended to show that Catherine Byron, son named in the indictment, went to ride with the defend- ndall, at his invitation, on the evening of September 1, hat while so riding with him in the suburbs of the city, she acked by two persons, beaten and bruised, and robbed of a money; and it was claimed by the government, and there ne evidence tending to show, that one of the attacking as the defendant, Tolliver, and that Randall was con- to the same in consequence of some previous understand- olliver was not arrested until the end of the third day robbery, and the evidence was conflicting as to whether been concealing himself and avoiding the whole or any hat time; and to show that he had so concealed himself, ct attorney called as a witness one of the policemen of ford, who assisted in his arrest, and asked him, "How r the robbery did you commence looking for Tolliver?" ndant, Tolliver, objected to the inquiry as inadmissible urpose for which it was put; but the judge allowed the to be put to the witness.

l Brown was called by the government to testify to cer- ements in the nature of confessions, and also implicating made to him, Brown, by Randall, while lying in jail trial; but upon examination it was found as a fact by e that whatever was said by Randall upon that occasion

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was said by him while unduly and improperly influenced by promises or threats made to him by officers and others, and upon that finding excluded the testimony proposed to be offered. Randall afterwards took the stand and testified in his own behalf; and upon cross-examination was inquired of by the district attorney in relation to the statements made by him to Brown, and was asked by the district attorney what statements he had made to Brown in the interview in the jail before referred to. The defendants objected to the inquiry proposed, but the judge ruled that having made himself a witness, the inquiry could be made whether he had made statements inconsistent with his testimony on the stand as affecting his credit.

Evidence was offered by the government in chief, tending to show that during a portion of the time between the robbery and his arrest, Tolliver was in concealment to avoid arrest. Tolliver then testified in his own behalf, and stated with particularity his whereabouts during the whole of said time; and particularly (in answer to questions by the district attorney) for a short time before his arrest. The district attorney then called a witness in rebuttal, who testified without objection to his whereabouts just previous to his arrest, contradicting to a certain extent the testimony of Tolliver upon the same point. The district attorney then offered to show by this same witness that while walking about the streets for an hour or two before his arrest, Tolliver had assumed a disguised gait and manner. No evidence had been given by the defence upon this point, and Tolliver objected to the same, on the ground that it was not admissible at that stage of the case, not being in rebuttal; but the judge ruled that such testimony could be properly given although no testimony had been given by him or question asked of him in relation to any disguise adopted by him, and admitted the evidence.

Catherine Byron testified that in the struggle with the robbers she bit the finger of one of them so as to cause a wound; and when Tolliver was arrested there was a wound upon the corresponding finger of his hand. She also testified that she was robbed of a ten dollar bill, a five dollar bill, and three two dollar bills; but whether they were bank bills or not she was wholly unable to say. When Tolliver was arrested three days afterwards, he was found to have in his possession, two five dollar

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bills, and two two dollar bills, one of which was a bank bill
ne other not. There was a stain on one of the two dollar
hich the district attorney claimed was a stain of blood, but
as no evidence that it was such except what appeared on
ion, and there was no evidence of the identity of the
other than this; and Catherine Byron could not identify
ey found upon Tolliver as hers, or any of it, and there
other evidence as to what she was robbed of. Upon this
the defendants asked the judge to rule that there was
nce of the robbery of any bank bills, as charged in the
nt; but the judge ruled that the evidence upon this point
cient to go to a jury.

ury found each defendant guilty; and the defendants
exceptions to the rulings and refusals to rule.

. *Knowlton*, for the defendants.

. *Loring*, (*C. R. Train*, Attorney General, with him,) for
mmonwealth.

s, J. As one circumstance having a tendency to prove
n the part of the defendant, Tolliver, the fact that he con-
himself immediately after the alleged robbery was admis-
This fact could only be proved by evidence that he was
for and not readily or easily found. Such evidence would
ttle weight unless it were nearly connected with the time
obbery, and therefore, among other particulars in regard
tempt made to find him, it was necessary and proper to
ow soon after the robbery the search for him began.

iling himself of the right to take the stand as a witness,
dant became a general witness in the case, subject to
tests of truthfulness, and the same rules as to examina
ross-examination as are applicable to all other witnesses.
orn to tell the truth, the whole truth, and nothing
ruth, he waived all right to keep anything back, even
se of questions, the answers to which would tend to
himself. *Commonwealth* v. *Lannan*, 13 Allen, 563.
ealth v. *Mullen*, 97 Mass. 545. *Commonwealth* v. *Bon-*
Mass. 587. *Commonwealth* v. *Nichols*, 114 Mass. 285.
he modes of impeachment, he, like any other witness
ross-examined as to a conflicting account of the matter
him on some other occasion. Such an inquiry may be

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into, not for the purpose of proving the truth of the former
nt, but as an impeachment of his credit as a witness. Day
ckney, 14 Allen, 255. He would still be at liberty to testify
his alleged confession was not true, and to offer such ex-
tion as to the inducements and circumstances under which
ve it as he may see fit. *Commonwealth* v. *Howe*, 9 Gray,
The limitations to which the course of inquiry upon this
was subjected by the court gave to the defendant all the
ction to which he was entitled.

e defendant, Tolliver, having offered evidence tending to
that instead of concealing himself, he was publicly walking
the streets before his arrest, it was wholly within the dis-
n of the presiding judge to allow evidence, on behalf of the
cution and by way of rebuttal, to the effect that whil
reets he was under an attempted disguise. The ruli
oint is not open to exception.

e evidence of the person who had been robbed was
as sufficient, taken by itself, to identify with entire
ills which had been taken from her. The parti
ence between some of the bills which she had lost a
upon Tolliver, three days after the robbery, was
etent to be considered by the jury, especially when
ction with the stain upon one of the bills whic
d, was occasioned by blood from the wound upon t
e of the robbers, as described in the bill of exc
of the bills found upon his person answered to the
contained in the indictment, and we cannot say u
t that there was no evidence tending to identify one
em. Its weight and effect were for the jury to consi

Exceptions over

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COMMONWEALTH *vs.* JOHN BUTLAND.

lk. November 22, 1875.—January 3, 1876. COLT, J., absent.

tment against B. for perjury, alleged that on March 25, 1875, at Boston, in unty of Suffolk and Commonwealth of Massachusetts, C. "was brought be- e Municipal Court of the city of Boston, holden at said Boston for the ion of criminal business, upon a complaint in due form of law," charging h perjury; that the further consideration of said complaint was continued e sixth day of April next ensuing; and that on said sixth day of April, said ng lawfully before said Municipal Court, it was lawfully ordered by said al Court" that C. recognize with sureties, and that he be committed until ld so recognize, and that on the ninth day of said April, at Boston afore- fore one A., a commissioner within and for said county of Suffolk, legally zed, and duly appointed and qualified to take bail in criminal cases in said B. offered himself as bail and surety in such recognizance for said C.; that then and there lawfully required by said commissioner — pursuant to the and practice of taking and approving bail — to make a written statement oath of his, said B.'s, circumstances and property, the same being material said commissioner in determining whether he would and should take and e said B. as his bail and surety; that said B., being then and there duly sworn requirement aforesaid, did then and there, in pursuance of said requirement, said statement, and did then and there, being so sworn as aforesaid, falsely, y, knowingly and corruptly say, depose and swear (in and by said written ent) as follows. The indictment then set forth the statement signed by B., titled "Commonwealth of Massachusetts. Suffolk, ss. Before A., a commis- duly authorized to take bail in criminal cases in said county." *Held*, that, s necessary under the St. of 1860, c. 186, § 1, to allege that the court had tion of the case of B., the fact was sufficiently alleged. *Held, also*, that the ent duly alleged before whom the oath was administered to B. with suffi- egations of the time and place thereof.

ioner to take bail in criminal cases may require a written statement under n the bail, although the case does not come within the provisions of the 32, c. 159.

ctment for perjury for swearing falsely when being examined under oath r a person, who had been arrested on a complaint to a Municipal Court ssault and battery upon a police officer, it appeared that the person arrested red to recognize to appear before the Superior Court, and that he entered cognizance "to answer to said complaint for the crime aforesaid." *Held*, recognizance was valid, and bound the principal to appear before the Su- ourt to answer to any indictment which might be substituted for the com-

ents under oath, of a person offering himself as bail, as to the value of erty, are material, and if they are wilfully and corruptly false, he is liable tion for perjury.

ent for perjury averred that the defendant stated under oath that certain s of the cash value of not less than five thousand dollars, whereas it was g value, to wit, ten dollars in all. At the trial there was some evidence

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that the land was of the value of eighteen hundred dollars. The defendant asked the judge to rule that the variance between the allegation and proof was fatal. The judge declined so to rule, and instructed the jury that it was not necessary for the government to prove that the true value of the property did not exceed ten dollars, but it must prove that its value was not what was stated by the defendant, and that he, knowing its value was less than stated by him, intentionally misstated its value. *Held*, that the defendant had no ground of exception.

On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn that he had land in a certain town worth $5000, the evidence on the part of the government was the testimony of one witness who put the value at $1800, and the deed of the land to the defendant, made six months before, which stated the consideration to be $2800; and there were other issues to be submitted to the jury involving the question whether the defendant had sworn falsely. *Held*, that the testimony of the witness was supported by corroborating circumstances sufficient to justify the submission of the issue to the jury.

On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn that he had personal property to the amount of $1285, consisting of stock in a grocery store in a certain town, two witnesses testified that he had no such store in the town. Two other witnesses testified that the defendant made admissions to them to the same effect. *Held*, that the issue was rightly submitted to the jury.

On the trial of an indictment for perjury, the issue being whether the defendant had knowingly falsely sworn on December 11, 1874, that his liabilities did not exceed $500, and that he was worth not less than $20,000 over and above all liabilities, there was evidence that the defendant went into bankruptcy in 1872, and that his schedules under oath showed debts to the amount of $85,000; that he had not received a discharge, and no dividend had been paid. *Held*, that this evidence, unexplained and uncontrolled by evidence that the defendant had since paid the debts or acquired property, was properly submitted to the jury.

An indictment alleging that the defendant committed perjury in an examination touching the amount of his property, upon his offer to be bail for one who had been committed to jail on a criminal charge, by falsely swearing that he had personal property at Gloucester, in the county of Essex and Commonwealth of Massachusetts, is supported by proof that he swore to a written statement that he had personal property at Gloucester, in the county of Essex, there being proof of facts to show that the statement could apply, and was intended to apply to Gloucester, in the county of Essex and Commonwealth of Massachusetts, and that he had no property there.

On an indictment for perjury, the issue being whether the defendant had falsely sworn that he owned land in a certain town of the value of $5000, it appearing that the deed to him of the land was signed by A. and his wife in her right, A. was permitted to testify, against the defendant's objection, that the defendant paid nothing to him for the land. *Held*, that the evidence was admissible.

INDICTMENT for perjury in two counts. The first count alleged that on March 25, 1875, at Boston, in the county of Suffolk and Commonwealth of Massachusetts, "one Lovell K. Currier was brought before the Municipal Court of the city of Boston holden at said Boston for the transaction of criminal business

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a complaint in due form of law, charging him, said Currier, the crime of perjury, committed at said Boston; that the r consideration of said complaint was continued until the ay of April then next ensuing; and that on said sixth day l, said Currier being lawfully before said Municipal Court id complaint, it was lawfully ordered by said Municipal hat the further consideration of said complaint be con- ntil the fourteenth day of said April, and that said Cur- gnize with sufficient sureties in the sum of twelve hun- lars for the personal appearance of him, said Currier, he said Municipal Court, on the said fourteenth day of hen and there to answer further to said complaint, and to receive that which should then be enjoined upon him, rier, by said Municipal Court, and not depart without and that said Currier should stand committed to the jail, on, in said county, until he should recognize as aforesaid; at upon said sixth day of April said Currier failed to ze as aforesaid, and was committed to said jail in pursu- said order; and that thereafter, to wit, on the ninth day April, and while said Currier was committed and held in aforesaid, at Boston aforesaid, before one Edward J. Jones, , a commissioner within and for said county of Suffolk, authorized, and duly appointed and qualified to take bail in criminal cases in said county, John Butland, of said Boston, imself as bail and surety in such recognizance for said that said Butland was then and there lawfully required ommissioner — pursuant to the course and practice of d approving bail — to make a written statement under , said Butland's, circumstances and property, the same erial to aid said commissioner in determining whether and should take and approve said Butland as such bail ty; that said Butland, being then and there duly sworn quirement aforesaid, did then and there, in pursuance of irement, make said statement, and did then and there, sworn as aforesaid, falsely, wilfully, knowingly and cor- y, depose and swear (in and by said written statement) s, that is to say: Commonwealth of Massachusetts. Suf- Before Edward J. Jones, Esquire, a commissioner duly ed to take bail in criminal cases in said county, I (mean-

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ing said Butland) offering myself as surety in the matter of said Commonwealth *vs.* Lovell K. Currier, on oath certify and declare."

The first count then set forth the written statement at length, negatived the declarations thereof, and concluded as follows:

"And so the jurors aforesaid, on their oath aforesaid, do present and say, that said John Butland, on said ninth day of April, before said Edward J. Jones, Esquire, then and there having such power and authority as aforesaid, in manner and form aforesaid, did knowingly and wilfully commit wicked and wilful perjury, against the peace of said Commonwealth, and the form of the statute in such case made and provided."

The second count was for perjury on the examination of the defendant as bail for one John White, who, as the indictment alleged, was lawfully brought before the Municipal Court of the South Boston District, for the transaction of criminal business, upon a complaint charging him with the crime of assault and battery upon a police officer, and was ordered to recognize with sureties for his appearance before the Superior Court, "to answer to said complaint for the crime aforesaid;" and for the failure so to do was committed to jail; and while so committed made application to a commissioner to be admitted to bail. The indictment then alleged that the defendant offered himself as bail, and on his examination before the commissioner, swore to a written statement, which was set forth at length in the indictment, and the allegations thereof negatived, and concluded in the usual manner.

At the trial in the Superior Court, before the jury were empanelled, the defendant filed a motion to quash the indictment, assigning reasons therefor. This motion was overruled. The defendant was then tried and found guilty, and alleged exceptions, the substance of which, together with so much of the material parts of the indictment as are not already stated, and of the motion to quash, appears in the opinion.

H. R. Cheney, for the defendant.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

MORTON, J. The motion to quash the indictment was rightly overruled. The statute provides that in every indictment fo

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y, it shall be sufficient to set forth the substance o. the charged upon the defendant in the criminal case in which jury is alleged to have been committed, and by what court re whom the oath was taken or made, without setting e indictment or any part of any proceedings, and without forth the commission or authority of the court or person hom the offence of perjury was committed. St. 1860, c.

rincipal reason for quashing this indictment, urged by ndant, though stated in different forms, is in substance, oes not sufficiently allege that the Municipal Court had on of the case of Currier, in which the perjury was o have been committed. It may be doubted whether allegation is necessary. Currier, having been committed inding sureties to recognize for him, had a right to be on bail, whether the court had jurisdiction or not, and t be perjury if the defendant swore falsely on the pro- s to procure his discharge.

f such an allegation is necessary, we are of opinion that it iently made in this indictment. The first count alleges urrier was lawfully before the court upon a complaint g him with perjury, and that it was lawfully ordered that gnize with sureties and be committed until he so recognize, ould not be true if the court had no jurisdiction of the his is sufficient within the spirit of the statute, the de- which was to avoid the necessity of setting forth in full plaint or other proceedings of the court or magistrate hom the case was pending. *Commonwealth* v. *Hatfield*, . 227. *Commonwealth* v. *Carel*, 105 Mass. 582. *Com- h* v. *Hughes*, 5 Allen, 499.

bjection that the count contains "no allegation by or hom the oath was administered to the defendant," and ent allegation of time and place, is unfounded. It ith certainty, so as not to be open to any other con- that the defendant, at Boston, on the ninth day of 75, made the written statement and took the oath al- fore Edward J. Jones, a duly authorized and qualified oner.

v.

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The objection that the commissioner had no authority to require or take the written statement under oath, is founded upon a misconstruction of the St. of 1862, *c.* 159. The design of that statute was to provide especial safeguards in the matter of admitting to bail persons who had been convicted in the Superior Court in the county of Suffolk, and, for that purpose, to require that the court or commissioner should, in such cases, take a written certificate under oath of the sureties; but it does not deprive the commissioner of the power which he had, independently of the statute, to take a written statement in other cases where persons offer themselves as bail. It does not affect the case at bar.

The same considerations dispose of most of the objections to the second count. The only ground of objection specially applicable to that count, upon which the defendant relies, is that the recognizance of White was not in due form. The indictment, after reciting that said White was lawfully before the Municipal Court upon a complaint charging him with assault and battery upon a police officer, alleges that he was ordered to recognize to appear before the Superior Court "to answer to said complaint, for the crime aforesaid." The defendant contends that, as he would not be tried on this complaint in the Superior Court, he should have been ordered to recognize to answer to any indictment which might be found against him for the offence charged. The case of *Commonwealth* v. *Slocum*, 14 Gray, 395, is decisive of this point. It was there held that a recognizance in this form was valid and sufficient, and bound the defendant to appear at the Superior Court and answer to any indictment which was substituted for the complaint.

We now proceed to consider the several exceptions alleged by the defendant in the course of the trial.

1. The defendant in his written statement swore that he owned real estate in Lynn of the cash value of not less than five thousand dollars, and also that he was worth in good property not less than four thousand dollars over and above all debts and liabilities.

The indictment alleges, in the second and twelfth assignments of perjury, that the real estate in Lynn was of trifling value, to wit, ten dollars, and that the defendant was not worth in good property four thousand dollars, nor any sum whatever over and above his liabilities.

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ard to these two assignments, the defendant contended
d the court to rule, that his statements as to the value
nd or his property were not material, and that he could
onvicted if such statements were false. The court in-
he jury that "if the defendant stated under oath the
his property to be much more than it really was, but
statement in good faith, or ignorantly, it being his
to its value, he would not be liable on account of his
tement; but if he, knowing its value was less than
him, intentionally misstated its value, in order that he
accepted as bail, he would be liable to conviction for
the other allegations are proved." This instruction
te and carefully guarded.

ue before the commissioner was the sufficiency of the
as bail. The matter to be determined was whether
rth enough to justify his approval as a surety. His
as to the value of his property were material to this
if they were wilfully and corruptly false, he would be
nviction for perjury.

defendant asked the court to rule that there was a
etween the allegation and the proof in the second
. The allegation in the assignment is, that the real
ynn was "of trifling value, to wit, ten dollars and no
there was some evidence tending to show that it was
teen hundred dollars.

rt, upon this request, properly ruled that it was not
or the government to prove that the true value of the
d not exceed ten dollars, but it must prove "that its
not what was stated by the defendant, and that he,
value was less than stated by him, intentionally mis-
alue."

e was whether the defendant wilfully swore falsely in
nt that the land was of the cash value of not less than
nd dollars. The allegation is only material as an aver-
the land was not worth the amount stated, and it is
ly satisfied by proof that the land was of materially
than that amount.

defendant requested the court to rule that the evidence
ity of the defendant's oath as to the value and amount

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of his property and the amount of his debts, was not sufficient to justify a verdict of guilty upon these assignments, but the court declined so to rule.

It is not necessary that there should be two living witnesses in contradiction of the statement of the defendant to justify a conviction of perjury. It is sufficient if, in addition to one directly opposing witness, corroborating circumstances sufficient to turn the scale and overcome the oath of the defendant and the legal presumption of his innocence are proved. *Commonwealth* v. *Parker*, 2 Cush. 212. And where the defendant's statement is contradicted by a witness, who is supported by corroborating circumstances, the evidence must ordinarily be submitted, under proper instructions, to the jury, whose province it is to judge of the weight of such corroborating circumstances.

In the case at bar the defendant's statement that the land in Lynn was worth five thousand dollars, was directly contradicted by the witness Bunelly, and there were circumstances proved which tended to support Bunelly, and to contradict the defendant. The deed to the defendant states the consideration to be twenty-eight hundred dollars, which, if unexplained, affords some presumption that that was the price paid for it. The deed also shows that the quantity of the land was about twelve thousand square feet; the defendant, in his statement, says that he does not know on what street it was situated; the suspicious character of the statement, and the improbability that the owner would not know the street on which land of so great a value per square foot was situated, were circumstances tending to prove the defendant's falsity. Further, if the defendant wilfully swore falsely as to other matters in the written statement, upon which the jury were to judge upon the evidence, this would tend to overcome his oath as to the particulars we are considering. We are of opinion that the court rightly submitted this question to the jury.

The same considerations dispose of the request to rule, that there was not sufficient evidence that the defendant did not own a grocery store and stock of goods in Gloucester. Upon this question there was the testimony of two witnesses that he had no such store, and in addition the admissions of the defendant to the same effect made to two other witnesses. The evidence was rightly submitted to the jury.

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court also rightly submitted to the jury the question, the defendant swore falsely as to the amount of his debts perty. The defendant swore on December 11, 1874, that s did not exceed five hundred dollars, and that he was wenty thousand dollars over and above all debts and lia- The proceedings in bankruptcy showed that in 1872 ndant, in his schedules, admitted under oath that he was in a very large amount, namely, eighty-five thousand nd that there had been no dividend or discharge. These explained and uncontrolled by any evidence that the t had since then paid the debts or acquired any prop- e proper for the consideration of the jury.

lisposes also of the request to rule, that the evidence was cient to support the assignments in the second count, arge that the defendant swore falsely as to the amount ts and property.

defendant also contended that there was a variance he allegation and the proof as to the store and property ter. The government's evidence tended to show that ant had no store or property in Gloucester, in the State husetts. The statement of the defendant upon this proved to be, "that I have personal estate in Glouces- county of Essex; grocery store, cash value is not less , consisting of stock in grocery store."

und which the defendant takes is, that there is no or assertion in his statement that he owned personal r a grocery store in the State of Massachusetts, and upon the case of *Commonwealth* v. *Hughes*, 5 Allen,

case the court say, "Whether any facts might have ed, in the light of which the written statement of the would have been interpreted so as to apply only to houses in Massachusetts, need not now be considered, ch facts were proved." In the case at bar such facts ved. There was sufficient evidence to justify the jury that the defendant's statement could apply, and was to apply only to Gloucester, in the State of Massachu- We are of opinion that this question was properly left to , with the instruction stated in the bill of exceptions,

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namely, "If the other evidence in the case satisfies you that the defendant meant in his statement Gloucester, in the county of Essex and State of Massachusetts, you may then consider his written statement as applying to that town of Gloucester."

5. The only other exception insisted on by the defendant is that to the admission of the testimony of Bunelly, that the defendant paid him nothing for the land in Lynn. The deed was made by Bunelly and his wife, in her right, to the defendant. The fact that the defendant paid Bunelly nothing may be of little weight, but it was admissible as a part of the transaction.

We have considered all the exceptions of the defendant which he has relied upon in the hearing before us, and the result is that he has shown no reason for disturbing the verdict of the jury.

Exceptions overruled.

JAMES CRIMM *vs.* COMMONWEALTH.

Suffolk. November 27, 1875. — January 4, 1876. COLT, J., absent.

A grand jury in this Commonwealth may consist of not less than thirteen, nor more than twenty-three.

Under the Gen. Sts. c. 171, § 4, providing for the case of deficiency of grand jurors in any court, the court is authorized whenever the number of grand jurors in attendance is less than the full number of twenty-three, to cause so many additional grand jurors to be summoned as in its opinion, making due allowance for absences and excuses, may insure the filling up of the grand jury to that number; and the summoning of a greater number does not affect the validity of an indictment found by the legal number of jurors.

If grand jurors, after being sworn, are at once excused and never join the grand jury in their deliberations, they form no part of the grand jury by which an indictment is found.

If on a writ of error to the Superior Court a record is sent to this court, which is afterwards amended on a writ of certiorari, the validity of the proceedings is to be determined by the amended record.

On a writ of error to the Superior Court, it appeared by the record sent to this court, as amended on a writ of certiorari, that of the twenty-three grand jurors summoned, five were permanently excused; that a venire was thereupon ordered by the court to issue for seven additional grand jurors, six of whom appeared and were sworn, and two of them permanently excused, leaving a grand jury of twenty-two; that these with the seventh additional juror before summoned constituted the grand jury by which an indictment was found. *Held*, that the grand jury was properly constituted.

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WRIT OF ERROR to reverse a judgment rendered for the Commonwealth, upon an indictment for burglary, at February term 75 of the Superior Court for the county of Suffolk, for the nsaction of criminal business. The assignment of errors was follows:

" First. That after twenty-three persons had been summoned grand jurors upon venires issued for that number, according the statute in such cases provided, and a legal grand jury had en constituted therefrom according to law, and after twenty of d grand jurors, being first duly sworn, had retired to com- nce their investigations, and before the finding of said indict- nt against Crimm, the court ordered a second venire to issue seven other persons, four of whom came into court and were orn as grand jurors, and allowed to retire with and take part the investigation of said grand jury as members thereof, said ond venire being illegal, and said persons returned under the ne being illegally sworn, as there was no deficiency in said nd jury at the time it issued or at any other time, and said sons returned under the same were not required; and said gal grand jury, constituted as aforesaid, was not a grand jury, said indictment found by the same is void.

Second. That after venires had issued for twenty-three per- s, and said twenty-three persons had been drawn and sum- ned according to law, and twenty of them sworn as grand ors, four other persons were illegally sworn as grand jurors l served as such; and by the reason of such swearing and ving of said four persons on said grand jury, the doings of said nd jury were and are illegal and void.

" Third. That by the serving upon said grand jury of said four itional persons, the number of persons serving was made to sist of an illegal and too large a number; to wit, twenty-four sons.

" Fourth. That said four persons, admitted to serve as afore- , were illegally admitted to serve, and this said service upon l grand jury rendered all the acts of said grand jury illegal void.

" Fifth. That while no deficiency of grand jurors existed, and er twenty-three grand jurors had been summoned according to , a new venire issued for and seven more persons were sum-

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moned and brought into court to act as grand jurors, causing said grand jury to consist of thirty persons.

"Sixth. That after said twenty-four persons had been sworn and permitted to serve upon said pretended grand jury, and before the finding of the indictment against this plaintiff, an additional person was illegally sworn and permitted to serve on said grand jury."

The record, as first brought before this court, was as set forth below, excepting the words printed in brackets, and including those in italics. The attorney general, after oyer prayed of the record remitted, suggested "a diminution of the record in said Superior Court, touching the proceedings relating to the empanelling of the grand jurors for the body of the county of Suffolk, in said court, and in regard to their being sworn according to law;" and therefore moved that a writ of certiorari might issue to the chief justice of that court, directing him to send up the whole of the proceedings remaining of record therein touching the premises, that this court might advise thereon. The motion was granted, and in obedience to the writ of certiorari a record was returned, differing from the first by the insertion of the words printed in brackets, and the omission of those printed in italics.

"Commonwealth of Massachusetts, Suffolk, to wit: At the Superior Court, begun and holden at the city of Boston, within and for the county of Suffolk, for the transaction of criminal business, on the first Monday of January, in the year of our Lord one thousand eight hundred and seventy-three, the Honorable John W. Bacon, a justice of said court, presiding:

"The following-named persons, having been legally drawn and summoned to serve as grand jurors, came into court and answered to their names; to wit, Henry Andrews, Edward T. Bates, Joshua R. Bigelow, Luther Chick, William D. Cook, Nathaniel Cummings, James Daley, Nathaniel Dexter, Horace B. Fuller, [Samuel S. Gay,] John A. Haven, Thomas M. Lewis, Calvin A. Littlefield, William Lutted, Noah H. Marston, Amos Porter, [J. E. C. Peterson,] William B. Stevens, Jr., [John T. Smith,] Benjamin S Shumway, Samuel Tuckerman and William Withington, all of Boston, and Robert Dunning, of Chelsea.

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the usual proclamation, the grand jurors were sworn
to the statute, and being charged by the presiding jus-
d to commence their investigations. Henry Andrews,
Dexter, Samuel S. Gay, J. E. C. Peterson and John
were excused permanently. Subsequently it appeared
A. Haven was chosen foreman, and Samuel Tuckerman

ourt ordered a venire to issue for seven additional grand
ttend upon the court on Wednesday, the eighth instant.
ighth, Wednesday, the court met, Honorable Charles
., presiding; the following-named persons, having been
wn and summoned on the additional venire to serve as
rs, came into court and answered to their names, and
n agreeably to the statute; to wit, John W. Chickering,
rawford, William A. Shapleigh, [John H. Swasey, Wil-
cPherson,] and Thomas Wright. [William J. McPher-
ohn H. Swasey, were excused permanently.]"

onwealth of Massachusetts, Suffolk, to wit: At the
Court, begun and holden at the city of Boston, within
county of Suffolk, for the transaction of criminal busi-
he first Monday of February, in the year of our Lord
nd eight hundred and seventy-three, the Honorable
Bacon, a justice of said court, presiding:

llowing-named persons, having been legally drawn and
to serve as grand jurors, came into court and answered
nes; to wit, *Henry Andrews*, Edward T. Bates, James
Joshua R. Bigelow, Luther Chick, John W. Chicker-
n D. Cook, Nathaniel Cummings, Thomas Crawford,
y, *Nathaniel Dexter*, Horace B. Fuller, John A. Haven,
. Lewis, Calvin A. Littlefield, William Lutted, Noah
n, Amos Porter, William B. Stevens, Jr., William A.
Benjamin S. Shumway, Samuel Tuckerman, William
n and Thomas Wright, all of Boston, and Robert
f Chelsea.

the usual proclamations, the grand jurors were sworn
o the statute, and then retired to commence their in-
s."

rd then set forth the return of the indictment, the ar-
and plea of the defendant, the empanelling of the jury,
ion and sentence.

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It appeared by the writs of venire facias returned with the record, that James T. Barrow, one of the grand jurors at February term, was the seventh additional juror, who was summoned but did not attend at January term.

H. E. Bolles, for the plaintiff in error. 1. The provisions of the Gen. Sts. *c.* 171, §§ 1, 2, 4, must be strictly followed, and the record shows such a departure from these provisions as made the grand jury an illegal body. The second venire issued when there was no deficiency, and the six summoned on the new venire were sworn and constituted, with the first eighteen, a grand jury of twenty-four. If those excused are to be treated as if never summoned, then the new venire made the number twenty-five. If this course of procedure is to be allowed, twenty-three can be summoned, one excused, and new venires issued for twenty-three more, and a grand jury constituted or packed for any purpose of oppression. It is no answer to say that in this country this is not likely to be. It was intended that we should have "a government of laws and not of men."

2. The same reasons apply to this point. After eighteen had been sworn, six more were sworn all at one time, making a grand jury of twenty-four. This was clearly illegal. These six men were equally incompetent to act. They had no right upon the grand jury. Any one upon it made the findings all illegal. *Commonwealth* v. *Davis*, cited 2 Pick. 559. *State* v. *Symonds*, 36 Maine, 128. Excusing two did not cure the illegality of those remaining. Four of these men served upon the grand jury which found the indictment against the plaintiff, and another came in at the February term, making five of them. If this course can be adopted, then any number can be summoned and sworn, and those not desired can be excused, and this constitutional tribunal become dependent entirely upon the discretion of the presiding judge. See 1 Lead. Crim. Cas. (2d ed.) 260, note to *King* v. *Marsh*.

It may be contended that, because these grand jurors were sworn every term, this original illegality was cured. But this illegality consists not alone in the swearing, but in their being summoned at all; and the terms of court have nothing to do with the grand jury, which lasts six months. Gen. Sts. *c.* 171, § 2. The foreman is chosen for the whole term. Gen. Sts. *c.* 171, § 8. The jurors are sworn for the whole term, and the statute only

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r them to be sworn when empanelled. Gen. Sts. *c.*
It has been expressly decided that they need not be
n. *Turns* v. *Commonwealth*, 6 Met. 224. The prac-
aring them at each term of court is not required by
n have no force in law.

ring, (*C. R. Train*, Attorney General, with him,) for
nwealth.

. J. A grand jury in this Commonwealth may con-
ess than thirteen, nor more than twenty-three persons.
alth v. *Wood*, 2 Cush. 149. In the present case, the
enire facias were originally issued by the clerk for
ee grand jurors, as authorized by the Gen. Sts. *c.* 171,
ection 4 provides that, "in case of deficiency of grand
ny court, writs of venire facias may be issued to the
f such cities or towns as the court may direct, to re-
ith such further number of grand jurors as may be
We are of opinion that this section authorizes the
ever the number of grand jurors in attendance is less
l number of twenty-three, to cause so many additional
to be summoned as in its opinion, making due allow-
ences and excuses, may insure the filling up of the
o that number; and that the summoning of a greater
not affect the validity of an indictment found by the
of jurors.

ors sworn by the clerk in the presence of the court
harged with the performance of their duties, so far
of the court is required. *Commonwealth* v. *Sanborn*,
. But if they are at once excused and never join
ry in their deliberations, they form no part of the
y which an indictment is found.

ty of the proceedings in this case depends upon the
l completed record, returned in obedience to the writ
issued upon the motion of the attorney general.
mmonwealth, 6 Met. 224. By that record it appears
uary term, five of the grand jurors originally sum-
e excused permanently, leaving a grand jury of
hat a venire was thereupon ordered by the court to
ven additional grand jurors, six of whom appeared and
, and two of these permanently excused, leaving a

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grand jury of twenty-two, and that those twenty-two, together with the seventh additional juror before summoned, constituted the grand jury of February term, by which this indictment was found. It thus appears that the grand jury in question consisted of only twenty-three persons, as the law requires.

The case of *State* v. *Symonds*, 36 Maine, 128, upon which the plaintiff in error relies, differs from this in two particulars: 1st. By the statutes of Maine, the court had no authority to summon additional grand jurors. 2d. The objection was taken before pleading the general issue. See *State* v. *Carver*, 49 Maine, 588; *Commonwealth* v. *Parker*, 2 Pick. 550.

As we are of opinion that no irregularity is shown in the case before us, it is unnecessary to consider whether the objection was seasonably taken. *Judgment affirmed.*

COMMONWEALTH *vs.* GAMING IMPLEMENTS.

Suffolk. November 23, 1875. — January 4, 1876. COLT, J., absent.

The Municipal Court of the city of Boston has jurisdiction to forfeit and order to be sold the furniture, fixtures, or personal property seized in a gaming-house on a search warrant issued from and returned to that court, under the Gen. Sts. c. 170, §§ 1–5, and the St. of 1869, c. 364, at a time when persons were there found playing an unlawful game.

A complaint on the Gen. Sts. c. 170, § 2, as amended by the St. of 1869, c. 364, § 4, alleged belief that "gaming apparatus and implements are used, kept and provided to be used in unlawful gaming in certain rooms resorted to for the purpose of unlawful gaming, in a certain building situated and numbered thirteen and one half in Hayward Place, in Boston, that is to say, in the rooms in the second, third and fourth stories of said building, and also that furniture, fixtures and personal property are contained therein, and may be found therein at a time when persons may there be found playing at some unlawful game, which said rooms are occupied by some person whose name is to your complainant unknown." The warrant issued on this complaint directed the officer to enter the rooms mentioned in the complaint and search for and seize said gaming apparatus and implements, and also to search for and seize all the furniture, fixtures and personal property found in the rooms described in the complaint, at the time when any persons are there found playing at any unlawful game. *Held*, that the premises to be searched were sufficiently described.

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St. of 1869, c. 364, § 2, authorizing the search for and seizure "of all the , fixtures and personal property found in" a gaming-house, the officer imited in his right to seize, under a warrant following the words of the merely the personal property liable to condemnation.

ation, filed after the return of a warrant issued on a complaint under the . c. 170, § 2, as amended by the St. of 1869, c. 364, § 2, after reciting the t and the warrant, averred that "by virtue of said warrant" the inform a day named, entered the rooms described, and then and there seized cer- ning apparatus and implements, (describing them,) "and your informant then and there seize certain furniture, fixtures and personal property, used rniture, fixtures and personal property of said rooms." *Held*, that the ion showed that the furniture, fixtures and personal property were seized of the warrant.

filing of an information after the return of a warrant issued on a com- nder the Gen. Sts. c. 170, § 2, as amended by the St. of 1869, c. 364, § 3, for the condemnation of certain gaming apparatus and implements, the ued an order "in accordance with the order of the court," directing a y copy of the information and order upon the persons in whose possession es were found, and by posting up a copy of the order and information on ng, where the seizure was made, fourteen days before the hearing. The the officer showed that after diligent search he could not find the parties nd that their usual places of abode were unknown to him, and that the s served by posting a copy, as directed, on the building. *Held*, that n of notice in the public papers was not required, and that the notice sufficient.

AINT on the Gen. Sts. *c.* 170, § 2, as amended by the St. . 364, § 2, alleging belief that "gaming apparatus and ts are used, kept and provided to be used in unlawful n certain rooms resorted to for the purpose of unlawful n a certain building situated and numbered thirteen alf in Hayward Place, in said Boston, and within the istrict of said court, that is to say, in the rooms in the ird and fourth stories of said building, and also that fixtures and personal property are contained therein, be found therein at a time when persons may there be ying at some unlawful game, which said rooms are occu- ome person whose name is to your complainant un- nd praying "for a warrant to search there for and to ame." The warrant issued on this complaint directed to enter into the rooms mentioned in the complaint, arch for and seize said gaming apparatus and imple- nd bring the said apparatus and implements so found e court, and also "to search for and to seize all the fur- xtures and personal property found in the rooms de-

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scribed in the above complaint, at the time w
there found playing at any unlawful game
furniture, fixtures and personal property bef
disposed of and dealt with as to law and justi

The officer's return in the warrant was as f

"By virtue of the within warrant I have t
searched the within described premises, and th
and seized the following gaming apparatus a
same being then and there kept and provided
in unlawful gaming, and I now have the sam
to wit." [Then followed a description of th
"I also, at the same time and place, seized
scribed furniture, fixtures and personal propert
followed a description of the property.] "The
when persons were there found playing at a
called faro."

An information was thereupon filed in th
Court, by the officer serving the warrant, wh
the complaint and the warrant, proceeded as f
upon, by virtue of said warrant and in pursu
informant did, on the twenty-seventh day of
into the rooms described as aforesaid, the said r
resorted to for the purpose of unlawful gamin
there seized certain gaming apparatus and imp
there used, kept and provided to be used in unl
wit: one faro table, nine packs of cards, one
hundred chips, and one deal box and one gam
said gaming apparatus and implements then bei
sion of Charles Childs, William Hersey, Charle
Lyle, Henry Black and Thomas C. Adams.

"And your informant did also then and th
furniture, fixtures and personal property used a
fixtures and personal property of said rooms, t
chairs, one side-board, two tables, eight spittoon
carpet, one foot stool, four table covers, five
pitcher, and two looking-glasses and one rubber
being found in said rooms at a time when cert
wit, said Childs, Hersey, Moore, Lyle, Black, an
there found playing at an unlawful game called f

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e, fixtures and personal property then being in the pos-
of persons, whose names are to your informant un-

l your informant further avers that the aforesaid warrant,
twenty-eighth day of said April, was duly returned into
nicipal Court, with the doings of your informant indorsed
and of record appears; that it is not necessary that any
foresaid gaming apparatus or implements should be longer
the purpose of being produced or used as evidence on
l; that all of said gaming apparatus and implements,
of said furniture, fixtures and personal property, are
ore said court and hath by law become forfeited, where-
prays that the said gaming apparatus and implements
burned or otherwise destroyed, under the direction of
rt, and that the said furniture, fixtures and personal
may be condemned, and adjudged forfeited, and sold in
ner as the court may order, and the proceeds of such
sed of as provided by law."

his information the court ordered that an order of
ie, and that the same be served upon the said Childs,
oore, Lyle, Black and Adams therein mentioned, and
f notice, of which the following is a copy, thereupon

onwealth of Massachusetts. Suffolk, ss. Municipal
he city of Boston. Upon the information aforesaid, it
by the court that the informant notify the within de-
rsons in whose possession said gaming apparatus and
s, and said furniture, fixtures and personal property,
d, and any and all persons claiming any right or in-
or to any of the things therein mentioned, to appear
e justices of said Municipal Court, to be holden at said
r the transaction of criminal business, on the nineteenth
ay, in the year of our Lord one thousand eight hundred
nty-five, at ten o'clock in the forenoon, by leaving an
copy of said information, and of the order of court
with the within described persons in whose possession
ing apparatus and implements, and said furniture, fix-
l personal property, were found, personally, if they can
l, or at their usual places of abode, if the same are

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known, and by posting up a like attested c
tion and order on the building therein name
said copy, and the serving the same on the w
sons in whose possession said gaming appara
and said furniture and fixtures and persc
found, to be fourteen days at least before the
day, that they may then and there appear t
mation, and for trial, and to show cause, if
the said alleged gaming apparatus and im
furniture, fixtures and personal property, s
feited, and why the prayer in said informati
not be granted."

On this order of notice the officer made th
"On the 29th day of April, in the year
thousand eight hundred and seventy-five, by v
order, I served the annexed information an
directed, by posting attested copies thereof o
uated and numbered thirteen and one half in
said Boston, being the same building in whicl
ratus and implements, and the furniture, fix
property, described in said information wer
twenty-seventh day of April, current, the ser
tion and order as above stated, and the postin
building as above stated, being more than fo
the time within appointed for the trial. And
gent search for the within described persons in
said gaming apparatus and implements, and s
tures and personal property, were found, and
within my precinct, and their usual places of abc
to me."

Nelson Tibbetts appeared as claimant of par
so seized. The Municipal Court adjudged the
to be forfeited, and ordered it to be sold, and
pealed to the Superior Court.

In that court Tibbetts filed the following cl
comes Nelson Tibbetts, of the city of Boston, a
the lawful owner of the personal property, viz.
one sideboard, two tables, eight spittoons, fifty
ing, one footstool, four table covers, five tumb

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water-pitcher, two looking-glasses and one rubber mat, described in the above complaint; and he now claims said property, and asks that the proceedings against the same be dismissed, and said property returned to him."

Before the jury were empanelled the claimant filed a motion to dismiss the proceedings, for the following reasons:

"1. The Municipal Court of the city of Boston has no jurisdiction further than to issue the warrant to search, and seize the property, and no authority is conferred by statute upon said court to render the decree therein named, ordering the furniture and other personal property to be sold, and from which decree the claimant appealed.

"2. The proceedings and decree of the court appealed from were void, illegal and without authority of law, and this court cannot take jurisdiction of the proceedings on appeal.

"3. The proceedings in this case are irregular and void, and contrary to the provisions of the Constitution of this state in this, that the furniture and other personal property for which a claim was made were appropriated to public uses without compensation, without a trial by jury, and by the decree of a court having no jurisdiction to adjudge the forfeiture of said property."

This motion was overruled, and the case proceeded to trial. It appeared in evidence that the property claimed was the property of the claimant Tibbetts; that he was not present at the time the gaming took place, and was not interested or connected with the parties who were engaged in the unlawful game; that a game called faro was, at the time of the seizure, being played by the persons named in the proceedings, in the room described in said complaint, &c., upon which the warrant to search was issued, said building being used for a gaming-house; that the furniture and other property seized were used in the apartments where the said game of faro was being played, as the furniture and other property of said building, and were seized as alleged.

The judge submitted to the jury the issues whether the articles claimed were used as the furniture, fixtures and personal property of said building, and whether the said building was a gaming-house, and the said articles found therein at a time when Charles Childs, William Hersey, Charles Moore, and other per-

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sons, were therein playing at an unlawful ga
called faro. The jury answered in the affirma

The claimant then asked the judge to rule a

"1. That the provisions of the St. of 1869, c
jurisdiction to the Municipal Court of the cit
judge a forfeiture of the furniture and othe
claimant, and that said court had no authority
the decree named in the proceedings.

"2. That if the provisions of said chapter
tion on said court to decree such forfeiture w
jury, said provisions were contrary to the prov
stitution of this state.

"3. That the proceedings had in the Muni
irregular and without authority of law.

"4. That the proceedings, decree, &c., of s
been defective, irregular, contrary to the form
Constitution of the state, this court has no p
before it for a condemnation of the personal pr
described in the written claim filed in this court

"5. That, upon the evidence, the facts as fo
and the proceedings before this court, the claim
a return of said property."

The judge declined to rule as requested, bu
upon the proceeding hereinbefore stated, and th
the jury, the government was entitled to a decr
tion and forfeiture, and ordered the same to be
claimant alleged exceptions.

G. W. Searle, for the claimant. 1. The Mun
no authority to decree a forfeiture and sale. T
c. 364, § 3, neither in terms nor in spirit confe
thority. It evidently and expressly contemplates
to another and different tribunal from the infer
wise the same language would have been emplo
to the jurisdiction to issue the warrant and de
Instead of this, the language used is, "applicatio
to a court of competent jurisdiction" for a decr
ural inference from the changed phraseology wo
Municipal Court was not intended as the compet
all, or else that it was not competent in all cases,

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where the value is over twenty dollars. The natural statutory court for applications for adjudging forfeiture is the Superior Court. It is a civil proceeding. Fish forfeitures are always in that branch of the court. The words used nowhere fix the tribunal of forfeiture. This would seem to imply that it would vary, dependent on the amount. In the case of illegal measures, the language is, "the proper tribunal." Gen. Sts. c. 49, § 194. If this is not the correct interpretation of the statute, it is void, being in violation of the provision of the Constitution requiring trial by jury, in all cases where the value of property involved is over twenty dollars. The fact of the right of appeal does not cure the difficulty; as is apparent if there is no appearance in a case. The decision of the court in *Attorney General* v. *Justices of the Municipal Court*, 103 Mass. 456, does not settle this question. The only point there decided was that it was not a proper case for mandamus. All beyond that point is *obiter*.

2. The complaint and warrant did not sufficiently describe the premises to be searched. The rooms to be searched on the second, third and fourth stories are not pointed out.

3. The warrant is defective in authorizing the officer to seize all personal property, whether used in connection with gaming or not.

4. There is no allegation in the information that the property claimed was seized by virtue of the warrant.

5. The order of notice issued on the information was not legally served. Notice should have been given through the newspapers.

W. C. Loring, (*C. R. Train*, Attorney General, with him,) for the Commonwealth.

DEVENS, J. Many of the objections taken by the claimant of the personal property, which has been proceeded against, were fully discussed and passed upon in *Attorney General* v. *Justices of the Municipal Court*, 103 Mass. 456, and although the mandamus there prayed for was not granted, the conclusions stated are not to be treated as the claimant contends as *obiter dicta* only. The nature of the application was such, it being a petition for the purpose of compelling an inferior but important local tribunal to take jurisdiction of certain proceedings under the St. of 1869, c. 364, and to consider and determine whether certain

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property found and seized should be conde
its direction, that it was appropriate to con
what were the powers and duties of that cou
as well as under the Gen. Sts. c. 170, §§ 1–5
amendment, even if in the particular case c
fects in the proceedings no mandamus could
So far, therefore, as this case is disposed o
there reached, as we are satisfied upon reëxa
correctness, it would be superfluous to discus
them. We proceed to consider only those
passed upon.

1. The complaint described with sufficient
ises intended to be searched. It alleges that
certain rooms" in a building definitely descril
in the rooms in the second, third and fourth s
ing," which said "rooms" are further averred
some person whose name is unknown to the
warrant is prayed to search "there" for the
against. The warrant authorizes a search of t
in the complaint. The words, "the rooms ir
and fourth stories," distinguish them sufficien
rooms in the building in which they are situa
the rooms which answer this description.

2. The complaint, also, and the warrant, in
the articles intended to be seized, other than g
or implements, follow the words of the St. of
which authorizes the search for and seizure
niture, fixtures and personal property found
house." Section 3 renders liable to condemn
such property so found which was "used as
tures or personal property of such gaming-ho
tended thereby to subject to forfeiture article
useful in themselves, which have been put to th
making a gaming-house more comfortable or ag
officer is not limited, in his right to seize, merel
property thus liable to condemnation. As one
the seizure is to obtain evidence of the unlaw
ducted in such house, he may also seize the oth
erty there, even if it should not be found afte

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condemnation as the personal property of the gaming-house, as it may be of importance in furnishing evidence of the business there transacted.

Even if this were not so, a complaint and warrant which were too broad in their terms as including articles which would not properly be liable to seizure, would not be so far defective that the claimant of property properly described therein, and which was liable to seizure, could take advantage of such defect to quash the proceedings.

3. The objection, that the information, filed after the return of the search warrant against the property here claimed, does not show that this property had been seized under the authority of the warrant, cannot avail. The information, after alleging the previous steps and the terms of the warrant, contains a recital of the acts done by the officer who had served it, and the words by "virtue of said warrant," with which this recital commences, apply to and qualify the whole of it, the sentence which states the seizure of the "furniture, fixtures and personal property" by the officer, as well as that which precedes it, which states his entry into the premises and the seizure of the gambling apparatus.

4. Neither is the objection tenable that there was no sufficient notice of the information against the articles sought to be condemned. No notice is provided for by the statute in express terms, but as it would be contrary to the general spirit of our law to decree that property should be destroyed or declared forfeit without a suitable effort to notify the owner thereof, thus affording him an opportunity to be heard in relation thereto, it has been held that notice should be given. *Attorney General* v. *Justices of the Municipal Court*, *ubi supra*. It should be such notice as in the judgment of the court would be reasonable and likely to convey information of the facts and proposed proceedings to the party in interest. While service of the notice, where parties are unknown, by advertisement in the public papers may often be proper, yet it is not the only mode, and often not the most effectual. The order issued by the clerk, "in accordance with the order of the court," directed a service by copy of the information and order upon the persons in whose possession the articles were found, and by posting up a copy of the order and

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information on the building where the seizure v
days previous to the hearing. The return o
that after diligent search he could not find t
and that their usual places of abode were unl
that the notice was served by posting a co
the building. This was a reasonable notice, s
court, before whom the proceedings were had,
quite as likely to convey the information inten
interested, as any which could be adopted.

Excep

COMMONWEALTH *vs.* TIMOTHY O'B

Suffolk. November 22, 1875. — January 4, 1876.

Where a person accused of a criminal offence introduces evide
that his general reputation is good, it is not competent for the
to put in evidence of particular facts.

On the trial of an indictment for an assault with a knife, the
witness who testified that on the evening of the assault a man
bought a knife of the same make and style as the knife, which
tended was in the hands of the defendant when the assault
he was not sure that the defendant was the man who bough
then permitted against the defendant's objection to state a c
had at the time of the sale with the man who bought the knif
exceptions, which did not state what the conversation was, th
no ground of exception to the admission of this conversation.

On the trial of an indictment for an assault with a dangerous
a knife, there was evidence that the assault was with a jac
ruled that a jack-knife, like that exhibited to the jury, was a
Held, on a bill of exceptions, which did not more particularl
that the court could not say as matter of law that the instructi

INDICTMENT charging the defendant with an
7, 1875, on James M. Ellis, with a certain danger
wit, with a knife, with the intent to kill. Trial i
Court before *Bacon*, J., who allowed a bill of exc
stance as follows:

During the trial one Philip Wachtell, a deale
was asked by the district attorney if he had eve
fendant before; and he answered, "I can't swear

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am not sure he is the man." He then proceeded to state that about six o'clock, on the evening of July 7, 1875, a man came to his shop, looked into his show-case, and wanted to be shown a knife. The district attorney then asked the witness to state the conversation that took place between them. The defendant's counsel objected, but the judge allowed the conversation to go in, notwithstanding the defendant's objection. The defendant excepted to this ruling and the evidence admitted under it. The witness then related the conversation that took place, stated that this person finally bought a knife of him for the sum of forty cents; that it was a jack-knife, and was of the same make and style of the knife shown to him, (referring to a knife which the government contended was knocked out of the defendant's hand on the day of the alleged assault.) On cross-examination the witness reiterated his former statement that he would not swear the defendant was the person who had this conversation, and who purchased the knife. He further stated that he could not swear the knife produced was the knife he sold, as he had sold seven or eight dozen of the same style and make of knives within six months.

During the trial the defendant called several witnesses, who testified to the fact that the defendant had the reputation of being a peaceable and quiet person. The defendant did not testify in the case. After the evidence for the defence was closed, the government called one Davis, an officer, and offered to show by him that the defendant was one of four defendants named in an indictment for an assault upon one John Walsh. The defendant objected, but the judge admitted the evidence, and the defendant excepted.

The government then offered to put in the indictment above referred to, and the same was admitted, against the defendant's objection, on the ground that it was proper and material as affecting the reputation of the defendant. It was admitted by the government, before the judge gave this ruling, that this indictment had been returned at the present term of court, and had been placed upon file. Davis was not asked as to the reputation of the defendant, and no attempt was made by the government, other than by the introduction of this indictment, to refute the evidence introduced by the defendant, as to the reputation of the defendant

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as a peaceable and quiet person. It appeared by the indictment that the defendant pleaded not 7; on the 9th satisfaction was filed; on the 10t pleaded guilty, and the indictment was placed ment of costs.

The defendant asked the judge to rule as foll jury believe that the knife was a common pocket O'Brien, (whether a large one or a small one is i particular,) and that he did not arm himself wi pose of an assault on Ellis, O'Brien cannot be s phraseology, to have been armed with a dangerou

"2. This knife is not in law what is call weapon.

"3. It is a question of law for the court to de jack-knife was a 'dangerous weapon,' and the c to rule in the negative.

"4. If the court refuses to so rule in either of it is thought to be a question of fact, the court rule that 'a dangerous weapon' *per se* is only a is intended in its natural and ordinary uses for defence or offence only or mainly, and not one wh or a case-knife, or an ordinary pocket-knife or ja may occasion dangerous injury to life or limb that purpose and that intent."

The judge refused to give either of the rulings instructed the jury as a matter of law that a jack exhibited to the jury, was a dangerous weapon; t to rule as requested, and to the ruling given, the cepted.

The jury returned a verdict of "guilty of assau with a knife, but without intent to kill and murd The defendant alleged exceptions.

G. W. Searle, for the defendant.

W. C. Loring, (*C. R. Train*, Attorney General, the Commonwealth.

ENDICOTT, J. The defendant called witnesses his general reputation as a peaceable and quiet government was then allowed to prove that the been indicted for an assault, and to put in evidence

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wherein he was, with other persons, indicted for an assault upon one John Walsh. To this indictment it appeared that the defendants pleaded not guilty; two days afterwards satisfaction was filed, and on the day following the plea was retracted by the defendants, and they pleaded guilty. The indictment was then placed on file on payment of costs, which were paid, but no sentence was passed. The evidence thus admitted to meet evidence of general reputation, was, in substance, that the prisoner had committed another assault, and had in court admitted or confessed the same by a plea of guilty. And the question is, can a particular fact be proved to rebut evidence of a general reputation.

Where a party undertakes to show that his reputation is good, or that the reputation of the other party or a witness is bad, he cannot put in evidence of particular facts to prove the general reputation he is endeavoring to establish. And to meet evidence of general reputation the opposing party may put in evidence to the contrary of a like general character. But he cannot prove particular facts for the reason that a particular fact does not necessarily establish a general reputation or fairly meet the issue presented, and may also raise collateral issues; and for the further reason that while a party is presumed always to be ready to defend his general reputation, he is not expected to be prepared to meet a distinct and specific charge. *Peterson* v. *Morgan*, 116 Mass. 350.

In *Commonwealth* v. *Hardy*, 2 Mass. 303, 318, it was said by Chief Justice Parsons: "It is not competent for the prosecutor to go into this inquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts." See *Commonwealth* v. *Sacket*, 22 Pick. 394; *Commonwealth* v. *Webster*, 5 Cush. 295.

In a case heard before all the judges of England, it was held that, if evidence of good character is given in behalf of the prisoner, evidence of bad character may be given in reply; but in either case the evidence must be confined to the prisoner's general reputation, and the individual opinion of the witness as to his disposition, founded on his own experience and observation is inadmissible. Chief Justice Cockburn, in delivering the opinion of the court, says: "The only way of getting at it [his character]

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is by giving evidence of his general characte
general reputation in the neighborhood in
"It is quite clear that, as the law now sta
cannot give evidence of particular facts, althoug
weigh more than the opinion of all his friend
So, too, evidence of antecedent bad conduct w
good ground for inferring the prisoner's guil
clear evidence of that kind is inadmissible."
ing of the limits of rebutting evidence, where
in evidence of good character, he says, "I thi
dence must be of the same character and co
same limits,—that as the prisoner can only give
eral good character, so the evidence called to
evidence of the same general description, showi
dence which has been given in favor of the pri
but that the man's general reputation is bad."
dissented admitted that evidence of particular fa
sible, but were of opinion that the testimony of a
on his own experience and observation went to
and was therefore admissible on the question of
Justice Erle said: "I agree that evidence of i
to be excluded; but whether the answer given
this case is in the nature of an individual fact or
to inquire, because a question of very general imp
raised; and, with reference to that question, I a
the answer, understood as evidence of dispositio
Regina v. *Rowton*, Leigh & Cave C. C. 520; *S.*
25; and 2 Lead. Crim. Cas. (2d ed.) 333, 351, a

It is true that upon cross-examination of a w
to general reputation, questions may be put to
of his information, and particular facts may be
ness's attention, and he may be asked if he ever
but this is allowed, not for the purpose of estab
of these facts, but to test the credibility of the
ascertain what weight or value is to be given t
Leonard v. *Allen*, 11 Cush. 241. *Rex* v. *Martin*
So in actions for slander, evidence of general bad
plaintiff may be put in evidence in mitigation o
where the plaintiff alleges that the defendant h

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in a particular respect, as for thieving, the defendant may put in evidence for the same purpose that the plaintiff's general reputation in that respect is also bad. *Clark* v. *Brown*, 116 Mass. 504. But we are not aware of any case, where the defendant upon that issue has been allowed to prove a particular act of theft.

We are of opinion therefore that the learned judge erred in admitting this evidence. The government was entitled to rebut the evidence of the defendant, he having put his character in issue, but could not do so by proof of another assault.

The evidence of Wachtell that, on the night of the assault, he sold, to a person who called at his shop, a knife similar to the knife which the government contended was in the hands of the defendant at the time of the assault, was competent; although Wachtell could not positively identify the defendant as the purchaser. The fact that the defendant was the purchaser might have been established by other evidence. As the conversation between Wachtell and the purchaser is not reported, we are unable to say that it was improperly admitted. It might have been entirely immaterial, in no way bearing on the guilt of the defendant. As the defendant has failed in his bill of exceptions to show that it was material, or that he has been injured by it, this exception must be overruled.

The same answer will apply to the ruling that a jack-knife, like that exhibited to the jury, was a dangerous weapon. That it was not a dangerous weapon as matter of law, the defendant has given us in his bill of exceptions no means of determining.

Exceptions sustained.

COMMONWEALTH *vs.* GEORGE T. MALLOY.

Suffolk. November 22, 1875. — January 4, 1876. COLT, J., absent.

If a criminal case has been brought by appeal from a Municipal Court to the Superior Court, and the complaint is sufficient upon its face to authorize a verdict and judgment upon it in the Superior Court, a misrecital of the complaint in the record of the Municipal Court furnishes no ground for dismissing the complaint.

A complaint under the Gen. Sts. c. 163, § 11, which alleges that the defendant at a time and place named "with force and arms did forcibly rescue and take out of

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the lawful custody of said complainant the body of one
then and there a prisoner arrested by and held in the law
plainant, upon the charge of a certain offence, to wit: the
and being a disturber of the peace, he the said complainant
police officer of said city, and being then and there duly
hold in custody the said A. upon the charge aforesaid," is
ing that the defendant knew that A. was in custody.

COMPLAINT by Benjamin H. Hunt, police of
cipal Court, of the South Boston district in t
alleging that the defendant on August 23, 187
within the judicial district of said court, with f
forcibly rescue and take out of the lawful cus
plainant, the body of one Curren, he the said
and there a prisoner arrested by and held in t
of said complainant, upon the charge of a certa
the crime of drunkenness, and being a disturbe
the said complainant, being then and there a p
city, and being then and there duly authorized
in custody the said Curren upon the charge afo
peace of said Commonwealth, and the form of t
case made and provided."

The defendant was adjudged guilty, and ap
perior Court; and a duly authenticated copy
the conviction, and of the other proceedings
transmitted to that court. The record recited
ant was brought before the court on the compl
H. Hunt, police officer, setting forth that he
on August 23, 1875, at Boston, "and within tl
of said court, with force and arms, did forcibly
lawful custody of said complainant the body of
legally held by said complainant, a police officer
and being a disturber of the peace, against the p
monwealth, and the form of the statute in su
provided." The rest of the record is immateri
cided.

In the Superior Court, before the jury were
defendant filed a motion to dismiss and quash t
proceedings under the same, for the following re

"1. There is no offence at law set forth in sa

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"2. There is no copy of the conviction of the defendant upon any offence in which the Municipal Court of the South Boston District could have had jurisdiction.

"3. The papers, as transmitted to this court, are irregular and defective. The description in the copy of the complaint on file in this case differs materially and substantially from the description of the offence recited in the copy of the judgment transmitted to this court.

"4. The provisions of the General Statutes in relation to the transfer of papers from lower courts on appeal have not been complied with."

Bacon, J., overruled the motion. The defendant was then tried and found guilty, and alleged exceptions.

J. W. Fox, for the defendant.

C. R. Train, Attorney General, for the Commonwealth.

MORTON, J. The Municipal Court transmitted to the Superior Court duly authenticated copies of the complaint, conviction and other proceedings in the case, in compliance with the Gen. Sts. *c.* 173, § 3. The objection, that the descriptions of the offence charged differ in the complaint and in the record of the conviction, is immaterial. The difference is not substantial. If the complaint is sufficient to authorize a verdict and judgment upon it in the Superior Court, the misrecital of it in the record furnishes no ground for dismissing it. *Commonwealth* v. *McCormack*, 7 Allen, 532.

The only other reason urged for quashing the complaint is, that it does not allege that the defendant knew that the person alleged to have been rescued was in the lawful custody of a duly authorized officer. The complaint is brought under the Gen. Sts. *c.* 168, § 11, which provides that "Whoever forcibly rescues any prisoner held in custody upon any conviction or charge of an offence," shall be punished as therein provided. This statute does not merely provide a punishment for the common law offence of rescue; it describes and defines the offence which it is intended to punish. *Commonwealth* v. *Lee*, 107 Mass. 207. Where a statute embraces all the ingredients of the offence intended to be punished, and the language used describes such offence with legal certainty, an indictment or complaint may well charge the offence in the words of the statute. *Commonwealth* v. *Barrett*, 108 Mass.

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302, and cases cited. The words of this
any prisoner held in custody," import a
prisoner out of custody by force. The pu
person who should thus rescue a prisone
not make a knowledge by the rescuer of
cer one of the ingredients of the offence.
pugn the general rule of law that in order
it must be done with a criminal intent. A
victed unless he effects a rescue by some
The intent to do such act is a criminal inte
that he does not know all the consequences
Prince, L. R. 2 C. C. 154.

For these reasons we are of opinion that
case is sufficient. It alleges with sufficient
was arrested and held in the lawful custody
authorized, for the crime of drunkenness,
custody the defendant, "with force and arm
and take out of the lawful custody" of sa
said Curren. These allegations include all
constitute the offence intended to be punishe

Ex

COMMONWEALTH *vs.* BENJAMIN F.
SAME *vs.* CHARLES E. PHEN

Middlesex. Nov. 27, 1875. — Jan. 4, 1876.

Where two persons go out to fight with their fists, by cor
each other, each is guilty of an assault, although there is
will.

TWO INDICTMENTS: one for an assault and ba
F. Collberg upon Charles E. Phenix; and the
sault and battery by Phenix upon Collberg.
were founded upon and supported by the same

At the trial of the two indictments in the Su
fore *Lord*, J., there was evidence for the Comm
to show that about six o'clock on the evening of

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22, 1875, Collberg and Phenix met near the station of the Boston and Maine Railroad in Malden, and had a slight altercation, as a result of which Collberg bantered Phenix to fight him; that Phenix declined on the ground that he did not want to fight with his best clothes on, but said that if Collberg would wait until he could go home and change his clothes, they would go to some place outside of the town and settle it; that thereupon Phenix did go home and change his clothes, and he and Collberg met at a retired place, remote from habitations and thoroughfares, and fought with each other in the presence of some fifty or seventy-five persons who had gathered there, and that the fight continued until Collberg said that he had enough, when it ceased and the parties went home; that the next day Collberg and Phenix were a good deal bruised, and looked as if they had been fighting.

The defendants testified that they had been acquainted with each other for a period of five or six years, during which time they had always been on the most friendly terms, and were so at the time of the act complained of, and subsequently; that during the period of their acquaintance they had engaged at various times in wrestling matches with each other, all of which had been carried on in a friendly spirit and without engendering any ill feeling between them; that on the day mentioned in the indictment they met towards evening near the station of the Boston and Maine Railroad in Malden, where they had some talk about a recent wrestling match that had taken place in New York, and, growing out of this, as to previous contests of this character which had taken place between them; that, after some talk about their matches, they agreed to go then to some place where they should not disturb any one, and have another trial of their agility and strength in this direction; that they shortly afterwards went to such a place and engaged in a "run and catch" wrestle with each other, without any anger or malice, or any intention to do each other bodily harm; that any injuries which they inflicted upon each other were inflicted accidentally and by mutual consent while voluntarily continuing in such contest.

There was no evidence of any uproar or outcries when the contest took place, or that any one was disturbed thereby, except that the parties were fighting in presence of a crowd of from fifty to one hundred persons who had collected together. After

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the evidence was all in, the defendants struct the jury as follows:

"If the jury are satisfied that whate defendants did to each other they did that the struggle between them was an tarily continued on both sides without ar ply for the purpose of testing their relati then there is no assault and battery, an be acquitted."

The judge declined to give this instruc jury upon this branch of the case in substa if the defendants were simply engaged in being a lawful sport, they could not be con battery; but if by mutual agreement betw ously made, they went to a retired spot for with each other, and for the purpose of doi injury by fighting, with a view to ascertain in fighting which was the best man, and the each endeavoring to and actually doing all his power to the other, and if, in such co the other with his fist for the purpose of inj properly be convicted of assault and batter though the whole was done by mutual arra and consent, and without anger on the part other."

To this instruction, and to the refusal of th instruction prayed for, the defendants alleged

G. S. Scammon, for the defendants.

W. C. Loring, (*C. R. Train*, Attorney Gen the Commonwealth.

ENDICOTT, J. It appears by the bill of e parties by mutual agreement went out to figh retired place, and did fight in the presence o hundred persons. Both were bruised in the fight continued until one said that he was sat also evidence that the parties went out to engag gage in a "run and catch" wrestling match. that the instructions given by the presiding j full and accurate statement of the law.

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The common law recognizes as not necessarily unlawful certain manly sports calculated to give bodily strength, skill and activity, and "to fit people for defence, public as well as personal, in time of need." Playing at cudgels or foils, or wrestling by consent, there being no motive to do bodily harm on either side, are said to be exercises of this description. Fost. C. L. 259, 260. Com. Dig. Plead. 3 m. 18. But prize-fighting, boxing matches, and encounters of that kind, serve no useful purpose, tend to breaches of the peace, and are unlawful even when entered into by agreement and without anger or mutual ill will. Fost. C. L. 260. 2 Greenl. on Ev. § 85. 1 Stephens N. P. 211.

If one party license another to beat him, such license is void, because it is against the law. *Matthew* v. *Ollerton*, Comb. 218. In an action for assault, the defendant attempted to put in evidence that the plaintiff and he had boxed by consent, but it was held no bar to the action, for boxing was unlawful, and the consent of the parties to fight could not excuse the injury. *Boulter* v. *Clark*, Bull. N. P. 16. The same rule was laid down in *Stout* v. *Wren*, 1 Hawks, (N. C.) 420, and in *Bell* v. *Hansley*, 3 Jones, (N. C.) 131. In *Adams* v. *Waggoner*, 33 Ind. 531, the authorities are reviewed, and it was held that it was no bar to an action for assault that the parties fought with each other by mutual consent, but that such consent may be shown in mitigation of damages. See *Logan* v. *Austin*, 1 Stew. (Ala.) 476. It was said by Coleridge, J., in *Regina* v. *Lewis*, 1 C. & K. 419, that "no one is justified in striking another except it be in self-defence, and ought to be known, that whenever two persons go out to strike each other, and do so, each is guilty of an assault;" and that it is immaterial who strikes the first blow. See *Rex* v. *Perkins*, 4 C. & P. 537.

Two cases only have been called to our attention, where a different rule has been declared. In *Champer* v. *State*, 14 Ohio St. 437, it was held that an indictment against A. for an assault and battery on B. was not sustained by evidence that A. assaulted and beat B. in a fight at fisticuffs, by agreement between them. This is the substance of the report, and the facts are not disclosed. No reasons are given or cases cited in support of the opposition, and we cannot but regard it as opposed to the weight

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of authority. In *State* v. *Beck*, 1 *Hill*, contains statements of law in which we

MEMORANDUM.

On the twenty-first day of Decembe OTIS P. LORD, one of the justices of t appointed a justice of this court, in place deceased, and took his seat upon the be January, 1876.

COMMONWEALTH *vs.* TIMOTHY J.

Essex. Nov. 3, 1875. — Jan. 29, 1876. COLT, absent.

On an indictment for the malicious burning of a building is competent for the government to show, on the questi the defendant burned the building on that day, that on ber 6, 1875, the defendant set fire to a shed ten feet dist connected therewith by a flight of steps.

In a criminal case the admission by the defendant that *the* cious intent does not preclude the government from prov

On the trial of an indictment for the malicious burning o ment contended that the motive of the defendant in setti his stock of goods, which was insured for more than its $500 on the day of the fire; that on that date the defends stock to the amount of $2000. To meet this evidence the copies of two mortgages on the goods, dated about six mo to secure payment of a note of $1000, and the other a note the defendant. No other evidence was introduced respectir that the mortgages were immaterial, and that the correctne gard to them need not be considered.

ENDICOTT, J. The defendant was indicted burning of a building belonging to one Gleason. contained three counts, charging the same offe committed on August 24, September 6 and 10, 1 Before the trial began, the government elected t third count only.

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The evidence offered by the government that the defendant, on August 24th and September 6th, set fire to a shed ten feet distant from the building, and connected therewith by a flight of stairs, was competent on the question of the intent with which he burned the same building on September 10th, for which offence he was tried. The instructions to the jury properly limited the effect of the evidence to the single purpose for which it was competent. *Commonwealth* v. *Merriam*, 14 Pick. 518. *Commonwealth* v. *Eastman*, 1 Cush. 189. *Commonwealth* v. *Tuckerman*, 10 Gray, 178, 200. *Commonwealth* v. *Shepard*, 1 Allen, 575 *Commonwealth* v. *Choate*, 105 Mass. 451. *Regina* v. *Dossett*, 2 C. & K. 306. The government was not precluded from proving that the building was burnt with a wilful intent, because the defendant conceded that fact before the trial began, and stated that the only question he desired to submit to the jury was whether he set the fire. *Priest* v. *Groton*, 103 Mass. 530.

The government contended that the motive of the defendant in setting the fire was to destroy his stock of goods, which was insured for more than its value. This value, on September 10, was about $500. Evidence was introduced by the government that on that date the defendant had insurance on the stock to the amount of two thousand dollars. To meet this evidence, the defendant put in office copies of two mortgages on the goods, dated January 10 and 22, 1875, respectively; one to secure the payment of a note of $1000, and the other a note of $700, both signed by the defendant. No other evidence was introduced respecting the mortgages.

Several instructions to the jury were requested by the defendant in regard to these mortgages and the effect to be given to them. The court gave the instructions, but added certain explanations and qualifications, and also gave an instruction upon the burden of proof, to which the defendant excepted.

In the view taken by the court of this evidence offered by the defendant, it is unnecessary to consider whether the instructions as given were correct. The evidence was immaterial. It did not show that the defendant's insurable interest, or the amount of money he was to receive from the insurers, was less than if there had been no mortgage. It had no tendency to disprove the motive of the defendant to destroy the goods. The inducement to

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destroy them would be quite as great, secure a debt much larger than thei been mortgaged. In either case he w it was no less an advantage to him bec it to pay his notes secured by the mort

The rulings of the court as to the evidence do not appear to have injure not necessary to consider them.

E. T. Burley, for the defendant.

C. R. Train, Attorney General, for t

INHABITANTS OF CHESHIRE *vs.* ADA ERVOIR COMPAN

Berkshire. Sept. 16, 1875. — Jan. 28, 1876. JJ., absent.

A town, within the limits of which existing public v county commissioners under the St. of 1873, *c.* 144, the soil of such ways, does not come within the pr corporation that has sustained damages by reason grade or repairs in such ways; and the objection assessed may be taken at the trial before a sheriff damages.

PETITION under the St. of 1873, *c.* 144 assess the damages caused to the petitione county commissioners in permitting the dam owned by it so as to injure certain tioner was bound to keep in repair. T structions of the presiding officer, retur petitioner. The verdict was certified to Superior Court; and the respondent appea case appear in the opinion.

T. P. Pingree & J. M. Barker, for the p

H. L. Dawes, (*W. T. Filley* with him,)

ENDICOTT, J. The question here raised tion of the St. of 1873, *c.* 144, which purpor tion to the acts for the erection and regulat time of its passage the owner of a dam ha

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ct, Gen. Sts. c. 149, to flow any town way or highway. hose land is overflowed, or otherwise injured by a dam, n compensation therefor; but there being no provision ing land devoted to the public easement of a way to regulating in what manner it may be done, it is to ed that no encroachment on such public right was in- the mill act. It has, therefore, been held, that a mill- by his dam overflows a public way, is liable to be r the maintenance of a nuisance. *Commonwealth* v. Pick. 247. *Commonwealth* v. *Fisher*, 6 Met. 433. a public way is rendered unsafe by reason of such e town may be indicted for want of repair. In an espass on the case to recover expenses incurred by the dover in repairing a highway, which had been over- greatly injured by the water of the defendant's mill- s held that the town had no remedy under the mill s. c. 116, Gen. Sts. c. 149, and that the action could ned. *Andover* v. *Sutton*, 12 Met. 182. There is no ler the mill act, because that gives a remedy only to and whose land is flowed.

rs in this case that there was no evidence of any own- the petitioner in the land over which the roads in e located, other than the general ownership, possession l pertaining to towns over ways legally located and within their limits, and the duty imposed by law in e same safe and convenient for travel. A town does case own the land over which a way passes. *Perley* r, 6 Mass. 453. *Millbury* v. *Blackstone Canal Co.* 8 Nor does it own the easement created by the con- f the way. That belongs to the public. The town ain the way because the general law imposes that duty, rporate capacity it has no property in the land under in the easement of the ways within its limits, and so dy under the mill act as a corporation whose land is therwise injured by a dam. Gen. Sts. c. 149, § 4. ompelled to repair a defect caused by flowing, a di- to the town thus ensues, and it may maintain an cover the expenses thus incurred, from the person the nuisance in the same manner as against any

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other person who creates a defect i
caused the town to incur expense in th
duty. *Lowell* v. *Boston & Lowell Ra*
in *Andover* v. *Sutton*, *ubi supra*, it wa
could recover from the defendant the e
not recover costs paid by the town on a
want of repair caused by the acts of t
costs were incurred in consequence of t
form a duty imposed by law.

A mill owner, therefore, cannot flow
and can be indicted if he does so. Th
so flowed is located has no remedy unde
jury caused by such flowage, but can ma
against the mill owner, and recover su
obliged by law to expend in repairing suc

The St. of 1873, *c.* 144, is intended to
to mill owners under the authority and
commissioners. It is provided in § 1, t
sires to raise, erect or maintain a dam fo
height or in such manner as to overflow
existing public way, may apply to the cou
ting forth the height at which it is desired
and the ways which may be injured there
alteration, change of grade or specific repa
the commissioners, after a hearing on the pe
alteration, repairs or changes of grade "as
enable the petitioner to raise, erect and mai
out overflowing or otherwise injuring such
give written direction and authority to suc
at his own expense such alterations, changes
within a reasonable time." It is further pro
tice of the hearing shall be given to the tow
are situated, and to the owners and occupa
thereby, in the same manner as notice of the
ways is given; and "the commissioners shall
be paid by the petitioner all damages sustain
corporation by reason of the alterations, cha
pairs ordered by them; and any person or co
by such assessment," may have the damages a

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laying out of highways. By the provisions of this act, re, when an order has been passed by the county commis- directing alterations, changes of grade and repairs in ex- ublic ways, and the petitioner has complied in all respects e order in making the changes, he may raise his dam to ght allowed, and flowage to that height is lawful.

question presented is, whether a town, within the limits n existing public ways have been changed by the commis- comes within the provisions of § 2, as a corporation that ained damage by reason of the alteration, changes of repairs in such ways.

the mill act, large privileges are conferred upon a per- ing a dam upon his own land for mill purposes. In *Bates outh Iron Co.* 8 Cush. 548, 553, Chief Justice Shaw It is a provision by law, for regulating the rights of pro on one and the same stream, from its rise to its outlet, ner best calculated, on the whole, to promote and secure nmon rights in it." See *Lowell* v. *Boston*, 111 Mass. s by the existing provisions of law no dam could be ed in such manner as to injure or interfere with any ex blic way, it is to be presumed that when the Legislature e St. of 1873, it had in view an extension of the powers ileges conferred by the mill act, by authorizing changes ways under the direction of a tribunal already clothed ority over that subject matter. New powers being thus upon the commissioners, they are to adjudicate and de- n a given case, whether there is occasion for the exercise uthority given; or, in other words, whether alterations ade in the ways to be affected by the dam without se- fecting the public convenience and necessity in the use ways. If they so determine, they may order such alter- be made as are necessary to enable the petitioner to dam "without overflowing or otherwise injuring such This provision is important, for the commissioners are the proposed alteration, so that in their judgment cannot be overflowed or injured. At the hearing ese alterations are to be determined, the town is to have nd may be heard upon that matter. The question, e, is to be settled by a board of public officers having

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in charge the public interests, and the convenience and necessity of the p and their adjudication as to the chan manner in which the ways are to be is conclusive.

The ways when thus altered are publ maintaining them rests upon the town visions of law, as in any other case, whe ordered by the commissioners. Whether town, or by the county commissioners, or in those cases where turnpikes have been of the Legislature, the obligation to keep i the towns within whose territorial limits keep it in repair does not depend upon the way is laid out, or the alteration is effecte proceeding, but arises from the fact that it the town limits. An increased expenditure laying out or alterations, but that is part In laying out turnpikes, or bridges, as high ture, express provisions have sometimes bee towns in which the highway lies may be rel expense of maintaining such ways by imp towns or cities, or upon the county. But in provision, the duty of maintaining the highw See *Northampton Bridge Case*, 116 Mass. 44

Upon examination of this statute, we find expresses or implies that the town can recov dent for the increased expense cast upon it b its ways ordered by the county commissioners. not damages sustained by Cheshire within th The damages which the commissioners may ass tion to persons and corporations must be taken to property, and so can only be assessed to th porations who have sustained such damage b changes in the ways, and cannot be held to corporations, which having in their corporate erty in the land, covered by the ways, or in the thereby are only damaged by the increased which is imposed by general law.

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objection to the jurisdiction was taken before the sheriff's
efore any evidence had been offered, or hearing had, and
of opinion that the respondent is not precluded from rais-
s question, because it could have been raised on a petition
tiorari to quash the proceedings of the county commission-
ordering a warrant to issue for a jury. It is a question of
tion, whether the county commissioners or a jury have au-
to assess such damages, and the objection may be taken
trial before the jury. *Verdict set aside.*

AVEN AND NORTHAMPTON COMPANY *vs.* JOEL HAYDEN & others.

n. January 19. — 25, 1876. COLT & ENDICOTT, JJ., absent.

signed by several persons, whereby "the undersigned" propose that, if party to the contract will do a certain thing, "we will undertake" to do other thing, is a joint contract on the part of the signers.

an action against several defendants sued on a joint contract, one of them executor or administrator cannot, under the statutes of this Common- e summoned in to defend the action.

nt made by a party to an action, as to the amount of the judgment to be against him, does not affect the form of the remedy against his estate.

ACT against Joel Hayden and seven others. Writ dated 1869. The declaration contained two counts. The first as follows: "And the plaintiffs say that the defend- e an agreement in writing, a copy whereof is hereto an- ereby said defendants agreed to secure the right of way laintiffs for their railroad, free of expense to the plain- the westerly side of the town farm in Northampton, stern terminus of the road in Williamsburg, for divers valuable considerations therein named, on the part of ntiffs, all of which have been fully performed by said But defendants, although requested, have neglected ed to perform the stipulations on their part to be per- as set forth in said agreement hereto annexed, whereby ntiffs have been put to great trouble and loss."

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The second count was as follows: "And plain
ants owe them the sum of forty-five thousand d
paid for defendants by plaintiffs at defendants' re

The copy annexed consisted of two papers sig
fendants. The first was as follows: "Williams
26, 1866. To J. E. Sheffield, Esquire, Committee
ampton & New Haven Railroad Company. The und
resenting a large portion of business on the line of
railroad from Northampton to Williamsburg, propose
company will extend their road to Williamsburg as s
ticable, we will undertake to secure good, responsible s
to the stock of your company, to the amount of 1250
pay for the same in instalments, as needed for buildin
We also propose to secure the right of way for the ro
expense to your company, from the westerly side of
farm in Northampton to the western terminus of the roa
liamsburg, and also to obtain the needful legislation i
chusetts to merge or consolidate the Northampton and Sl
Falls Railroad Company with the Northampton and New
Railroad Company, so as to form one corporation fro
Haven to Williamsburg. It is understood that this prop
is not to be binding on our part, unless we can secure the
of the amount of stock above named, and also the right o
or make such arrangement in regard to the same as shall b
isfactory to your company; also that the stock (1250 share
not to share in the earnings of the road until the extension
operation."

The second paper was as follows: "Williamsburg, August
1867. To the New Haven and Northampton Company. T
undersigned, whose names are subscribed to proposals submi
ted in January 1866 to the New Haven and Northampton Com
pany for them to extend their railroad to Williamsburg, hereby
agree that said company may go forward and secure the right o
way for said road west of Northampton town farm, either by
purchase or appraisement by the county commissioners, as said
company may think best, and that it shall be done without preju-
dice to the legal rights of either party named in said proposals."

On June 30, 1873, the following agreement, signed by the par-
ties, was filed in the case: "Judgment shall be rendered for the

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iff as damages, as if upon a verdict, for three fifths of such
s an assessor to be appointed by the court, unless agreed
by the parties, shall find the plaintiffs have paid or are
to pay for their right of way described in the contract,
nterest thereon. Said assessors shall report each item, and
ounds of allowance or rejection, and shall also report any
ons of law arising in the making of such assessment, if re-
d by either party, to this court, with right to take the same
reme Judicial Court. It is understood that the verdicts,
and amounts paid shall be considered the value of the
es taken. Any outstanding claims in favor of the Nono-
lk Company against the plaintiff are agreed to be adjusted
id by the said Joel Hayden and others, defendants in the
uit, but without prejudice to any claim said defendants
ve on Lucius Dimock or said Nonotuck Silk Co. for con-
n."

Hayden died in November, 1873, and Thomas Talbot and
were appointed administrators of his estate in December,
In June, 1875, after the former decisions upon other
f the case, reported 107 Mass. 525, and 117 Mass. 433,
erior Court issued a summons to the administrators to ap-
l defend the action. This summons was duly served upon
nd, at October term 1875, they appeared by attorney
ed that the process be dismissed, as having been issued
ently and without authority of law, and that they be
ed from further answer.

J., ruled that the court had no authority to issue the
s and require the administrators to defend the action;
plaintiff alleged exceptions.

Stearns & N. A. Leonard, for the plaintiff. 1. The
was not joint in such a sense as to require all the sign-
joined in the suit, and the action to proceed against all
ivors in case of the death of one. The plaintiff might
signers as it desired. The contract does not name any
r parties who shall execute it, but purports to bind each
ry one who shall sign. The stipulations are several in
ture, and binding upon those who may deem that their
interests will be subserved by signing it. *Springfield* v.
107 Mass. 532. *Mattoon* v. *Barnes*, 112 Mass. 468.

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Warring v. *Williams*, 8 Pick. 322. *Herrick* v. *Johnson*, 11 Met. 26. *Yale* v. *Wheelock*, 109 Mass. 502.

2. In any event, the death of Hayden severed the contract. His administrators were liable to an action upon the contract after the expiration of one year. Gen. Sts. *c.* 97, § 28. *Burnside* v. *Merrick*, 4 Met. 537, 544. *Curtis* v. *Mansfield*, 11 Cush. 152. More than a year having elapsed since the appointment of the defendants as administrators, and they, being liable to an action, are liable to be summoned in as defendants in this action. The objection which formerly was urged against joining administrators and executors with surviving co-contractors, to wit: that the execution to be issued would run differently against the different defendants, — as to some, against their proper persons and estate, and as to the administrators, against the estate of the deceased, — does not now apply, as under the Gen. Sts. *c.* 129, § 4, there may be separate trials, separate judgments and different executions. *Fuller* v. *Morse*, 4 Gray, 294. *Hawkes* v. *Phillips*, 7 Gray, 284. Since the passage of the St. of 1852, *c.* 312, § 3, there seems to be no reason why the administrators of a deceased defendant, in an action against joint defendants, may not be summoned in to defend the action brought against his intestate, or, after the expiration of a year, brought in as an original defendant, although the action may proceed under the Gen. Sts. *c.* 127, § 11, against the survivors, if the plaintiff desires. The question of the way in which judgment shall be entered does not now arise, as the plaintiff may, after the defendants are in court, discontinue as to all the other defendants than the administrators of the defendant intestate.

3. By the agreement for judgment, Hayden bound himself to abide the judgment to be entered. It thus, by his voluntary agreement, became a part of the case and of the record that he and his estate would remain liable for the judgment that was to be rendered.

C. Delano, for the administrators of Hayden.

Gray, C. J. This is a joint contract, and was so declared upon in this action. One of the defendants having died intestate, the question now presented is whether the action can proceed against his administrators as well as against the surviving defendants.

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common law, in case of a joint contract, if one of the joint ctors died, an action at law could not be brought or prose- against his executor or administrator, but against the sur- contractors only; and if the contract was several, or joint veral, the executor or administrator of one could be sued eparate action, but not jointly with the survivors, because to be charged *de bonis testatoris*, and they *de bonis pro-* *Foster* v. *Hooper*, 2 Mass. 572. 1 Dane Ab. 158. *Jen-* *De Groot*, 1 Caines Cas. 122. 2 Wms. Ex'ors (5th Am. 576, 1577. By our statutes, if one joint contractor dies, ate may be charged as if the contract had been joint and , that is, by action at law against his executor or adminis- alone. St. 1799, *c.* 57. Rev. Sts. *c.* 66, § 27. Gen. Sts. § 28. *Curtis* v. *Mansfield*, 11 Cush. 152. *Sampson* v. 101 Mass. 145.

provision of the practice act; St. 1852, *c.* 312, § 3; Gen. 129, § 4; that "persons severally liable upon contracts in , including all parties to bills of exchange and promissory nay all or any of them be joined in the same action," is a pleading, relating to parties severally liable by their own t, and not to those whose liability, originally joint, must, on of subsequent events and operation of law, be enforced y; and does not affect the survivorship of actions or the s against the representatives of parties deceased. This evident by those sections of the chapter upon that sub- ich declare that in case of the death, before judgment, of several defendants in a personal action, the cause of urvives, the action shall proceed against the survivors; ch allow such action to be prosecuted against an executor nistrator, only when the deceased is the sole defendant, last surviving defendant in the action. Rev. Sts. *c.* 93, 2, 13. Gen. Sts. *c.* 127, §§ 5, 11, 12.

llows that, by the death of the defendant Hayden, the f action was severed, and could be enforced against his trators by a separate action only. The agreement signed in his lifetime, as to the amount for which judgment be rendered, did not affect the form of remedy by which ate could be charged after his death. *Prior* v. *Hembrow*, W. 873, 889. *Exceptions overruled.*

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THOMAS LEONARD *vs.* SAMUEL ADAMS.

Worcester. Oct. 6, 1875. — Jan. 7, 1876. AMES & LORD, JJ., absent.

The defendant owned a tract of land and conveyed it by a deed embracing in its description the whole width of a road, called a town road, running along the east side of the premises, its east side being made the east side of the land conveyed. The deed contained a covenant that the premises described were free from all incumbrances, except the aforesaid road, so far as the same was not discontinued. The town had previously voted, while the defendant owned the land, to discontinue a portion of the road bounding on the land conveyed. *Held*, in an action for breach of the covenants of warranty and against incumbrances, contained in the deed, that the deed conveyed the fee of the town road subject to the public easement. *Held*, also, that whatever private right of way certain persons had in the portion of the land, subject to the public easement, was merged in the public way, and that, as such right did not appear to have been acquired before the way was laid out, it could not be revived on its abandonment.

CONTRACT for breach of the covenants of warranty and against incumbrances in a deed from the defendant to the plaintiff, dated January 23, 1858. Writ dated February 10, 1873.

At the trial in the Superior Court, before *Dewey*, J., it was admitted, that at the time of the conveyance to the plaintiff, two owners of adjoining lots had rights of way over the land conveyed, and that for the damages arising from these incumbrances the plaintiff was entitled to recover, and evidence was introduced as to the damages. The plaintiff further contended that he was entitled to recover damages on account of a road referred to in the deed, and of the rights of one Woodcock, and those holding his estate, to pass over the same.

The judge instructed the jury, with the consent of the parties, to return a verdict for the plaintiff for the damages on account of all the rights of way which the plaintiff contended he was entitled to recover for, and to find specially the amount included in said verdict on account of the road and right of way of Woodcock.

The jury returned a verdict for the plaintiff for the sum of $266, and assessed the damages for the incumbrance of the road and right of way of Woodcock at $90. The case was thereupon reported for the consideration of this court; if the plaintiff was entitled to recover for the last named incumbrance, judgment was to be entered on the verdict; otherwise for the sum of $176. The facts reported appear in the opinion.

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. McCafferty, for the plaintiff.
). Smith, for the defendant.

r, J. The plaintiff seeks to recover for a breach of the nts of warranty and against incumbrances contained in the ant's deed to him in 1858. Among other causes of action ns damages on account of a certain town road referred to deed as the road to Burncoat Pond; and also for the one Woodcock, and those claiming under him, to pass e same. In 1841, while the defendant was owner of the s, the town voted "to discontinue the town road from muel Adams to Burncoat Pond, so called, to a bridle

eed, under which the plaintiff claims, embraces in its de- the whole width of the road. It is called a town road; long the east side of the premises, and the east side of it he east side of the lot conveyed. The deed contained a that the premises described "are free of all incum- except the aforesaid road, so far as the same is not dis- d," with the usual covenant to warrant and defend

eed, by its true construction, conveys only the fee in the ject to the public easement, if any, then existing in it. ription of it as a town road, with the restricted covenant ncumbrances, implies that the land was subject to the sement, except so far as the road had been discontinued oper authorities. *Stetson* v. *Dow*, 16 Gray, 372. *Hol- Rowley*, 8 Allen, 473. *Newhall* v. *Ireson*, 8 Cush. 595. *Richardson*, 13 Allen, 146.

ws that the town way, or so much of it as then re- vas not an incumbrance within the meaning of the cove- use the covenants in a deed attach only to the estate or ntended to be conveyed. The words granted premises interest in the land described which the deed purports *Sweet* v. *Brown*, 12 Met. 175. *Hoxie* v. *Finney*, 16 2.

he other incumbrance, if the town road was not legally ned by the proceedings in 1841, then the right of Wood- l those holding his estate, to pass over the same was no ance on the granted premises, because it was merged in

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the public easement. And if the public easement was discontinued, then the facts in the case do not show a private right of way acquired by Woodcock, by grant or otherwise, before the town road was laid out, which would revive upon its abandonment. Nor has the right been since acquired by grant, and could not within the time limited have been secured by adverse use.

The plaintiff fails to establish these alleged incumbrances, and as to the covenant to warrant and defend, it is sufficient to say that it is not claimed that there has been any eviction by paramount title, or anything equivalent thereto. By the terms of the report the entry must be

Judgment, for the smaller sum, for the plaintiff.

EDWIN SCHOFIELD *vs.* THOMAS MCCONNELL & trustee.

Worcester. Oct. 7, 1875. — Jan. 7, 1876. AMES & LORD, JJ., absent.

A., by an instrument in writing and duly recorded, assigned to B. on December 13, 1873, "all claims and demands which I now have, and all which at any time between the date hereof and the first day of February, 1875, I may and shall have against C., for all sums of money due, and for all sums of money and demand, which at any time between the date hereof and the said first day of February, 1874, may and shall become due to me as laborer." *Held*, on a trustee process served after February, 1874, and before February, 1875, that the assignment was not void on its face, but applied to all wages until February 1, 1875.

A. being indebted to B. and other creditors, assigned to B., by an instrument duly recorded, his wages due and to become due from C., until a certain date, B. having at the time knowledge of the other debts. B. received the wages monthly, and applied part of them to his debt and part, at A.'s request, for necessaries for A.'s support, he having no other means of subsistence. At the time of a trustee process, brought by one who was a creditor of A. when the assignment was made, against A., in which C. was summoned as trustee, and B. appeared as claimant, it appeared that money was still due from A. to B., although B. had received money enough, had he so applied it, to pay his own debt. It was found as matter of fact that the assignment and the subsequent arrangements between A. and B. were not made with any intent on their part to defraud the creditors of A. *Held*, on a bill of exceptions setting forth the above facts, that the court could not say as matter of law that the assignment was fraudulent. *Held*, also, the appropriations made by the parties being valid, that the law of appropriation of payments, applicable when no appropriations are made by the parties, did not apply.

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STEE PROCESS to recover $29 for medical attendance. dated August 28, 1874. The defendant was defaulted. Vashburn & Moen Manufacturing Company, summoned as , admitted that, at the time of service upon it, there was ands the sum of $103.30, due the defendant. Sibley Put- ppeared as claimant of the funds in the hands of the trus- virtue of the following assignment, under seal, dated De- 13, 1873, signed by the defendant, and duly recorded:

ow all men by these presents, that I, Thomas McConnell, rcester, in the county of Worcester and Commonwealth of husetts, in consideration of one hundred dollars to me paid ey Putnam, of Worcester, the receipt whereof I do hereby ledge, do hereby assign and transfer to said Sibley Putnam ns and demands which I now have, and all which, at any tween the date hereof and the first day of February, 1875, and shall have against Washburn Moen Manufacturing ny, for all sums of money due, and for all sums of money nand which, at any time between the date hereof and the st day of February, 1874, may and shall become due to services as laborer, to have and to hold the same to the bley Putnam, his executors, administrators, and assigns And I, Thomas McConnell, do hereby constitute and the said Sibley Putnam and his assigns to be my attor- vocable in the premises, and to do and perform all acts, and things touching the premises, in the like manner to its and purposes, as I could if personally present."

he trial in the Superior Court, before *Dewey*, J., it ap- in evidence that the defendant was a workman, having a mily, with no means of support, except his daily wages; had been for several years in the employ of the trustee, id its workmen once each month; that he applied several efore to the claimant, a grocer, to furnish him with groceries family as he required them; that the claimant refused to him on account of his poverty, unless the defendant would m as security therefor an assignment of his wages on the similar to that above set forth; that after receiving said ent the claimant supplied the defendant with groceries as ded them from day to day, and at the end of each month imant received from the trustee the wages of the defend-

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ant; that, the defendant having no other means to buy fuel or meat, the claimant usually paid to or for the defendant small amounts for these and other necessary purposes, which were either charged to the defendant or deducted from the amount received for his monthly wages, and the balance was applied to the payment of the claimant's account for groceries, but, owing to these other necessities of the defendant, there was always a balance due to the claimant; that the amount of this balance continued to increase until July, 1873, when, after applying that monthly payment, the balance was $94.66.

The judge found as a fact that it was then agreed by the parties that each future monthly payment should be applied to paying each future monthly account in the first instance, leaving still outstanding this $94.66, to be paid from any excess of funds; that, at the time of the service on the trustee, this old account had been reduced, by a payment of $10, to $84.66, and the amount due on the new account to the claimant was nearly $50, both together exceeding the amount of funds in the hands of the trustee.

The judge also found as a fact that the assignment was not made, nor were the subsequent arrangements between the parties made, with any intent on the part of the claimant or the defendant to defraud the creditors of the latter, but were made as the claimant properly required security, and that the payments of money by the claimant to or for the defendant were only in cases of necessity for his support.

It appeared that at the time the claimant took the present assignment, having held previous ones, he knew the defendant was indebted, and, after he took this assignment, knew that he was indebted to the plaintiff and several others, and had been for a long time, and that, with that knowledge, from the moneys received under this assignment, he had paid over at different times to the defendant, or to others for his benefit, as heretofore stated, amounts sufficient, if they had been reserved and applied, to have paid the claimant's full account against the defendant, and left a sufficient balance in the trustee's hands to satisfy the plaintiff's claim; that he had continued to do so until the present time, and had paid over to the defendant since July, 1873, enough to pay the claimant's entire claim and the demand of the plaintiff.

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plaintiff asked the judge to rule as follows: "1. That the
ment was not valid on its face, and would not hold the
fter February 1, 1874, as against a trustee process.
That if, at the time of service on the trustee, the claimant
eived enough to have paid his debt, since he took the as-
nt, he cannot claim the funds in the hands of the trustee
action, it being admitted that the claimant knew that
ere creditors whom the defendant owed.
That the claimant having paid over money to the defend-
owing that there were other creditors, and the payments
eceived without any special application, the law will apply

judge refused the first and second requests, and on the
led that if no agreement was made, nor any special ap-
, the payments would be applied to the oldest outstand-
s; but that this rule did not apply when an agreement
le as to the application.
judge found for the claimant; and the plaintiff alleged
ns.

Merrill, for the plaintiff.

Blackmer, for the claimant.

J. The court could not properly rule as matter of law
assignment was not sufficient to transfer all wages due
ruary 1, 1874. The sentence in which this date occurs
refers to the more prominent previous clause extending
nment to February 1, 1875, and is plainly not intended
ts effect. It is a manifest clerical error.
cts relied on by the plaintiff to impeach the validity of
nment were entitled to consideration as bearing upon its
fraudulent character. But on that point it was found as
at there was no intent on the part of the claimant or the
t, either in making the assignment or in the transaction
to defraud the creditors of the latter. The payment of
y the claimant to or for the defendant, only in cases
was necessary for his support, would not be conclusive
of fraud, or impair his claim to indemnity out of the
ssigned for all supplies furnished, and this claim amounts
than the funds in the hands of the trustee.

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The appropriations made by the parties at the time the several sums were received, if made with no intention to defraud creditors, were valid, and there was no occasion to apply the rule of law which prevails, when no appropriations are made by the parties. *Exceptions overruled.*

SAMUEL K. BUELL *vs.* COUNTY OF WORCESTER.

Worcester. Oct. 7, 1875. — Jan. 7, 1876. AMES & LORD, JJ., absent.

At the trial upon a petition to the Superior Court, for a jury to assess the damages caused to the petitioner's estate by raising the grade of a highway, it appeared that the petitioner, in anticipation of the change of grade, had built foundation walls to a height of about six feet above the old grade, and that the new grade was established two or three feet higher than the petitioner anticipated. The petitioner was then permitted, against the respondent's objection, to introduce evidence in relation to putting the property in the same position relatively as before, and the expense thereof. The judge admitted the evidence subject to instructions that that would be a mode of determining the damages, provided that would be the course which a prudent man would adopt in relation to property in that condition, provided such expenditures were the most economical way of diminishing the damages caused by the change of grade; that it was for the jury to decide what course a prudent man would adopt in relation to such property after the location and change of grade; and that the damages awarded the petitioner were in no event to exceed the amount of the diminution in the value of the petitioner's property owing to the laying out of the street and the change of the grade. *Held*, that the evidence was rightly admitted, and that the instructions were correct.

PETITION to the Superior Court, for a jury to assess damages alleged to have been caused to the petitioner's land by the laying out of a highway in Worcester.

At the trial before *Dewey*, J., it appeared that the highway in question was laid out by the county commissioners on March 16, 1871, and that the laying out consisted in widening a former way, called Chandler Street, about ten feet, and raising the grade thereof at various points, among others, opposite the premises of the petitioner about seven feet.

The petitioner's premises consisted of thirty thousand feet of land upon the southerly side of old Chandler Street and on the westerly side of Bellevue Street, and the lot was nearly rectangular. Early in 1870 the lot was low and swampy, with a

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assing through it from north to south, which also passed Chandler Street, but there was a mound of hard land near theast corner of the lot. The relation of the lot to the highway, before any work under the new laying out had one upon it, was, that it was lower than the grade of the eet, and the land descended from the sides of both Belle- reet and Chandler Street. By the laying out in question, ifty feet in area of the petitioner's land was taken, and, street being extended farther north than the old one, a about one hundred and fifty feet in area was left outside street adjacent to the petitioner's land.

petitioner offered evidence tending to show that he bar- for the land in January, 1870, and in February and 1870, began digging upon it; that he cut down the and used it for grading up the rest of the lot, east of the that he graded that part of the lot so as to make it quite ound; that the deepest filling was ten feet; that he dug near the east side of the lot, for the foundation walls of a The respondent objected to this evidence, but it was ad- by the court for the purpose of showing the condition of at the time of laying out of the street, and for no other The petitioner also offered in evidence that he con- in 1870, near the east side of said lot and about twenty n the southerly line of said Chandler Street, as laid out ounty commissioners, the stone foundation walls of a build- nded by him for a factory. This wall was raised to a veraging about six feet above the old grade of Chandler t a point opposite the wall itself, and was raised to that n order that it might conform to and be available with the ted new grade of Chandler Street; but the new grade of r Street was actually raised about a foot higher than the aid foundation walls.

petitioner contended and offered evidence tending to show new grade of Chandler Street was established two or et higher than he anticipated when he built said walls; premises east of the brook, constituting three fourths of re lot, could be put relatively in the same position as be- alteration of the street, by raising the walls and grading lot east of the brook to correspond with the raised walls

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that this would require the walls to be raised three and six tenths feet, and the lot in the same proportion, and the part of the lot between the wall and Chandler Street to the present level of the street; that this plan would require the construction of retaining walls; that another method would be to raise the walls as before, construct a driveway from Bellevue Street on the south side of the lot, put in a retaining wall on Bellevue Street, and to grade from the building to the present level of Chandler Street; that the expense of the first method would be about $4200, and the expense of the latter method about $2100.

The respondent objected to all this evidence in relation to putting the property in the same position, relatively, as before, and the expense thereof, as incompetent, but the judge admitted the same for the purposes, and subject to the restrictions stated in the instructions to the jury. At the time of the laying out, the walls had been completed, and no work was ever done on them and no building ever erected on them afterwards.

The judge instructed the jury as follows: "Much evidence has been introduced of the expense of putting the property, relatively, in the position it was before, or as near as it could be placed. This is proper for your consideration, and would be a mode of determining the damages, provided that would be the course which a prudent man would adopt in relation to property in that condition and situation, provided such expenditures were the most economical way of diminishing the damages caused by the change of grade. It is for you to decide what course a prudent man would adopt in relation to such property after the location and change of grade. The damages awarded the petitioner are in no event to exceed the amount of the diminution in the value of the plaintiff's property, owing to the laying out of the street and the change of the grade." The jury assessed damages at $2450; and the respondent alleged exceptions.

H. B. Staples, for the respondent.

G. F. Verry, for the petitioner.

COLT, J. The petitioner claimed damages occasioned by a change of grade in the street. He was entitled to recover the diminution in value occasioned to his property in the condition in which it was when the change was made from a lower to a higher grade. Upon that question, and as one of the steps in determining

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y might consider what expenses a prudent man would rea-
y incur in putting the property, with reference to the new
in as good condition as it was before, being limited in
verdict to compensation for the diminished value of the
ty. This excludes a recovery for particular improvements
estate, or changes unreasonably made, or not necessary to
e property in as good condition as before. The rule has
equently applied in cases of this description and in analo-
ses. *Foster* v. *Boston*, 22 Pick. 33. *Plympton* v. *Woburn*,
y, 415. *Chase* v. *Worcester*, 108 Mass. 60. *Hartshorn* v.
of Worcester, 113 Mass. 111. *Bates* v. *Ray*, 102 Mass.

e is nothing in the condition of the property which should
e rule, or which calls for the exclusion of the evidence
The petitioner had the right to construct the founda-
his building so as to meet the anticipated change of grade.
change brought the street higher than he anticipated, it is
to see why the respondent has suffered less than if his
ions had been adapted to the still lower grade of the old
The petitioner had the right to use and increase the
le capacity of his estate. And his purpose seems to have
diminish rather than increase his claim for damages.

Exceptions overruled.

PTON CARPET COMPANY *vs.* CITY OF WORCESTER.

ster. January 5. — 7, 1876. AMES & DEVENS, JJ., absent.

St. of 1871, c. 361, authorizing the city of Worcester to supply itself with
ter, and providing in § 3 for the payment of damages by the city to persons
thereby, and for the appointment by the Superior Court of three commis-
to assess the damages, an order of the Superior Court appointing such
sioners is interlocutory merely, and exceptions thereto cannot be entered in
rt until after a final disposition of the case in the court below.

TION under the St. of 1871, *c.* 361, § 3, for the appoint-
f commissioners to assess the damages sustained by the
er by the taking, by the city council of the city of Worces-

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er, of East or Lynde Brook, in the town of Leicester, to supply the city with pure water.

In the Superior Court, before *Colburn*, J., the petitioner contended that certain facts, put in evidence by the respondent, did not constitute a defence to the granting of the petition. The judge so ruled, and ordered commissioners to be appointed; and the respondent alleged exceptions.

W. S. B. Hopkins & F. T. Blackmer, for the respondent.

T. L. Nelson, for the petitioner.

By the Court. The order appointing commissioners was interlocutory in a case pending in the Superior Court, and exceptions thereto cannot be entered in this court until after a final disposition of the case in the court below. St. 1871, *c.* 361, § 3. *Safford* v. *Knight*, 117 Mass. 281. *Gifford* v. *Rockett*, *ante*, 71. *Rose* v. *Taunton*, *ante*, 99. *Exceptions dismissed.*

Lavoisier Hill *vs.* George Crompton & another, executors.

Worcester. Oct. 8, 1875. — Jan. 10, 1876. Ames & Lord, JJ., absent.

Under an answer denying each and every allegation in the plaintiff's declaration, the plaintiff is bound to make out his case; and all the facts necessary to be proved by him for this purpose are put in issue.

In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness called by him that the testator had before that suit was brought agreed to pay for the expenses thereof, if it could not be settled for a certain amount. The defendant was permitted, against the plaintiff's objection, to testify for himself that, at an interview, during the pendency of that suit, at which the testator, the witness for the plaintiff and himself were present, the testator stated that the defendant was to look after his matters, that he wanted the defendant to understand that he never had any transactions with the corporation or any suit that was to be or had been brought against it, to which the witness made no reply, and that the testator further said that he had not long to live and wanted them to know about it. The jury were instructed that if the persons in whose presence the statements were made by the testator had no authority from the plaintiff to act in the matter to which the statements related, the jury were not to consider those statements as testified to by the defendant. *Held*, that the evidence was rightly admitted, as tending to contradict the plaintiff's witness, although the statements were made by the testator after the suit was brought. *Held*, also, that the instruction was sufficiently favorable to the plaintiff.

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n against an executor to recover for services and disbursements in a suit
y the plaintiff against a corporation, for which it was contended the tes-
nised to pay, the plaintiff relied upon the testimony of a witness that in
question of the plaintiff as to what they should do about the suit, the
id, "If you can settle the matter by taking off $400 or $500, do so; if
it, and I will pay the bill." Another witness gave substantially the same
, except that he did not refer to the matter of attempting a settlement as
the first witness. *Held*, that the jury were rightly instructed that the
ould not recover without showing that he attempted to settle with the
n by throwing off $400 or $500 before he brought the suit, although the
ntained only a general denial.

exceptions to the refusal of a judge to set aside a verdict and grant a
asked for on the ground that the verdict was for a larger amount than
anted by the instructions given, this court will not sustain the exceptions
y present sufficient facts to enable the court to perceive that the judge
natter of law in holding that there had been no error in the computation
ury of the excepting party.

ACT, by the surviving partner of the firm of Hill &
, on an account annexed, for money paid to E. C. Cleve-
defendants' testator, and for services and expenses in-
the prosecution of a suit brought by the plaintiff, as such
partner, against the Newburg Woollen Company, at
d request of Cleveland, to recover payment for certain
which Cleveland manufactured, as the agent of Hill
an, for the Newburg Woollen Company, and delivered
mpany. Writ dated October 27, 1873. The account
howed a debit of $4353.68, and a credit of $3700.10,
balance due of $653.58. The first twenty-six items of
t related to the expenses and services in the suit against
urg Woollen Company, and amounted to $2093.79.
er denied each and every allegation in the plaintiff's
n, except as to the credit side of the account. The de-
also filed a declaration in set-off, showing a debit of
and a credit of $2261.82, leaving a balance of $1535.75.
er to the declaration in set-off admitted debits to the
$3026.09, and alleged that credit was given therefor
intiff's account. It also admitted the credit side of the
nd denied the other items.

e was referred to an auditor, who found for the plaintiff
8, and interest.

trial in the Superior Court, before *Dewey*, J., the only
fact in dispute was as to the liability of the defendants

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for the services and disbursements in the action against the Newburg Woollen Company. It appeared in evidence that said company refused to pay for the machinery on the ground that it was defective and not delivered on time.

The plaintiff put in evidence the auditor's report, and the deposition of Edwin S. Lawrence of New York, who testified that he was the salaried superintendent of the machinery department of Hill & Chapman, from May, 1870, to November, 1872; that in the latter part of 1870 Cleveland furnished machinery, as agent for Hill & Chapman, to the Newburg Woollen Company; that he, Lawrence, made the contract, as agent for Hill & Chapman, between them and Cleveland; that a greater part of the communications between Cleveland and Hill & Chapman were made by him; that he heard the alleged contract between Hill & Chapman and Cleveland, under which the plaintiff claims they sued the Newburg Woollen Company, and on which this suit was brought, and his testimony was in substance as follows: "I heard a conversation between Cleveland and Hill & Chapman, concerning the expenses of the suit in New York, in 1870, after the machinery had been shipped to the Newburg Woollen Company, and set up in their mill; the company had refused to pay the bill, claiming that the machinery was not according to contract and not delivered on time; just before this conversation, Hill, Cleveland and I had been to the office of Orrin Skinner, a lawyer, to consult with him about collecting the claim; after we left his office I said to Cleveland, 'What shall we do about it?' referring to the claim against the company; Cleveland replied, 'If you can settle the matter by taking off $400 or $500 do so; if not, fight it and I will pay the bill.'" He also testified that he went to Worcester, on July 26, 1871, to assist Mr. Skinner, who had been employed by Hill & Chapman, in taking the deposition of Cleveland to be used in the Newburg suit; that he attended to the taking of said deposition as agent of Hill & Chapman; that he went to several other places, and at the request of Mr. Skinner, to assist in getting testimony for the plaintiffs in the suit; that he never had any conversations with Cleveland in relation to the suit against the Newburg Woollen Company, except the one before referred to in New York, and one at the time Cleveland's deposition was to be used in the suit against the Newburg Woollen Company was taken, in Worcester, about July 26, 1871.

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The plaintiff also put in evidence the deposition of one Jackson, whose testimony was substantially the same as that of Lawrence as to the agreement of Cleveland to pay for the suit against the company, and as to the direction given by Cleveland to sue the company upon its refusal to pay for the machinery delivered by Cleveland, except that Jackson did not refer to the matter of attempting a settlement as stated by Lawrence.

The defendants, against the plaintiff's objection, were allowed to introduce the testimony of W. W. Rice, one of the defendants, as to a conversation between Cleveland and Lawrence, about July 26, 1871, at the time the deposition of Cleveland was taken, to be used in the suit against the Newburg Woollen Company, and after the suit was brought against the company, which testimony was as follows: "I am one of the executors of Cleveland, and had charge of all his affairs; I had a conversation with Cleveland and Lawrence, at the time said deposition was taken, and before they began to take the same. Cleveland said to Lawrence that he had sent for me because I was to look after his matters - that he wanted me to understand that he had nothing to do with the Newburg Woollen Company or any suit that was to be or had been brought against the company; that the business was transacted with Hill & Chapman; that he never had any transactions with the Newburg Woollen Company; to which Lawrence made no reply; that Cleveland further said in that conversation to Lawrence and me, that he had not long to live, and he wanted us to know about it."

Neither Hill nor Chapman were present at this conversation; and there was no evidence except as hereinbefore stated that the agency of Lawrence extended to the subject matter of said conversation, or that he had any authority except as hereinbefore stated, to bind the plaintiff by any part he might take in any conversation. There was no evidence that Lawrence heard said statement, except as aforesaid, and the statement of Mr. Rice on cross-examination that the remarks were made to all in the room, including him and Lawrence and the magistrate and the lawyers on both sides of the Newburg Woollen Company suit, and that he and Lawrence got on the right of Cleveland, at the time they were made, and Lawrence heard the same.

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The plaintiff objected to the admission of this evidence or any dence tending to disprove the defendants' liability, on the und that it was not admissible under the answer, and that had no notice of such defence, and could have brought suffi- nt evidence to rebut the same; and also contended that the dence thus introduced was incompetent in the absence of the intiff, and incompetent, as being a statement after suit was ught by his alleged request, to disprove the alleged contract pay the expenses of said suit, made before said suit was ught.

There was no evidence at the trial to support the defendants' laration in set-off, except the admissions contained in the an- r thereto; and there was no evidence of any attempt to settle the plaintiff with the Newburg Woollen Company before suit. The jury were instructed that, if they found for the defendants, y could not find for items in the declaration in set-off which re not admitted upon the pleadings.

As to the testimony of Mr. Rice, the judge instructed t hat if the persons in whose presence said statements we said testator had no authority from the plaintiff to ac tter as to which the testator made the statements, t tements were not competent for the jury, and the jur consider as in the case the statements testified to e."

The judge also instructed the jury that if they believed t tract between the plaintiff and Cleveland was as testi Lawrence, in regard to paying the expenses of the suit Newburg Woollen Company, then the plaintiff could er these expenses without showing that he attempted to h the Newburg Woollen Company, by throwing off $ 0 before they brought a suit against them.

The jury found for the defendants, and assessed damages ount of $1535.75. The verdict was rendered March 23, e jury were instructed to give interest on the amount nd due from the date of the writ.

The plaintiff moved to set aside the verdict, on the g t it was unwarranted by and contrary to the evidence trary to law and the ruling of the judge as to the a he verdict. This motion was overruled by the judge.

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se rulings and to the admission of the evidence objected laintiff alleged exceptions.

Gile, for the plaintiff.

Blackmer, for the defendants.

ıs, J. Upon an answer denying each and every allega- ıe plaintiff's declaration, the plaintiff is bound to make ıse, and all the facts necessary to be proved by him for ıose are put in issue. *Davis* v. *Travis*, 98 Mass. 222. e defendants pleaded nothing in avoidance or discharge bility, which the plaintiff sought to impose upon the es- ıeir testator, but simply negatived the averments of the ın, they were entitled by any appropriate evidence to t offered by the plaintiff, and thus disprove their liability. ı answer denying the making of a promissory note, an ı since it was signed may be proved. *Lincoln* v. *Lin-* Gray, 45. And a defendant in replevin, under an answer the plaintiff's title and right of possession, may prove in himself. *Verry* v. *Small*, 16 Gray, 121. *Hawes* v. 00 Mass. 216, and cases cited.

ıatter in controversy related to the liability of the de- testator for services and disbursements in a suit brought laintiff against the Newburg Woollen Company, and upon the testimony of one Lawrence that Cleveland e that suit was brought agreed to pay for the expenses It was shown by the testimony of Mr. Rice, that while was pending, and while Lawrence was acting for the at the time of taking a deposition, Cleveland informed in his presence that Rice was to act for him in his mat- he wanted Rice to understand that he had nothing to he Newburg Woollen Company, or any suit that was to l been brought against that company; that the business sacted with Hill & Chapman, that he never had any ons with the Newburg Woollen Company, to which e made no reply. Cleveland afterwards added, accord- e testimony of witness, "that he had not long to live, and s to know about it." The jury were instructed by the disregard this statement, unless Lawrence had authority the plaintiff as to the matter in reference to which it e. This ruling was sufficiently favorable to the plaintiff.

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Lawrence was a witness for him as to the vital question in the case, namely, whether Cleveland had ever become responsible for these expenses, and had testified that in a certain contingency Cleveland had agreed thus to become responsible. It was competent to contradict him by showing that he had made statements inconsistent with his testimony, and it was also competent to do this by showing that he was silent when statements inconsistent with it had been made in his presence. It was for the jury to determine whether he understood them, had the opportunity to reply to them, could properly have done so, and generally whether he so conducted himself that by his silence he must be deemed to have acquiesced. If this were shown, it would tend to impeach him as to the testimony given in the case, as any acts or declarations of a witness inconsistent with his testimony are always admissible for this purpose. *Commonwealth* v. *Galavaro*, 9 Allen, 271. *Brigham* v. *Clark*, 100 Mass. 430. As this evidence was thus admissible, it can have done the plaintiff no harm that the court only permitted it to be considered in case the jury should find that Lawrence had authority to act for the plaintiff. There is nothing in the exceptions to show that any force was given to it on that account against him.

It is not important that this declaration of Cleveland was made after suit brought, for the statement itself could not have been admitted in evidence unless it were acquiesced in, and this acquiescence, whenever made by Lawrence, tended to control his testimony.

The instruction, that according to Lawrence's statement of the agreement the plaintiff could not recover without an attempt to settle by throwing off $400 or $500, was also correct. This was not a matter in avoidance requiring to be specially set forth as the plaintiff contends. The contract as testified to by Lawrence was not an absolute one to pay the expenses, but to pay them if the claim could not be settled by throwing off $400 or $500, and it was a part of the plaintiff's case to show that he had made the attempt before by the contract any obligation was imposed on defendant. While Jackson stated the agreement without this qualification, and the jury or the auditor might have found that Jackson's was the correct statement, as the plaintiff relied also on Lawrence's statement, an instruction was necessary as to what

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be required of the plaintiff if the contract were found to
en as stated by him.

ufficient facts are presented to enable us to perceive that
rt erred in matter of law in holding that the verdict had
rrectly computed, or at least that there had been no error
omputation to the injury of the excepting party.

Exceptions overruled.

LEDYARD A. WATKINS *vs.* PHILIP B. BOWERS.

Oct. 28, 1875. — Jan. 7, 1876. MORTON & LORD, JJ., absent.

on by the payee against the maker of a promissory note, it appeared that
ntiff was an agent of a life insurance company. Evidence was admitted for
nce tending to show that the note was given for a policy of insurance in
pany upon an agreement with the general agent of the company that the
nt should have sixty days to determine whether he would or would not be
and that, if within that time he should decide not to be insured, and should
the plaintiff, who was then present, the policy should be taken back and
returned. *Held*, that this evidence was competent upon the issue whether
s a contract between the parties and a completed delivery of the policy and
der it.

on upon a promissory note, given to the plaintiff as the agent of a life in-
company for a policy of insurance under an agreement that, if the defend-
uld within sixty days notify the plaintiff that he had decided not to be
the policy should be taken back and the note returned, evidence was put
e defendant tending to show that during the sixty days he took the policy
wn where the plaintiff resided and endeavored to find him for the purpose
ing the policy to him. *Held*, that the testimony was competent to rebut
umption of the defendant's acceptance of the policy arising from his in-

RACT upon a promissory note, for $752.80, dated August
, made by the defendant, payable to the order of the
in two months from date.

e trial in the Superior Court, before *Pitman*, J., the only
s for the jury, under the ruling of the judge were whether
ract was entered into between the parties, and whether
s or not a want or failure of consideration.

vidence of the defendant, which was admitted against the
's objection, on the ground that it was an attempt to alter
ol a written contract by oral evidence, and for other

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reasons, was in substance as follows: The defendant testified that he had been solicited by the plaintiff, who was an agent of the Phenix Mutual Life Insurance Company of Hartford, to take out a policy on his life; that on August 10, 1874, the plaintiff came to his house and introduced to him G. E. Holloway the general agent of the company, to whom he said that if he intended to get insured he would see him at Fall River. Watkins or Holloway inquired how long time he wanted to make up his mind to be insured, and he replied that he could not tell, it might be longer or shorter. Holloway then said: "I will do this. It is something I will not allow my agents to do. I will take out an application for a policy, and if it is accepted by the company I will send you a policy, and I will give you sixty days to make up your mind whether you will be insured or not, and if at the end of sixty days you make up your mind not to be insured, you may notify Watkins, and he will come and bring the papers and take the policy, and it shall not cost you a cent." He finally accepted the offer. Holloway placed the note before him and asked him to sign it. He then said he would not sign it. Holloway said it would not be binding unless he decided to keep the policy and be insured. The defendant said, "If I sign this note shall I not be held to pay it?" and Holloway said, "No, this is a conditional transaction; you will not be holden unless you decide to keep the policy and be insured. It will not be binding any way."

He also testified that on these assurances he signed the note; that before that, during the conversation, he had signed, under the circumstances stated, the application for a $10,000 policy from the company, and a physician had examined him and certified thereon; (which application and certificate were produced in court and went in on cross-examination as evidence;) that when he signed the application the plaintiff said it was not binding, but it was necessary for him to sign it or the company would take no notice of it; that the defendant told the plaintiff he should not sign any papers that should be binding on his part; that the plaintiff took the note and application; that as the party were leaving the house Holloway remarked, "I consider you insured for sixty days." The defendant said, "No, I do not consider myself insured until I decide whether I will be or not."

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fendant further testified that about a week afterwards called at his house and left the policy there with his defendant being absent at the time; that on his return day he saw it there; that in about two weeks from the s left there he saw Watkins in Fall River, and told him not keep the policy; that in a few days after that con- Watkins called at his house, and he told him what the ding was, that he wanted him to return his papers and p the policy. Watkins replied that he knew all about uld do just as he had agreed to, but wanted him to keep .

fendant further testified, against the special objection of tiff as to its competency in any view of the case, that ken the policy to Fall River previously to his seeing there, and had endeavored to find Watkins; that he did that he had any office or house; that he expected to ; that he looked around for him on September 26, and sday, September 30, and tried to find him but could on October 2, he went to Fall River, having the policy and met Watkins on Main Street; that he got out of e to hand him the policy, saying to him, "Here, I have olicy long enough, take it;" that Watkins waived his said, "Hold on, and I will come up to your house to- d get the policy;" that the next day, Watkins drove rd; that he handed Watkins the policy, and he took it and, opened it, and looked at it, and placed it back in pe and said he was sorry he did not keep the policy, it great injury to him; that the defendant said: "You agreement that you were to take it back if I did not o be insured, and you would give up the note;" that eplied, that he was very sorry he did not keep the policy sured; that he would leave the policy there, then, and rtford; that he would then bring his papers and take ; but he did not do it, and left the policy still in his, s, possession. The defendant's testimony was corrob- other witnesses.

intiff contended, and his evidence tended to show, that told the defendant that he would take his application the policy, if accepted by the company; and if at the

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end of sixty days he did not find it was a good investment for his estate, or that the facts in regard to the standing of the company or the form of the policy had not been stated truly, he would return the note and cancel the policy. On other points, as well as on this, the plaintiff's evidence was substantially in direct conflict with that of the defendant. No question was made but that the policy was a good and valid life insurance policy for the sum of $10,000, on the life of the defendant, if there was ever a completed contract.

The plaintiff requested the judge to rule, as a matter of law, that taking all the evidence relied on by the defendant as true, it did not constitute a legal defence to the action. This the judge declined to do, and instructed the jury for the purposes of the trial that there was no evidence of fraud for them to consider, but the sole question for them was as to the consideration; that if the minds of the parties met, and there was a competent contract, so that the policy ever attached or the company became liable, either temporarily or permanently, then there was a consideration, and no defence to this suit; but if, on the other hand, the jury were satisfied that the defendant refused to make any contract, or to be bound in any way, but expressly reserved to himself the right of deciding whether he would be insured, and within the time limited notified the plaintiff that he would not, that there was then no consideration to support the note; that, if they believed the evidence of the defendant and his witnesses, there was a want of consideration, and their verdict should be for the defendant; otherwise, if they believed the plaintiff and his witnesses, their verdict should be for the plaintiff.

The jury found for the defendant; and the plaintiff alleged exceptions.

J. Brown, for the plaintiff.

J. M. Morton, Jr., for the defendant.

COLT, J. It was a question of fact for the jury whether there was a contract between the parties and a completed delivery of the note and policy under it. The rule excluding parol evidence to contradict a written instrument is not infringed by the admission of such evidence, to show that the instrument never had any binding force for want of due delivery, or, if not under seal, for want of consideration; because the evidence is offered not to

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ntract, but to prove that no contract was ever made; is a preliminary one. *Coddington* v. *Goddard*, 16 *Faunce* v. *State Mutual Life Assurance Co.* 101 Mass.

e at bar the note in suit had no binding force until evidence of a subsisting debt, and none if made sideration. The consideration necessary to its validity whether the contract of insurance was so completed th parties that the policy attached and the company le under it temporarily or permanently. There was evidence on these points, and the judge rightly ruled minds of the parties met, there was a contract, and a leration for the note, but not otherwise. The jury there was no completed contract of insurance, and consideration for the note. The fact that the policy the defendant's house and retained by him would be aring on the question of its delivery and acceptance, clusive, and all the circumstances are to be considered *Blanchard* v. *Blackstone*, 102 Mass. 343.

nony of the defendant that he took the policy to Fall endeavored to find the plaintiff, tended to rebut the of acceptance which might be drawn from his inac- as rightly admitted. *Bornstein* v. *Lane*, 104 Mass.

t contended at the argument that there was any evi- nd which ought to have been submitted to the jury.

Exceptions overruled.

ALBERT F. CHACE *vs.* JOHN SHERMAN.

27, 1875. — Jan. 10, 1876 MORTON & LORD, JJ., absent.

for slander which alleges, in the form prescribed by the Gen Sts. he defendant charged the plaintiff with a certain crime "by words e plaintiff substantially as follows," is supported by proof that the oke words substantially, though not precisely like those set out in on.

or slander alleged that the defendant charged the plaintiff with burn- mill, with the intent to defraud the insurers thereof, "by words spoken

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of the plaintiff substantially as follows: He (meaning the plaintiff) burned it (meaning the said mill) because he was poor and wanted the money." At the trial there was evidence that the defendant charged the plaintiff with burning his own mill "to get his insurance." *Held*, that words were proved "substantially" as alleged, under the Gen. Sts. c. 129. *Held*, also, that the objection that the declaration did not show that the defendant charged the plaintiff with a crime, could be taken only by demurrer.

A declaration for slander alleged that the defendant accused the plaintiff, by certain words, which were set forth, of burning his own building with intent to defraud the insurers thereof. The defendant's answer contained a general denial, and alleged that "there are no sufficient allegations in said plaintiff's writ and declaration of any matter or thing to constitute the substance of slander in form and manner." *Held*, that, if the answer contained a demurrer, it could not first be treated as such in this court.

TORT for slander. The counts relied on at the trial were the first and third. The first count was as follows:

"And the plaintiff says that on the thirteenth day of November, 1878, he was the owner of a certain building, to wit, a saw-mill, at Swansey, in said county, and in use and occupation thereof; that said mill was insured, for the benefit of the plaintiff, against loss or damage by fire; that said mill or building was wholly destroyed by fire on or about the night of said thirteenth day of November; that afterwards the defendant publicly, falsely and maliciously accused the plaintiff of wilfully and maliciously burning the said building or mill, with the intent the insurers thereof to injure and defraud, by words spoken of the plaintiff substantially as follows: 'That damned cuss (meaning the plaintiff) burned his mill;' 'Albert Chase, he burned it, and every one around here thinks so,' 'or nearly every one.' 'He (meaning the plaintiff) burned it (meaning the said mill) because he was poor and wanted the money.'"

The third count was as follows: "And the plaintiff further says, that after said building or mill was consumed, as aforesaid, the defendant publicly, falsely and maliciously accused the plaintiff of wilfully burning said building or mill, insured as aforesaid, and as set out in the first count of the declaration, with intent to defraud the insurers thereof, in words spoken of the plaintiff substantially as follows: 'He (meaning the plaintiff) burned it (meaning said building or mill) because he (meaning the plaintiff) was poor and wanted the money,' thereby meaning the amount said building or mill was insured for."

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wer contained a general denial, and alleged that no sufficient allegations in said plaintiff's writ and of any matter or thing to constitute the substance of form and manner."

trial in the Superior Court, before *Aldrich*, J., the ony put in by the plaintiff to prove the speaking of lleged was the following:

Davis testified that on the morning after the mill l he had a talk with the defendant about the burning and the defendant told him "he knew the mill would nd the mill was burnt, and Albert F. Chace burnt it nsurance."

aker testified that some time between the middle of and December 1, 1873, he had a conversation with ant about the mill, and the defendant said, "The ss set his mill afire to get his insurance; the damned on fire to get his insurance for he had about spent his

arney testified that on January 1, 1874, he had a n with the defendant about the burning of the mill; ked the defendant how the mill was burned, and he That damned cuss burned it;" that he asked what ss? and he said, "Albert Chace, he would have to dn't;" he also said the "mill was insured." "I said nsured he could not get the insurance money," to defendant replied, "he would look out about that." s also testified that in April of the same year, the told him he would have him (the plaintiff) up for mill and strip him.

ndant asked the judge to instruct the jury as follows: s set out in the declaration must be, if not precisely, tially proved. The evidence therefore must show the have been made substantially as alleged so far even as are concerned. It cannot be shown that the same made, but in another form, and in the use of sub- different language; [and there is no testimony in the which the jury would be authorized to find that the ained in said declaration have been so proved, so far itute slander."]

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The judge gave these instructions exc
brackets, which he declined to give, and
structions, not objected to, upon all other
jury found for the plaintiff; and the de
tions.

J. M. Morton, Jr., for the defendant.

H. K. Braley, for the plaintiff.

DEVENS, J. The instructions reques
were given, except that there was "no
the jury would be authorized to find that
said declaration have been so proved, s
slander," which was refused.

The object of the mode of pleading pres
c. 129, is to inform the defendant, not onl
charge alleged to have been made by hin
in which it was uttered; and it would not
the same charge made by words substantiall
set forth. *Baldwin* v. *Soule*, 6 Gray, 321.
495. *Doherty* v. *Brown*, 10 Gray, 250.
3 Allen, 69. *Clark* v. *Brown*, 116 Mass.
ever, necessary to prove that the words w
forth in the declaration, but only substanti
it may appear that the crime was charge
which the plaintiff alleged it to have been c
Soule, *ubi supra*. *Robbins* v. *Fletcher*, 101

Upon the proof there must be deemed t
of the words substantially as the plaintiff all
cient to show that the crime was charged ag
he alleged it to have been. *Baldwin* v. *Soule*,
ter v. *Hewson*, 2 Man. & Ry. 176. All the
were accompanied by other statements as
which the plaintiff burnt the mill, namely,
upon it, which, important as they were in
charge, were not set out in the declaration; b
way diminished the effect of the words alleg
trary tended to show that they were used with
which the plaintiff sought to attribute to
therefore, testimony in the case that the words
used; and that they had been so used as to co

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as all of them had been uttered in connection with a
that the purpose of the plaintiff had been to obtain
or his mill, thus burnt, from the insurers.

endant contends that it is not actionable to accuse one
his own mill, and that so much of the declaration, as
e plaintiff merely with this, sets forth no actionable
d must therefore be rejected. *Bloss* v. *Tobey*, 2 Pick.
etts v. *Goding*, 9 Gray, 254. But these words, when
rtain connections, are actionable; and the declaration
t, by the use of these words as set forth, the defendant
e plaintiff with the crime of wilfully burning the mill
t to defraud the insurers. It is the duty of the plain-
, when the words are not in themselves intelligible, in
ense in which he claims them to have been spoken, to
so by a concise and clear statement, and by reference
ts as may be necessary for that purpose, and, if he does
s, the defendant may demur to the declaration. Gen.
Brettun v. *Anthony*, 103 Mass. 37. *York* v. *John-*
ass. 482. But this rule is for the benefit of the de-
d if, because he is sufficiently informed of the con-
which the words were used, or of the facts to which
or for any other reason, he neglects to demur, he can-
trial object to the insufficiency of the declaration,
fails to show how or in what connection words, inno-
emselves, were used so as to import the crime which
avers to have been charged by them. *Clay* v. *Brig-*
y, 161. The question, then, to be passed upon is only
defendant used the words, making thereby the charge
declaration avers that he did.

d by the defendant, the question of the legal insuffi-
ne facts to constitute a defence or establish a right of
be raised by a request for a ruling at the trial as
there was a demurrer. *Montague* v. *Boston & Fair-*
Works, 97 Mass. 502. This, however, is quite a dif-
osition from that which he seeks to establish, namely,
sufficient facts are shown to maintain the action he
their effect because they have been defectively set
ough was set forth by the declaration to show a cause
nless it were demurred to for its deficiency. *Clay* v.
ubi supra.

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The defendant contends that the answer raises sufficiency of the declaration. On examining it any intelligible demurrer, certainly not one in th by Gen. Sts. *c.* 129, § 11. If there were one, ho respect formal, it could not be now discussed. T to show that it was insisted upon at the trial, call tion of, or passed upon by, the presiding judge. demurrer ruled the declaration sufficient, the d have presented the matter by a proper exceptio Had he held the declaration insufficient, the plai applied to him for leave to amend, which, on deemed suitable and just to both parties, he wou have granted. *Exceptio*

ANSON J. BARKER *vs.* CITY OF TAU

Bristol. Oct. 27, 1875. — Jan. 10, 1876. MORTON &

If a city passes an order reducing generally the grade of a st passes another order for the construction of sidewalks in the land adjoining the street, and injured by the change of grade, under the Gen. Sts. *c.* 44, § 19, filed within one year from the walk in front of his premises was brought to its final grade, age done by the change of grade.

Where, at the trial for the assessment of damages sustained by in a street, the city introduces evidence that the changes made tioner's own improvements, had increased by a given sum the ises, it is competent for the petitioner to show how much he provements upon the premises since the change of grade.

It is no bar to a petition for the assessment of damages, sustain grade in a street, that the petitioner was one of the original p provements.

PETITION to the county commissioners for a ju damages to the petitioner's estate by lowering the throp Street and High Street, in the city of Taun

At the trial before a sheriff's jury, it appeared tioner had for many years been the owner of an e he lived, on the westerly side of Winthrop Stree November 8, 1873, he purchased an adjoining es ner of Winthrop Street and High Street.

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tion for damages for the change of grade of Winthrop
presented to the mayor and aldermen on July 1, 1874.
itioner put in three orders passed by the respondent.
ated July 5, 1871, was as follows: "Ordered, that the
wn on the plan herewith, and by measurements corre
hereto, be adopted and established as the grade of
Street from Harrison Street easterly so far as covered
an. The superintendent of streets is hereby directed
e same at an expense not to exceed eight hundred dol-
he finance committee are hereby authorized to nego-
porary loan for the payment of the same."
ond order, dated September 3, 1873, for the construc-
dewalk on Winthrop Street, was as follows: "Ordered,
uperintendent of streets be instructed to construct a
n the westerly side of Winthrop Street, from the post-
e railroad crossing of the Taunton and New Bedford
with edge-stones, and cover the same with concrete, at
not exceeding twenty-four hundred dollars, to be paid
ppropriation for public improvements; and that he be
to make a report of the expense of the same to this
der that an assessment be made upon the abutters for
ction of said sidewalks."
d order, dated May 20, 1874, for the construction of a
n High Street, was as follows: "Ordered, that the
ent of streets be instructed to construct sidewalks
n width on both sides of High Street, from Winthrop
channel Street, with edge-stones, and cover the same
te, at an expense not exceeding twenty-two hundred
be paid from the appropriation for public improve-
d that he be instructed to make report of the expense
e to the committee on sidewalks, in order that an as-
e made upon the abutters for the construction of said

itions for the construction of the sidewalks on Win-
t and High Street were signed by the petitioner among

red in evidence that under the order of July 5, 1871,
f grading Winthrop Street, and the sidewalks thereof,
in the fall of 1871; that not much was then done ex-

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cept to lower a portion of the street in f
premises; that in the summer and fall of
the street in front of the petitioner's pre
the established grade, and the sidewalks
same grade; that in the summer and fall
in front of the petitioner's premises was
the direction of the superintendent of stre
grade of Winthrop Street, and the curbi
being covered with concrete, and a portion
rods below the petitioner's premises was
same to the required grade.

It also appeared that the work upon E
menced soon after the third order was passe
pleted during the summer; that, in doing t
the street and sidewalk in front of the peti
considerably lowered, and the injury to s
damages were claimed, was caused by such l

The respondent objected to any evidence
by the petitioner by the construction of the s
signed the petitions for making the sidewalk
was overruled, and the evidence admitted.

As the orders numbered two and three fo
the sidewalks do not authorize any change of
ent objected to any evidence tending to show
tioner by any change of grade of these stre
of constructing these sidewalks. The objec
and evidence admitted of all the acts done by
of streets, and those in his employ, in the c
sidewalks.

The petitioner, on his examination in chie
pense he had incurred in consequence of the
and testified at length and without objecti
thereof. Several experts, called by the respon
the change that had been made had increase
petitioner's premises from $500 to $1500, but i
mate they included what had been done by the
as the city. The petitioner was then recalled
he had expended beyond what he had already
spondent objected to the question, because it in

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tness to state what improvements he had made upon this
The objection was overruled, and the witness answered
or $1600. On cross-examination, he stated that about
f this sum had been expended in repairing the interior of
use, about $500 for painting the exterior of the house, and
naining $500 or $600 he was unable to account for, further
y saying that he had employed a team a great part of the
r, at $3.50 per day.

respondent asked that the jury be instructed as follows:
under this warrant the petitioner cannot recover for the
of grade under the order of July 5, 1871, if the petition
petitioner was not presented to the mayor and aldermen
one year from the completion of the work under that
This instruction was refused; but the jury were in-
that the petitioner was entitled to recover for all the
done to his estate by the change of grade, he having
d his petition to the mayor and aldermen within one year
time when the sidewalk in front of his premises was
to its final grade.

ury returned a verdict for the petitioner. In the Supe-
rt, the petitioner moved that the verdict be accepted and
Aldrich, J., overruled the motion, and ordered the
o be set aside; and the petitioner appealed.

Bennett & H. J. Fuller, for the petitioner.

Williams, for the respondent.

J. The petitioner claims damages for the act of the city
ing the grade of two streets. At the trial before the
jury, he put in evidence an order passed in July, 1871,
ing the grade of Winthrop Street, followed by an order
mber, 1878, for the construction of a sidewalk in that
nd also by an order in May, 1874, for the construction
alks on High Street.

s in evidence, that, under the order of 1871, work on
p Street was carried on through the year and into the
and fall of 1872, when the street in front of the peti-
premises was cut down to the established grade, but the
ks were only partially brought to grade. In the summer
of 1873, the sidewalks were finally reduced to the estab-
grade of that street. The petitioner is required to file his

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petition for damages within one year f
the work." Gen. Sts. c. 44, § 19. This p
1874, and the respondent asked that the
the petitioner could not recover for cha
first order, if the petition was not presente
the completion of the work under that or
told that the petitioner, having presented
year from the time when the sidewalk i
was brought to its final grade, could recov
by change of grade.

In view of the real issues presented by t
see that this instruction is fairly open to
takes from the jury a question of fact wh
submitted to them, namely, the question wh
pleted. There was no contradictory evidenc
the work was done. The real question was,
gan to run from the completion of the grade
that is, the part devoted to carriage travel,
tion of the grade of that part devoted to foo
no dispute but that the petition was presente
the latter time. It would have been erro
that it must be presented within a year fro
grade of the carriage way was completed.
show that the order of 1871 is limited to
broad enough in terms to cover the whole str
are a part of the street; and it appears that
of grade in the sidewalk was commenced ar
before the order of 1873, for the construction
passed. There is nothing in the terms of t
sistent with the order of 1871, or which sho
tended to supersede or repeal that order. Tl
to the grade of the whole street; the last, to
sidewalks with concrete pavement and edge
nothing which determines that the work of
under the last order after September, 1873.
work was done by the superintendent of stre
be unjust to the petitioner now to hold that t
as it was done after the last order, should b
that, so as to defeat or diminish his claim f

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dent was not wronged by the instruction given and the re-
o give the one asked.

respondent objected that the petitioner should not be al-
to state how much he had expended in improvements upon
emises since the change of grade. And this objection would
een well taken if the cost of such improvements had been
d as a substantive ground of damage. *Buell* v. *County of*
ter, ante, 372. But here the testimony was competent in
o the respondent's evidence that the changes made, includ-
e petitioner's own improvements, had increased by a given
e value of the premises. It was necessary for the jury to
ow much of that sum was due to the petitioner's own acts.
ompetent for this purpose, it is right to infer that it was
ed to the jury with proper qualifications, or that the ob-
party did not care to limit its effect. It must appear
vely that such evidence was permitted under objection to
perly used. *Earle* v. *Earle*, 11 Allen, 1.

o bar to the claim for damages made by the petitioner,
was one of the original petitioners for the improvements.
ne is not evidence of an assent that his property shall be
public use without compensation.

conceded at the argument that the objection that the
not liable for the acts of the superintendent of streets
osed of by the decision in *Thurston* v. *Lynn*, 116 Mass.
ll other points were waived by the respondent at the ar-

Verdict accepted.

OHN N. AMES *vs.* JESSE D. BATES & trustee.
I L. FREEMAN & another *vs.* JOHN N. AMES & trustee.

Oct. 28, 1875. — Jan. 10, 1876. MORTON & LORD, JJ., absent.

sed of A. a claim against B., pending an action by A. upon the claim. B.
viously purchased a claim against A., and had given notice thereof to A.
s brought thereon by B. in the name of the assignor, in which W. appeared
re claimant of funds in the hands of B. summoned as trustee. At the time
purchase of the first claim W. had no knowledge of the claim against A.
that judgment for the plaintiff in the second action could not be set off
t judgment for the plaintiff in the first action

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TWO ACTIONS OF CONTRACT. In th
Wilkinson, J., judgment was rendered f
action, and a motion was made by Bate
first action and equitable owner of the j
action, that the judgment in the second
tanto against the judgment in the first.
this motion; and Bates alleged exceptions.
appear in the opinion.

E. Ames, for Williams.

J. Daggett, for Bates.

DEVENS, J. The equitable owner of th
of these actions is Earl S. Williams, who
claim upon which it is founded, after the con
the action thereon. This purchase was mad
purchase by Bates, the defendant in the fir
of Freeman and another against Ames, w
of the second judgment, and notice thereof
chased this claim after action had been brou
him, so that it could not have been used in
the statute only permitting demands not ne
when a party has become the equitable own
notice to the plaintiff before the commenc
Gen. Sts. *c.* 130, § 5. At the time William
he had no knowledge that there was any
Ames as that of Freeman and another. Judg
in the first action by Williams in the nam
Bates for the sum of $120.18, with costs,
brought an action in the name of Freeman
ered judgment against Ames in the second
$83.99, and moved in the Superior Court th
ment should be set off *pro tanto* against the fo
was refused by the presiding judge.

While there is no express statute author
judgments where the creditor in one action is
other, except in a limited number of cases, G
2, 3, 5, yet this power has been frequently e
of law, and rests upon their jurisdiction over s
their general superintendence of proceedings be
peace v. *Coates*, 8 Mass. 451. *Greene* v. *Hat*

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a power is only to be exercised upon careful consideration the circumstances of the transactions out of which the ients arise and in order to protect the just rights of par-

the present case the nominal parties to the judgments are ie same, nor is the equitable owner of the judgment re-d in the name of Ames, the defendant in the suit of which is the equitable owner. But even if Ames had continued the owner of the judgment recovered in his name, it might be questioned whether Bates should be permitted to set off st it the judgment recovered by him in the name of Free-nd another, when he could not have set off the claims upon the judgments were founded. The reason why a party is rmitted by the statute to set off such claims may fairly be ed *to* be, that it is not just that one should be encouraged of paying his own debt to seek out claims against his in order thus to change the position of parties *pendente* this reason is equally applicable to judgments which rwards be obtained upon such claims.

er this might be as to Ames himself, it is clear that as ignee of Ames, Bates should not be allowed to effect ge. When the equitable rights of third parties would be by an offset of this character, it is not to be made to the intervening rights honestly acquired. *Greene* v. *Hatch*, ra. *Zogbaum* v. *Parker*, 55 N. Y. 120. *Gay* v. *Gay*, e, 369. *Ramsey's appeal*, 2 Watts, 228.

n the assignee bought the claim sued by Ames, he took it to all legal defences and also to all demands which might y have been pleaded in offset to or diminution of it, but ht thus acquired should not be defeated either wholly or y, even if it be assumed that Bates having purchased a gainst his creditor which had no relation to and did not at of the claim sued, might have been permitted by leave court if he had recovered judgment thereon, to offset it the judgment recovered by his creditor. The assignee no knowledge of any such claim, could have contemplated ingency so remote as this, and to permit the offset would isregard his just rights.

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We have not considered whether the
was or was not a matter entirely within tl
perior Court, and its refusal therefore no
exception, as whether this is so or not
properly refused.

JOHN PRESTON *vs.* AMERICAN LIN

Bristol. Oct. 29, 1875. — Jan. 10, 1876. MORT

A laborer who has assented to a regulation of his emplo
sons intending to leave are required to give two weeks
the overseers of their respective rooms, and no person w
discharged or entitled to wages then due unless this re
cannot maintain an action to recover for his labor if h
giving the required notice, although the defendant is not
the plaintiff without notice.

In an action by a laborer who worked under no express
for no definite time, to recover for his services to his n
plaintiff had been in the defendant's employ fourteen mo
ularly received his pay in an envelope on which was pr
defendant, providing that "all persons intending to leav
weeks' notice of such intention to the overseers of their
person will be considered honorably discharged or entit
less this regulation is complied with." It did not appear
this regulation when he commenced the work, but he tes
after, and knew of it "about all the time he was in t
Held, that it was rightly submitted to the jury as a que
plaintiff assented to be bound by the regulation, and tha
mitted to consider the fact that, after knowledge of it, h
before.

CONTRACT upon an account annexed to rec
a weaver, while in the employ of the defendant
July 6, to August 1, 1874. The answer contai
nial, set forth, in substance, the notice which a
alleged that if the plaintiff worked for the
without giving the notice thereby required, an
claimed was thereby forfeited.

At the trial in the Superior Court, before *Wi*
peared in evidence that the defendant corporati
on the business of manufacturing cotton cloth, p

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e third Thursday of each month; that the pay roll was made
up to and including the second Saturday of each month
ous to the pay day, so that there would be several days'
, being that interval, which would remain unpaid on each
day until the following pay day; that the pay of each oper-
was put in a small sealed envelope and handed to them;
on the outside of this envelope, plainly to be seen, the fol-
g words were printed: "Particular notice. All persons
ding to leave are required to give two weeks' notice of
intention to the overseers of their respective rooms; and
erson will be considered honorably discharged or entitled
ages then due unless this regulation is complied with.
ican Linen Company. Walter Paine, 3d, treasurer. Fall
1870."

plaintiff had been in the defendant's employ about four-
onths, when he left in August, 1874, and had regularly
his pay in an envelope as described. The plaintiff, on
amination, testified that he had known the rule or regu-
question about all the time he was in the defendant's
that he could not tell when his attention was first di-
the printed matter on the back of the envelope; that it
ve been soon after he went to work, or might have been
t he read it, but did not pay any particular attention to
t he could read and write, and understood that he was to
d work a two weeks' notice before he left; that he never
ed any dissent from the rule or regulation in question to
icer or agent of the defendant, and never said or did any
from which it could infer that he did not agree to or
to said rule, or did not understand the same; that on the
turday in August, he went to the second hand of the room
he was working and told him he wished to leave at the
f that day's work, and the second hand told him that if he
l to leave he must work his notice; that he went in the
oon again, shortly before the mill stopped, and told the sec-
nd that he wished to leave at the close of that day, and
cond hand made the same reply as in the morning; that on
ccasions he knew what was meant when told that he must
his notice, and that he could not then get his pay if he left;
e left the defendant's employ at the close of that day's

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work, and did not return to work his notice so to do, although he was able to do so, a On the following pay day he went to the the overseer testified that he then told him his pay unless he worked his notice, and reply thereto. This was denied by the pla

The plaintiff testified that he understood mean, that if he left without giving and w notice he would not be entitled to his pay o be on the following pay day, or two weeks he worked two weeks after notice he would on the day of his leaving, but that he did mean that he would forfeit his wages. The fendant corporation testified, on cross-exami knew or heard before of such a construction the rule had been in force about four years, about one thousand hands employed in the evidence, and it was not contended by the plaintiff's attention was called to this rule, employ, by any of its agents. The above w the testimony in the case.

The defendant contended that upon these to infer that the plaintiff had knowledge of rule and assented thereto, so that it was a con him, and that he forfeited his wages by so le was contested by the plaintiff, and he requeste and instruct the jury as follows: "1. That m work, after receiving and reading the notice or as given, would not authorize the jury to find thereby promised or agreed to forfeit his wag without two weeks' notice.

"2. That assent could not be inferred from continued in the defendant's employ after read the envelope, as he was not thereby required to anything while in its employ, to show his assent

"3. That upon the facts shown the defenda that the contract relied on by it was a mutual o it was not binding.

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1. That a fair interpretation of the notice on the envelope is hat the employee should forfeit his wages by reason of leav- ithout notice, but that payment may be delayed.

. That this regulation or notice as given is not a contract, it imposes a penalty unequal and uncertain in extent, and fore cannot be enforced as a contract; that upon a fair in- etation thereof, most favorable for the defendant, leaving ut notice would only entitle it to recover by set-off or re- nent such special damage as it can show it has suffered."

e judge refused to rule and instruct the jury as requested, structed them, among other things, that if they were satis- at the plaintiff had knowledge of the rule or requirement, his silence, or by his words or acts, he assented to it, or he defendant a right to believe that he assented to it, it be a contract binding upon the plaintiff; and continuing k in its employ after he knew of the rule would be a cir nce tending to show his assent; but that the jury must all the surrounding circumstances to see if such contract tered into, or the defendant was justified in presuming the of the plaintiff to the rule or requirement.

jury found for the defendant; and the plaintiff alleged ons.

rown, for the plaintiff.

. *Morton, Jr.*, for the defendant.

ENS, J. The fair interpretation of the regulation which endant had made requires us to hold that by the terms of e employees who intended to leave work must give two notice of such intention, and that, failing to do so, they ot be entitled to the wages which would otherwise be due the next pay day. Such a regulation, if assented to by ntiff, would form a part of the contract, and if he violated aving without notice, he could not recover the wages which en unpaid. The defendant would not be left merely to by action or in recoupment such special damages as it show it had sustained by the violation of his agreement. *Salisbury Mills*, 3 Allen, 340. *Hughes* v. *Wamsutta Mills*, en, 201. *Potter* v. *Cain*, 117 Mass. 238. It is not quite o understand the argument much insisted on by the plain- at as the contract was not mutual, that is, that as it im-

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posed no corresponding obligation upon the plaintiff two weeks' notice before dism sustained. It is competent for either par the right to terminate the contract abru agrees only to do so upon notice; and suc good upon sufficient consideration.

The more important inquiry at the trial v tiff ever assented to this regulation. There he knew it at the commencement of his v that he read it soon after he went to work, it "about all the time he was in the defend instructions submitted to the jury, as a ques the plaintiff assented to the regulation so tha the contract, and permitted them to consider, that after knowledge of it he continued to wo may be by acts as well as words, and by silen fairly bound to speak, if he dissents, as well *Commonwealth* v. *Galavan*, 9 Allen, 271. 100 Mass. 430. The plaintiff was engaged, shows, under no express contract, and for When first informed of this regulation, if he bound by it, and, if it were insisted on, aban could not have been enforced against him; bu fourteen months he continued to work with a it, and without any objection to it, legitimatel an assent to it. *Collins* v. *New England Iron* Whether the plaintiff assented or not was fairly jury. *Excep*

GERARD C. TOBEY & others *vs.* CITY OF Bristol. Oct. 29, 1875. — Jan. 10, 1876. MORTON &

A deed, in which the land conveyed is bounded upon a private wa and those claiming under him to deny the existence of the way as then actually laid out, or clearly indicated and prescribed.

At the time of a conveyance to A. of land in a city, bounded in t the grantor was the owner of the street. It was then used as a

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ies were marked out and defined by rows of trees and fences, which boundaries
nded a portion of the land afterwards conveyed by the same grantor to B.,
situated at the corner of the street. On a petition by B. for the assessment of
nages for the taking by the city of a portion of the land conveyed to him, for
ng out the street, the jury were instructed, at the request of the city, that if the
ntor was the owner of the street at the time of the conveyance to A., and at
time the street was fully defined and marked out by having fences and trees
dicate its width, and that deed was duly recorded, neither the grantor nor any
claiming under him would have a right to obstruct any part of the street as
cated by the fences and trees as they were at the time of the conveyance, and
jury can find for such land only such damages as B. would be entitled to for
ng out a street over land over which A. had a right of way. The petitioner
ested an instruction to the jury that the declaration in the deed to A. did not
ir the right of the petitioner to full damages for all the land embraced in his
and included in the way laid out. This instruction was also given, with the
ion, "but it is for the jury to say what that right is." *Held*, that the instruc-
were conflicting, and that that given at the request of the petitioner was erro-
. *Held, also*, the deed to A. being upon certain conditions subsequent, that
for B. to show that that deed had been defeated by breach of condition and
therefor, and that, if not so shown, it was proper for the jury to consider,
the question of value, that the land was subject to A.'s right of way.

ITION by the heirs of Joshua B. Tobey to the county com-
ners for a jury to assess damages for the taking of land, on
rner of Main Street and Trescott Street in the City of
on, by the respondent, to lay out Trescott Street.

the trial before a sheriff's jury it appeared that by the
out of Trescott Street twenty-one and one quarter feet
petitioners' land on Main Street was taken and about
feet on the rear line. The land of the petitioners was
ed to Joshua B. Tobey by Samuel T. Tisdale on Novem-
1856.

respondent, for the purpose of showing that the rear por-
the petitioners' land was incumbered by a right of way,
a deed from Tisdale to the Central Christian Society,
May 2, 1848, of "a certain lot of land in said Taunton on
sterly side of Trescott Street." The deed then described
nd by courses and distances, one of the bounds being
ce with the line of said street eighty feet." Following the
ption was the following clause: "Reserving one pew in the
which is to be erected by said society on the above named
be selected by myself and to be mine free from all taxes
ents, while the society shall have an existence, and when-
said society shall disband, the above described land with the

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improvements thereon, excepting the hou
with the furniture and fixtures thereto
back to the said Tisdale, and his heirs a
said church edifice be completed within o
hereof."

At the time of the above conveyance, 7
of the land which is now Trescott Street, a
petitioners.

The respondent offered evidence tending
time also, Trescott Street was used as a stre
daries were marked out and defined by rows
and that such boundaries included a portic
wards sold to Tobey, namely, the portion in
ing which was then standing on the land and
building that was there when the street was

By a plan of the land made after the cor
to the Central Christian Society, and before
Tobey, it appeared that the society's land wa
hundred feet from that sold to Tobey. Th
sented Trescott Street as thirty-one feet wic
the land sold to Tobey, which parcel of land,
on the other side of the street, projected into
ing the way to seventeen and a quarter feet,
continued for one hundred and one feet unti
Street.

The respondent asked for the following instr
given: "That if Samuel T. Tisdale was the o
which is now Trescott Street, on May 2, 184
his deed of a tract of land on the west side of
Central Christian Society, and at that time Tr
fully defined and marked out by having fences
dicate its width, and the deed of the Central C
was duly recorded, then neither Samuel T. Tisd
claiming under him would have a right to obst
Trescott Street as indicated by the fences and t
isted May 2, 1848, and the jury can find for such
damages as the petitioners would be entitled to f
street over land over which the Central Christia
successors and assigns, had a right of way."

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ie petitioners asked for the following instruction upon the subject: "That the declarations in the deed from Samuel isdale to the Central Christian Society do not impair the of the petitioners to full damages for all the land embraced ie deed to their ancestor, Joshua B. Tobey, and included in vay laid out." This instruction was also given with the ad- n, "but it is for the jury to say what that right is."

ie jury returned a verdict for the petitioners. In the Su- r Court the petitioners moved that the verdict be accepted recorded. This motion was denied and the verdict set aside; the petitioners appealed.

. *H. Fox*, for the petitioners. 1. The petitioners' land was umbered with a right of way. The deed to the Central tian Society, given in 1848, describes the estate conveyed to "on the westerly side of Trescott Street." It does not w far the street extends, either in length or width; does fer to any visible boundaries, nor even to any plan of the As the respondent claims the facts to be, it could not en a well-defined street, for if the testimony offered by rue, the building on the petitioners' land was projecting one and one fourth feet abruptly into the street. The of the respondent is that the deed to the society gave ty a right to keep this angular area directly in the rear building, and five hundred feet from the society's land, f it was within the rows of trees and fences on the day conveyance to the society, even though it might not have f any practical use as a way to and from its land. No de- in this Commonwealth has gone to this extent. In *Parker th*, 17 Mass. 413, and *O'Linda* v. *Lothrop*, 21 Pick. 292, it l that where one conveys land bounded on a way or street, estopped to deny the existence of a way or street coexten- ith the land conveyed. This case is precisely like those, that here the grantor gave a name to the way or street, ich the land was bounded. *Tufts* v. *Charlestown*, 2 Gray, loes not extend this rule. The first case, where the court that the grantee has a right to have the way kept open be- the line of his own land, is *Thomas* v. *Poole*, 7 Gray 83, the land conveyed was bounded upon a way or street l out, to be opened thirty feet wide, extending from Main

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Street to land of S. In *Farnsworth* v. *Ta*
ers v. *Parker*, 9 Gray, 445, and *Fox* v.
109 Mass. 292, the street was delineated
in the deed and recorded. In *Stetson*
there was a covenant in the deed that if
as laid out on a plan it was to be open an
The distinction between these latter cases
not trifling. When Tobey bought his lan
the plan then exhibited, there was nothing
that the way was not the same in 1848 a
cated. The records did not show it. No
tion of the land showed it. Must he lool
the position of perishable fences during the
May 2, 1848? Even if the deed to the Cen
gave it a right of way by implication, be
land, to the outlet of Trescott Street, it w
follow that the street must all the way b
width it then had. The right to pass out
never been interfered with. The narrowe
been against the building of the petitioners,
1848. *Fox* v. *Union Sugar Refinery*, 109 M

2. The sheriff gave the instruction asked
ent, and the instruction given at the reques
was rendered harmless by the addition made
the evident purport of which was to leave to
evidence before them, the extent of the way a
diminution of damages. If the jury followec
tions, as it is to be presumed they did, they n
allowance for the incumbrance of a right of w
tions taken together amount to this: "1. A ri
2. It did not depend upon this deed." If th
stated the rights of the parties, the verdict s
aside because he erred in stating how those rig

3. Any right of way which the society had
not by covenant, express or implied. *Howe* v
206. An estoppel can only be availed of by p
Braintree v. *Hingham*, 17 Mass. 432. The ci
or privy to this conveyance. In *Tufts* v. *Char*
371, it seems to have been assumed, without dis

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could avail itself of such declarations in the deed; but at time, and until the case of *Howe* v. *Alger*, 4 Allen, 206, the had uniformly spoken of this right of way as one by im- covenant and not merely by estoppel.

There was no evidence that the right of way, if one ever ed, had ever been asserted or still existed. *Paine* v. *Woods*, Mass. 160.

The conveyance to the Central Christian Society was upon onditions subsequent that it should build a house within one and that it should continue to exist and not disband. There o evidence of either of these facts. The burden of proof pon the respondent to show that the right of way still d, or was claimed.

E. Williams, for the respondent.

ENS, J. The two instructions, given at the request of the dent and of the petitioners respectively, were important as g the value of the land, and are inconsistent with each They cannot be reconciled by construing the first as a that a right of way existed, and the second as a ruling is right did not depend upon the deed of Tisdale to the l Christian Society, in which case, the petitioners contend ven if the sheriff erred in the latter instruction, the ver- ould not be set aside, as it was an error only in stating e rights of the society were acquired, and immaterial, in- as the respondent was allowed the benefit of such de- as should properly have been made on account of the ce of such a right of way. The first instruction, given at uest of the respondent, attributes to the deed made by Tis- the Central Christian Society, in connection with the hown as to the existence of a street with a visible boun- he effect of creating a right of way in favor of that society, cessors and assigns, over Trescott Street as it then existed; the second, given at the request of the petitioners, states e declarations in the deed "do not impair the right of the ners to full damages for all the land embraced in the deed r ancestor, Joshua B. Tobey, and included in the way laid Not only is a different effect given to the deed in the two ctions, but a different rule of damages prescribed for the Nor is the inconsistency rectified by the addition made by

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the presiding officer to the latter instructi
jury to say what that right is." Assun
thereby leave the jury to judge what the
ers was under the deed, but only left them
(which is the construction most favorable i
ruling,) it still left them to determine the
the petitioners to full damages unimpaired l
the deed previously made to the Central Ch

Even if the rulings are inconsistent, it is
ever, whether the latter ruling was erron
were correct, while that first given was othe
could have no ground of complaint, as any
jury may have fallen by reason of the confu
tions would necessarily have been in its favo
are satisfied with the verdict.

When a grantor conveys land bounding or
and his heirs are estopped to deny the existen
way, and the right thus acquired is not on
the land conveyed, but embraces the entire le
it is then actually laid out or clearly indicat
Stetson v. *Dow*, 16 Gray, 372, and cases cit
Sugar Refinery, 109 Mass. 292, 295. The d
Christian Society bounded its lot on the wes
cott Street, the grantor being then the owner
there was evidence that it was then used as
daries marked and defined by rows of trees an
within them was included a portion of the lan
to Tobey, and for the taking of which the peti
damages, namely, the portion in the rear of
standing on the land, which same building wa
street was laid out by the city. It is conte
area in the rear of the building could have bee
use to the society in going to or from its land, i
right to have the area kept open for that purpos
within the rows of trees and fences defining t
day of the conveyance. But the way as marked
ments was in view of the parties; its location m
posed to have entered into the consideration of th
the question is not here of how much value this

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was as then defined, but whether the right to use it passed
toppel as against the grantor. That it did so pass, and
by that a servitude was imposed upon the land afterwards
ed to Tobey, who took his land subject to it, is well sus-
l by the authorities. *Thomas* v. *Poole*, 7 Gray, 83. *Rodg-*
Parker, 9 Gray, 445.

hile Tobey did not have notice as clear and effectual as he
have had if a plan had been made and recorded at the
of the deed to the Central Christian Society, instead of a
ion of the street by perishable monuments, yet, when he
t in 1856, he had notice by the record that his grantor
1848 sold a tract of land bounding on Trescott Street,
was for him to inquire what that street then was. If he
sed upon the faith of a plan exhibited to him which did
rectly indicate it, such purchase could not deprive the so-
f its right, or diminish the extent of the street.

although the right of way which the society had was by
l, does the respondent seek to avail itself of it in any such
that intended when it is said estoppels can only be availed
arties or privies. *Howe* v. *Alger*, 4 Allen, 206. *Braintree*
ham, 17 Mass. 432. It asserts no rights by virtue of this
l, but in determining what it is to pay on account of land
y it for public purposes, the fact that the land is subject
ain servitudes which diminish its value, is a legitimate
for deduction.

respondent undertook to show that this right of way ex-
the deed to the Central Christian Society. That deed
an estate defeasible on certain conditions subsequent. The
of proof was on the petitioners to prove that such estate
n defeated by breach of condition and entry therefor, and
sequently they were entitled to damages for injury to the
state.

Verdict set aside.

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REUBEN E LADD *vs.* NEW BEDFORD

Bristol. Oct. 29, 1875. — Jan. 28, 1876. MORT

A railroad corporation is not liable to a road master in
tained by him while riding in one of its cars, which is
breaking of a switch on its road, in the absence of e
negligence in procuring a proper switch, or any defect
have been discovered upon the most careful inspection
tended, or could reasonably have been expected, to hol
which were driven at unreasonable speed, or of other
which the corporation would be liable.

A railroad corporation is not liable to an employee for a
while riding in one of its cars, which is thrown from the
the cars were imperfect by the want of check-chains, if
cars without check-chains were dangerous, and knew tha
cars were not provided with check-chains, and did not noti
whether the car in which he was riding had check-chains

TORT by a road master, in the employ of th
ration, to recover for an injury sustained by
of the defendant's cars, in one of which he
thrown down a bank by the breaking of a sw
ant road.

At the trial in the Superior Court, *Wilkin*
the evidence would not warrant a verdict for
directed a verdict for the defendant; and th
exceptions, the substance of which appears in t

E. H. Bennett & W. H. Fox, for the plaintif

G. A. Torrey, for the defendant.

GRAY, C. J. The original declaration alleg
dent was caused by the defendant's negligent e
incompetent switchman and an incompetent eng
incompetency and negligence of the switchman a
But there was no evidence at the trial that the c
gently employed incompetent servants; and it
the argument that the switchman and the engin
servants of the plaintiff, for whose negligence
was not liable to him. *Gilman* v. *Eastern Rai*
233.

The plaintiff now relies upon the amended de
alleges that the injury was caused by the negligc

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ien: 1st, in not having a proper switch at this place; 2d, in mperfection of its cars by the want of proper check-chains.

The corporation was doubtless obliged to use the utmost consistent with the nature and extent of its business, in pro- ng a proper switch; but it was not responsible for hidden cts, which could not have been discovered by the most careful ection. *Ingalls* v. *Bills*, 9 Met. 1. *King* v. *Boston & Worces- Railroad*, 9 Cush. 112. *Simmons* v. *New Bedford, Vineyard Nantucket Steamboat Co.* 97 Mass. 361. *Ford* v. *Fitchburg lroad*, 110 Mass. 240. *Readhead* v. *Midland Railway*, L. R. . B. 412, and L. R. 4 Q. B. 379.

here was no evidence at the trial that there was any negli- e in procuring a proper switch; or any defect in the switch h could have been discovered upon the most careful inspec- ; or that any accident would have happened by reason of the ition of the switch, if there had been no negligence on the of the engineer in passing over it at an unreasonable rate of l; or that the switch was intended, or could reasonably have expected, to hold cars upon the track which were driven at asonable speed.

here was therefore no evidence which would have warranted jury in finding that the defendant was liable by reason of a ct in the switch. *Duffy* v. *Upton*, 113 Mass. 544.

Upon the question whether check-chains were a usual and er precaution to be taken by the defendant, the evidence was icting. But the plaintiff's own testimony showed that for a time he had been in the employ of the defendant corpora- and had been of opinion that to run trains of cars without k-chains was not safe for passengers; that he knew that some e defendant's cars were not provided with check-chains; hat he did not notice, when he took this car, nor until after ccident, whether it had check-chains or not.

ery corporation has the right to carry on a business which gerous, either in itself or in the manner of conducting it, s not unlawful, and interferes with no rights of others; and liable to one of its servants, who is capable of contracting nself, and knows the danger attending the business in the er in which it is conducted, for an injury resulting there- *Priestly* v. *Fowler*, 3 M. & W. 1. *Skipp* v. *Eastern Coun-*

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ties Railway, 9 Exch. 223. *Seymour* v. *A*
Coombs v. *New Bedford Cordage Co.* 102
livan v. *India Manuf. Co.* 113 Mass. 396.
cific Railroad, 3 Dillon, 319.

This is not like a case in which the pre
upon or by means of which the business is c
narily defective, in which case the master
cially if he has promised the servant to r
failed to do so. *Snow* v. *Housatonic Rai*
Huddleston v. *Lowell Machine Shop*, 106 M
Clarke, 6 H. & N. 349, and 7 H. & N. 937.
ington, 2 F. & F. 533. *Patterson* v. *Pitts*
Railroad, 76 Penn. St. 389.

As to the case of *Britton* v. *Great Weste*
7 Ex. 130, cited for the plaintiff, it may be
defendant in that case was under absolute obli
do what it had failed to do. 2d. The jury fo
tiff did not know of the risk which he assumed
can hardly be reconciled with several previ
same court. *Dynen* v. *Leach*, 26 L. J. (N. S
v. *Yates*, 2 H. & N. 768. *Griffiths* v. *Gidlow*

In the case at bar, any risk arising from t
chains was one incident to the plaintiff's emplo
ingly assumed by him, and for which, therefor
no action against the corporation. *Excep*

THOMAS G. HAYNES *vs.* BENJAMIN G.

Essex. Nov. 4, 1875. — Jan. 8, 1876. MORTON &
ENDICOTT, J., did not sit.

There is sufficient privity of estate between a testator, a perso
vised land for life and the remainderman under his will, t
adverse possession, if the possession by the testator and his
for twenty years.

The mere payment of rent or admission of title by a tenant, w
of his landlord, will not operate to interrupt an otherwise co
session by the landlord.

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IT OF ENTRY, dated November 12, 1870, to recover a par- land in Haverhill. Plea, *nul disseisin*. At the trial in uperior Court, before *Allen*, J., the jury found for the de- ant; and the tenant alleged exceptions, the substance of appears in the opinion.

W. Perry & L. S. Tuckerman, for the tenant.

B. Ives, Jr., for the demandant.

LT, J. There was evidence tending to show adverse pos- n of the demanded premises, commencing with the occupa- f Mrs. Atwood in 1832, and continued until her death in She devised all her real estate to Susanna Gage for her emainder in fee to the demandant. The possession was ued in Susanna until her death in 1863, and by the de- ant until shortly before the commencement of this action rincipal question is whether there was that privity of estate en the testatrix and her devisees which is required to estab- tle by continuous adverse possession.

s settled that the disseisin of an heir, devisee or grantee e tacked to that of an ancestor, devisor or grantor, to cre- tle by adverse possession. *Leonard* v. *Leonard*, 7 Allen, *Melvin* v. *Proprietors of Locks & Canals*, 5 Met. 15, 32. adverse possession, continued for twenty years, affords a sive presumption of grant to the first occupant.

s claimed that there is no such privity between the life ten- d the remainderman, because the latter in no sense claims the former. But the answer is, that both claim under the vill by one title. The disseisin, which was commenced by tatrix, is continued by each in accordance with that title, referred by each only to the entry of the testatrix. There en no loss of possession; no restoration of the seisin to the vner; no new entry. The disseisin which commenced with atrix has been continuous in her devisees, and establishes e by lapse of time. It is plainly distinguished from a successive entries and new disseisins by different and dent parties.

es not follow, because no act of the life tenant in dispar- t of his title, and no disseisin of him, will be permitted e the remainderman, that an adverse possession main- y the tenant, under his title, will not enure to the benefit

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of the former. The test of title is that tl
ruption of possession, and no new entry
session ends before the expiration of the
lish the presumption, the seisin of the t
and he comes in by right, and not by
parties.

The other question relates to the effe
alleged payment of rent to the owner ma
demandant, and those in privity with him
demanded premises. There was evidence
of those who occupied under the testatrix
permissive, and the jury were told that the
have the benefit of such acts, unless they we
were under the authority or direction of At
instruction was also given as to what constit
sion. And it cannot be stated as matter
ment of rent, or an admission of title, by a te
ant or his grantor, without the knowledge of
alone operate to interrupt an otherwise cont
pation. *Exc*

GEORGE W. ELA *vs.* SELINA Co

Essex. November 4, 1875. WELLS & MOR
January 21. — 22, 1876. COLT & D

Where a petition to establish the truth of exceptions is refer
hear the parties and report the facts, and there is a confl
troversy as to the inferences of fact to be drawn from the
of either party to have the judgment of the full court t
recommit the report to the commissioner to report the e
findings were based will be granted.

A bill of exceptions tendered stated that requests for instruc
the judge by the petitioner's counsel before the arguments;
to receive or read them; that he accompanied his refusal
if the counsel was not satisfied with his instructions to the j
them; and that at the close of the charge the judge ask
briefly the substance of his requests, and the counsel then
evidence reported by the commissioner, to whom a petition

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exceptions was referred, showed that no requests for instructions were pre-
te the judge until after the arguments and just before the charge; that the
did not refuse to receive the requests for instructions before the arguments;
hen he refused to read the requests just before the charge, he informed the
l that at the close of the charge he could call the judge's attention to any
not covered by it; that after the charge he again asked the counsel to call
ention to any point in the instructions to which he objected; and that the
el, instead of doing so, insisted on reading in full his request for instruc-
Held, that the exceptions were rightly disallowed.

ITION to establish the truth of exceptions alleged by the
ner in an action brought against him by the respondent,
sallowed by *Wilkinson*, J., who presided at the trial in the
or Court.

petition was referred by this court to a commissioner "to
he parties and report the facts." His report was duly
ed to this court, and the respondent then moved that the
be recommitted to the commissioner to report the evidence
which his findings were based.

3. *Ives, Jr.*, for the respondent.

F. *Saunders*, for the petitioner.

AY, C. J. The jurisdiction over petitions to establish the
of exceptions disallowed by a judge of the Superior Court
this court, like that over exceptions which have been al-
is exclusively in the full bench of this court. Gen. Sts.
§ 11. *Priest* v. *Groton*, 103 Mass. 530. *Cullen* v. *Sears*,
ass. 299.

matter of convenience, the court has adopted the practice
rring the petition in the first instance to a commissioner to
the facts, and his report of the facts found by him is
ily sufficient to present to the full court every question
ither party desires to argue. But if at the hearing before
missioner there is a conflict of testimony, or a controversy
ferences of fact to be drawn from the evidence, it is the
either party to have the judgment of the full court.
To hold otherwise would be to allow greater weight
inding of a subordinate officer of the court than to the
ertificate of the judge to whom the exceptions were orig-
esented

Motion granted.

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The commissioner then made a report
the case was argued upon the petition and
1876, and is stated in the opinion.

J. A. Loring, (*C. G. Saunders* wit. him,
S. Lincoln, Jr., for the respondent, was n

GRAY, C. J. The bill of exceptions ten
requests for instructions were presented to
fendant's counsel before the arguments; t
refused to receive or read them; that he acc
with the statement, that if the counsel was
instructions to the jury, he could except to
the close of the charge the judge asked the co
the substance of his requests, and the cou
requests. It omits to state that the judge, b
the charge, requested that the counsel woul
any omission or defect in the charge, and tl
not comply with this request.

The evidence reported by the commissio
requests for instructions were presented to tl
the arguments and just before the charge;
not refuse to receive requests for instruction
ments; that when he refused to read the requ
charge, he informed the counsel that at the clo
could call the judge's attention to any point
and that after the charge he again asked the
attention to any point in the instructions to w
and that the counsel, instead of doing so, insis
full his requests for instructions.

These differences are important. Before th
the right of the defendant by his counsel to pr
instructions, and to have them examined by the
upon at some time before the jury retired. Af
were concluded, the counsel had no right to ad
the jury, upon the law or the facts of the case
of the presiding judge. The bill of exceptions a
sents the judge as arbitrarily denying to the
which he was entitled. The evidence before us
judge refused no right, but properly declined
conduct of the cause to the counsel. The judge

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with truth or with his official duty, have allowed the
ns which were presented to him. Those exceptions hav-
rightfully disallowed, the petitioner is not entitled to be
pon the questions of law stated therein. *Crow* v. *Stowe*,
ss. 153. *Sawyer* v. *Yale Iron Works*, 116 Mass. 424.

Petition dismissed.

ES HODGKINS, administrator, *vs.* EASTERN RAILROAD COMPANY.

Nov. 4, 1875. — Jan. 28, 1876. MORTON & LORD, JJ., absent. ENDICOTT, J., did not sit.

an in the employ of a railroad corporation cannot maintain an action the corporation for personal injuries, caused by the making up of a train of h platforms of unequal height, by the ordinary servants of the corporation, e direction of one of its station masters.

to recover for personal injuries sustained by the plain-
testate while employed as a brakeman by the defendant
ion. At the trial in this court, *Ames*, J., withdrew the
n the jury, and reported it for the consideration of the
rt, in substance as follows:

ne opening of the case to the jury, the counsel for the
stated that on the day of the accident a train of passenger
luding a smoking and baggage car, was made up at the
r station of the defendant in Boston, by its ordinary
under the general direction of its station agent in
who has charge of the making up of trains, to be run
railroad to Rockport, and the plaintiff's intestate was
pon this train to act as brakeman; that the train was
of cars having platforms of unequal height; that a
nade up was unsafe and dangerous, especially for brake-
was well known to be so by the officers and managers
fendant; that a due regard for the safety of its ser-
d especially of brakemen, required of the defendant
ould run no cars in the same train having platforms of
eight, and that it was negligence on its part to run
s or allow them to be made up.

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It was admitted that the cars composi
were properly made, complete and suita
with reference to their platforms and in
the plaintiff's intestate was assigned to se
this train by the station agent in Boston.

The counsel for the plaintiff farther sta
rival of the train at Rockport, it was left
men (not including the conductor) for the
the train in reverse order of cars, as was ne
returning to Boston the next morning. F
the passenger cars were set off upon a sidin
of the train, consisting of baggage and sn
drawn to be sent forward again upon the n
the cars upon the siding. After the form
considerable headway in moving forward up
was discovered by the switchman at the sid
set off had not been pushed sufficiently far
clear the main track, and that a corner of o
so far over the main track as to prevent t
train passing them without collision. The sw
set the switch in such manner as to direct th
train back upon the siding, full upon the two
it. The course adopted by the switchman wa
most prudent open to him under the circums
covered that the cars could not pass each o
tracks.

The plaintiff's counsel farther stated that th
riding upon the platform of that car which
cars were moving, and that this came into vi
the stationary cars upon the siding. The pla
thus meeting being of unequal height, the pl
forced over that of the other, and the plaintif
ing at the brake received the injuries for wh
brought.

The plaintiff contended that the injuries
reason of the train having been made up with
forms of unequal height; that if it had been
having platforms of equal height no damage
done to said intestate, and that his injuries di

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t of care or negligence, or that of any person having the
d management of the train.

on the evidence above set forth the plaintiff could main-
s action, the case was to stand for trial; otherwise judg-
o be entered for the defendant.

F. Saunders, (*C. Saunders* with him,) for the plaintiff.

. Ives, Jr. & S. Lincoln, Jr., for the defendant, were not
upon.

AY, C. J. The making up of the train of cars with plat-
of unequal height was the act of fellow servants of the
ff, for which, by the well settled law of this Common-
, he can maintain no action against the corporation. *Far-
Boston & Worcester Railroad*, 4 Met. 49. *Hayes* v. *Western
ad*, 3 Cush. 270. *Albro* v. *Agawam Canal*, 6 Cush. 75.
nnon v. *Stony Brook Railroad*, 10 Cush. 228. *Seaver* v.
& *Maine Railroad*, 14 Gray, 466. *Gilman* v. *Eastern
ad*, 10 Allen, 233. *Johnson* v. *Boston*, 118 Mass. 114.

Judgment for the defendant.

THANIEL J. HOLDEN *vs.* DAVID BLANEY & others.

Nov. 6, 1875. — Jan. 29, 1876. COLT, MORTON & LORD, JJ., absent.

r by his will provided that the residue of his estate should be divided into
hares, and that one portion should be paid to each of his surviving children
t the shares to be paid to his married daughters should be paid to them
m the control of their husbands, and that the daughters should alone have
t to use their respective shares. A codicil to the will directed that the
one of the daughters should "be held in trust" by the executors, and
that "they are hereby directed to pay over to her, my said daughter, from
time, a sufficiency for her comfortable support and maintenance during the
her natural life, excepting only, that in case she shall survive her said hus-
the remaining portion of her share of my estate shall then be paid over
full. My object in thus limiting the payment of my said daughter's share
tate during the lifetime of her said husband, is to prevent his having any
benefit of or from my estate." The daughter died after the testator, and
time of her husband, leaving a will by which she bequeathed her share
ther's estate. *Held*, that she had a vested interest in fee in her father's
hat the time of payment to her was only postponed by the codicil; and
executor was entitled to said share.

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BILL IN EQUITY by the executor of J
the executors of Jason Chamberlain, alleg

The will of Jason Chamberlain, dated J
making certain specific bequests, provided

"Fourth. All the rest and residue of
after satisfying the foregoing bequests, of
that I shall die seised of and possessed, or
any way entitled at the time of my decea
ever the same may be situated, I do give
the same in six equal shares and portions,
each of my five surviving children, namel
of David Blaney, Mary B. Sawyer, wife
Jason Chamberlain, Junior, Sylvester S. Ch
Chamberlain, and the remaining one equal
among my four grandchildren who are the
resentatives of my late daughter, Ann S. H
ick W. L. Huntoon, both now deceased, to
same in five equal shares and portions to the
surviving children, and the remaining one
and among my said four grandchildren an
heirs and assigns forever. But I do order
equal shares and portions of my estate herei
said married daughters, Ellen Blaney and
spectively, shall be for their own sole and
trol, and subject to no right or control of
bands, and they my said daughters, and they
right to use and dispose of their respective
queathed to them."

On December 16, 1871, Chamberlain ma
will, the material parts of which are as follow

"I, Jason Chamberlain, the testator of th
hereby make this present codicil, which I
shall be taken as a part of my said foregoing
ment, which will, in all respects, excepting w
or changed by this codicil, I do hereby republ

"First. I do hereby order and direct that
my estate bequeathed in the fourth item of
will to my daughter Mary B. Sawyer, wife of
shall be held in trust by my executors and tru

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y directed to pay over to her, my said daughter, from time
ne, a sufficiency for her comfortable support and maintenance
g the term of her natural life, excepting only that in case
hall survive her said husband, all the remaining portion of
hare of my estate shall then be paid over to her in full. My
t in thus limiting the payment of my said daughter's share
y estate, during the lifetime of her said husband, is to pre-
his having any share or benefit of or from my estate, be-
I consider that he does not treat my said daughter as a
and dutiful husband should and would treat a dutiful wife."
amberlain died on October 13, 1872, and his will and cod-
vere duly admitted to probate. On May 10, 1874, Mary B.
er died, leaving a will, in which the plaintiff was named as
tor, and disposing of all her estate. Her husband survived

e prayer of the bill was that the defendants should pay to
laintiff Mary B. Sawyer's share of her father's estate.
e defendants demurred for want of equity; and the case
eserved by *Devens*, J., on the bill and demurrer, for the con-
ation of the full court.

F. Thomas, for the defendants. 1. If the bequest had re-
ed as under the will, Mary B. Sawyer might, by a last will
testament, have devised one half of the amount given to her,
ut the assent of her husband, to third parties; and might
devised the whole to him. If she had died intestate, her
nd would have taken the whole under the statute of distri-
ns. Gen. Sts. *c.* 108, §§ 1, 9. To prevent these results, or
f them, the codicil was made, the testator's intent and pur-
eing that his daughter's husband should not have any share
benefit from, his estate. This purpose, manifested in the
self, is the chief end and aim of the codicil. Seeing that
ll failed to accomplish this purpose, the testator made the
by which he devised one sixth part of the residue, given
y B. Sawyer by the will, to trustees, with directions to
t of the income (and it would seem of the principal) suffi-
or her comfortable support and maintenance during life;
the contingency of her surviving her husband, the "re-
g" portion to be paid to her in full; that is to say, he
o Mary B. an equitable life estate, capable of being en-

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larged in the contingency (which has not l
she survived her husband, and when the pe
seeking to guard her would no longer exist.
1 Pick. 818. *Palmer* v. *Stevens*, 15 Gra
Bank of Cape Ann, 8 Allen, 313. *Larned*
389. *Barrus* v. *Kirkland*, 8 Gray, 512.

A construction of the codicil which gives
power of devising the estate utterly defeats
pose of the testator; because she might dev
husband, or, if she died intestate, he would
in a third contingency, if she made a will, gi
others, he might claim one half.

2. There is a narrower view of the will a
fatal to the bill, and that is, no portion of t
trust fund is to be paid over during the lifeti
and he is still alive. No power of appointme
daughter by the will or codicil in terms or by
power, if it were possible to infer it from th
would be equally in conflict with the obvious i
of the testator.

To effect the object and purpose and plain
tator, the payment over of any part of the pri
place till the death of the husband of Mary B.
effect to the purpose and intent of the testator,
presumption of law that the testator means to h
undevised, the remainder after Mary B. Sawyer
be held to fall into the residue and pass to the re
other than Mary B. *Thayer* v. *Wellington*, 9
298, and cases cited.

J. A. Gillis, for the plaintiff.

ENDICOTT, J. The question in this case is wh
of Mary B. Sawyer goes to her executor, or falls
of Jason Chamberlain's estate as intestate prop
tributed among all his residuary legatees.

In deciding this question, the intent of the te
gathered, not only from the codicil, but from th
the will, so far as those provisions are not altered
For it is an established rule of construction that t
change the will only so far as the intent is mani

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ons of the will are not to be disturbed further than is neces-
o give effect to the codicil. *Quincy* v. *Rogers*, 9 Cush. 291,
1 Jarman on Wills, 160.

the will, it is clear that Mrs. Sawyer was to take a vested
st in one share absolutely on the death of the testator, and
e intended by his will to dispose of his whole estate. And,
opinion, it is equally clear that the testator did not intend
e codicil to alter the provision vesting one share of the resi-
n Mrs. Sawyer, but only to postpone the time of payment.
is evident from a careful examination of the language of
odicil. There is no devise over showing that the testator
led to change the will in this respect. The share is not
d in terms to trustees, but only that it shall be held in
and no other trust is named except to provide for her sup-
and the share thus to be held in trust is referred to and
oed as the share bequeathed in the will. The trustees are
nited to the income in providing for her support, but they
pay her "a sufficiency for her comfortable support and
enance" during her life. This indicates, in the absence of a
over, an immediate beneficial interest, and a postponement
f the time of payment. *Eldridge* v. *Eldridge*, 9 Cush. 516.
v. *Winthrop*, 3 Allen, 51, 60. In all the cases cited by
fendants to show that a right to expend the principal by a
for life does not enlarge the gift and make it a legacy,
is a devise over on the death of the party having the bene
nterest during life. In the event of the death of her hus-
"all the remaining portion of her share of my estate shall
e paid over to her," as if the property was hers, although
ertain time to be held by trustees. In stating the purpose
codicil, he uses the words, "thus limiting the payment in
ring the lifetime of the husband," implying postponement
the time of payment.

can we give the construction to the last clause for which
endants contend, that the testator intended under all cir-
nces to prevent the husband from having any benefit in
te, and, therefore, that it must be inferred that he did not
he share should vest in her, but that it should remain in-
roperty. The effect of this construction would be to con-
evident intent of the testator in his will to dispose of all
erty.

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The words "my purpose in thus limitin
said daughter's share of my estate during t
husband, is to prevent," &c., must be take
ceding clause, clearly indicated by the use
and to apply to the provisions that are there
visions refer only to her maintenance durir
ment of the residue to her, if she survive
other words, it was the intention, as expre
husband from having any benefit in the estat
of the wife. *Decree*

JAMES P. RAY & others *vs.* EDWIN D. W
trustees.

Suffolk. Nov. 10, 1875.—Jan. 10, 1876. END
absent.

Under the bankrupt act, U. S. St. of 1867, c. 176, § 21; U. S.
tiff having a valid attachment upon the property of a defe
action, but not within four months after the attachment w
proceedings in bankruptcy, is not entitled to a special ju
only against the attached property, until the question of t
determined, if there is no unreasonable delay on the part
deavoring to obtain his discharge.

CONTRACT against the acceptors of a draft fo
the Waterville Manufacturing Company, paya
after date, and dated September 3, 1873. Wr
20, 1874, and served on the trustees on the
trustees admitted funds of the defendants in th
amount of $1164, and they were in December,
trustees. The defendants appeared and filed an
that they had been on November 7, 1875, adjudi
and that sufficient time had not elapsed for then
discharge, and praying that this suit should be
the determination of the court in bankruptcy, on
their discharge.

At the trial in the Superior Court, before *Putn*
a jury, it appeared that the defendants had be

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pts, as alleged in their answer; and it was admitted that nt time had not elapsed in the proceedings in bankruptcy m to obtain their discharge, and that there had been no onable delay on their part in endeavoring to obtain it. It lso admitted that the plaintiffs' debt was under the bank- ct provable in the proceedings in bankruptcy. The de- nts contended that this suit should be stayed to await the nination of the court of bankruptcy on the question of their rge, as provided in the bankrupt act, and filed a motion effect; but the judge refused to stay the same, and or- judgment for the plaintiffs for the whole amount of the ance, "such judgment only to be enforced against the ty attached on the writ in the hands of the trustees, but be enforced against the person of the defendants, or either n, or any other property." The defendants alleged ex- s.

Russell, for the defendants.

Stone, Jr., for the plaintiffs.

AY, C. J. A creditor who has brought his action more than months before the commencement of the proceedings in uptcy, and has made an attachment which is not dissolved h proceedings, may doubtless, after the question of the pt's discharge has been determined by the United States have a special judgment against the property attached, a certificate of discharge has been granted to the bank- *Davenport* v. *Tilton*, 10 Met. 320. *Bates* v. *Tappan*, 99 76. *Stockwell* v. *Silloway*, 113 Mass. 382. *Johnson* v. 116 Mass. 392. *Peck* v. *Jenness*, 7 How. 612. *Doe* v. *ss*, 21 Wall. 642, 646.

the bankrupt act expressly provides that "no creditor ebt is provable under this act shall be allowed to prose- inal judgment any suit at law or in equity therefor against krupt, until the question of the debtor's discharge shall en determined; and any such suit or proceedings shall application of the bankrupt, be stayed to await the de- ion of the court in bankruptcy on the question of the ," unless in case of unreasonable delay on the part of rupt in endeavoring to obtain his certificate, or of pro- for the purpose of ascertaining the amount due, to a

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merely formal judgment, upon which n
U. S. St. 1867, *c.* 176, § 21. U. S. Rev. S

The object of this provision is not onl
rupt, in case he obtains his certificate, fr
cause of action against him merged in a
action upon which would not be barred by
ford v. *Rice*, 102 Mass. 472; but to prev
by suits until the question of discharge is d
fore extends to all cases, without regard to
the debt would or would not be barred ther
3 Bened. 14; *In re Ghirardelli*, 1 Sawy
enable the assignee, to whom all the rights o
property have passed, subject to the attachm
elects so to do, and assume the defence of t
1867, *c.* 176, § 14. U. S. Rev. Sts. § 504
21 Wall. 642. *Cleveland* v. *Boerum*, 24 N.

If, indeed, neither the bankrupt nor the
stay of proceedings, the court may proceed to
v. *Baker*, 104 Mass. 211. *Cutter* v. *Evans*,
v. *Childress*, *ubi supra*. But the court sho
time for the assignee to come in if he sees fi
bankrupt or the assignee seasonably interpos
proceedings must be stayed.

In *Bosworth* v. *Pomeroy*, 112 Mass. 293, th
admitted to defend the action, and it was ag
ties that the case stood as if the bankrupt h
charge.

In the present case, it having been duly a
rupts, and proved to the satisfaction of the c
time had not elapsed for them to obtain their
there had been no unreasonable delay on thei
ing to obtain it, the action of the Superior Co
of proceedings and ordering judgment, was err

Excep

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JAMES W. GOODRICH *vs.* JOHN T. WILSON.

Nov. 11, 1875.—Jan. 10, 1876. ENDICOTT & LORD, JJ., absent.

risdiction of a state court over an action by an assignee in bankruptcy against son, to whom the bankrupt has made a fraudulent preference, is not excluded e bankrupt act, U. S. St. of 1867, *c.* 176, or by the U. S. St. of 1874, *c.* 390,

action by an assignee in bankruptcy to recover money alleged to have been ulently paid by the bankrupt to the defendant, it appeared that the defendant dmitted that a statement made by the bankrupt, at his examination before egister, in regard to the money paid by him, was true. *Held*, that the plaintiff ightly permitted to show what the statement was by any one who heard it, he fact that it was made in the course of the bankrupt's examination before egister did not render it incompetent.

ction by an assignee in bankruptcy to recover money alleged to have been ulently paid by the bankrupt to the defendant, evidence of what the bank- said to the defendant, some days before, when he borrowed the money of him, what he wanted it for, or of statements then made by the bankrupt as to his iary condition, or of the time fixed for repayment, has no bearing on the ion whether the defendant knew or had reasonable cause to believe the bank to be insolvent at the time he repaid it.

ction by an assignee in bankruptcy to recover $1500 alleged to have been ulently paid to the defendant by the bankrupt, the defendant asked the judge truct the jury that if the defendant made a contract with the bankrupt, be proceedings in bankruptcy had been instituted, to render him personal services ay for other legal services to be rendered to or for the bankrupt, the con- would be valid, and the assignee would not be entitled to recover the money under that contract, if the defendant complied with the terms of that con- and that the payment was not a preference, unless it was made in pursu- of a fraudulent combination between the bankrupt and the defendant. The refused so to rule, and instructed the jury that a person had a right to re- ounsel to assist him in the proper discharge of his duty as a debtor in under the bankrupt act, but that if insolvent he could not retain counsel y other purpose; that if the amount was paid as a retainer, with the intent vent so much as was in excess of what was reasonable from going to the rs, and the defendant knew that the payer was insolvent, and knew, or asonable cause to know, that he did it for this purpose, the assignee could the whole amount paid. *Held*, that the instructions were sufficiently favor- the defendant, and that he had no ground of exception.

r by the assignee in bankruptcy of William F. Wilson, to $2700 alleged to have been paid by the bankrupt to the nt in fraud of the bankrupt act. There were also counts act for the same cause of action. Writ dated March 18,

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The defendant moved to dismiss the
diction. This motion was overruled, and
answer containing a general denial, and a
$500, and the further sum of $700, were
ant, and were repaid to him while Willi
vent, and before bankruptcy proceedings w
that the sum of $1500 was paid to the def
certain proceedings instituted against Will
ing proceedings in bankruptcy.

At the trial in the Superior Court, befo
dence, which was conflicting, tended to s
William F. Wilson and Company, consistin
Francis D. Harrington, was formed on or ab
that on or about October 31, 1871, William
charge of the firm's business and proceeded
pute having arisen between him and Harri
spective rights in the firm; that on Novem
F. Wilson paid to the defendant $500, whic
borrowed of him; that on November 4, Wil
rowed $700 of the defendant, upon the expre
it back within three days; that with this $7
son paid some drafts and a note of the firm,
day; that thereafter, on the same day, an at
and a keeper placed over the goods in the sto
suit of Weil Brothers & Dreyfus, with whom
F. Wilson & Co. had an open account; tha
William F. Wilson paid back to the defendant
on the 4th; that from the 4th to the 9th day o
tiations were had with Weil Brothers & Drey
discharge their attachment, when it was discov
attachment of $4000 had been put on by Ch
nephew of Harrington, and thereupon William
fied the creditors of the firm to be present at the
ber 13; that a meeting of the creditors was ha
November 13, and the condition of the firm ma
statement drawn up by the bookkeeper, showing
plus of $2100; that at the creditors' meeting
made by the defendant in behalf of his brother,
son, that, in view of the troubles which had aris

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ent injury to the credit of the firm, he, William F. Wilson, ld pay said creditors sixty-five cents on the dollar, and as- e all the liabilities and carry on the business alone, said pay- t to be made in the unsecured notes of said William F. Wil- that the defendant had acted more or less as counsel for the since its formation. The plaintiff offered evidence tending ow that the defendant, for his brother, made the ultimatum xty-five cents or bankruptcy, which the defendant did not t; that on November 18, William F. Wilson paid to the de- nt $1500 as a retainer, for the purpose of engaging such counsel as might be necessary in any legal proceedings might arise out of William F. Wilson's relations with Har- on, or the affairs of the firm; that on November 23, Har- on, at request of creditors, petitioned said firm into bank- , under the United States bankrupt act; that, after a denial kruptcy by William F. Wilson, and a trial, said firm was cated bankrupt on December 21, 1871, and on December 71, William F. Wilson filed his schedule showing assets amount of $13,836.10, and liabilities to the amount of 3.01.

cis D. Harrington testified that he was present when Wil- Wilson was examined in bankruptcy and made a state- regard to paying money to the defendant; that after- e went to the office of the defendant, and asked him if ement made by William F. Wilson, as to paying money efendant, was true, and the defendant said it was; that F. Wilson stated on his examination that he had paid Wilson $1500 retaining fee, and some $1100 for an old owed him; that he paid $500 for a debt he owed his and $700 for money which he said he had borrowed of that he said this money was paid about November 20. timony was admitted subject to the exception of the de-

am F. Wilson testified, for the defendant, that he commu- to the defendant, at the time of borrowing the $700, the e to which he proposed to put it, and what he wanted it de was then asked to state what he told the defendant he d it for, as bearing on the question whether the defendant probable cause to believe the witness insolvent. The evi-

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lence was excluded, and the defendant ex
was also asked the following questions, al
to be inadmissible, and the defendant excep
any statement to him as to your pecuniary
that you borrowed that money of him? At
loan of your brother, was anything said a
which it should be repaid? Was there a
time you borrowed that money, when it was

The witness further testified that he first
attachment when his brother came to his
sheriff's office; and that this was after the ar
made to pay off the first attachment. He
following questions, which were ruled out, su
ant's exception: "Had any demand, in any
made on you by Baker, for the payment of
upon you? Was there anything due to Bal
the time that the attachment was put on?"

The defendant requested the judge to instru
lows: "1. As to the payment of the $1500
made a contract with the bankrupt, before pro
ruptcy had been instituted, to render him pe
procure and pay for other legal services to be
the bankrupt, such contract would be valid,
would not be entitled to recover the amount of
that contract, if the defendant complied with
contract, and performed such services as may ha
of him, and procured the services of such other c
have been requested to procure.

"2. The payment was not a preference; be
present consideration, it would be a valid payme
made in pursuance of a fraudulent combinati
bankrupt and the defendant."

The judge declined so to rule, and instructed
lows: "In regard to the retainer, a person who f
solvent has a right, in good faith, to retain couns
in the proper discharge of his duty as a debtor
the bankrupt law. He has no right to retain coun
to prevent his property from going to his assignees
the same from being distributed under the act, or

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any way impair, hinder, impede or delay the operation and effe
of, or evade the provisions of, this act. He cannot, in other words
hire counsel for the purpose of doing anything but his duty
under that law, and that is to give all his property, that the law
takes, to his creditors through the assignee. He may employ
and it is necessary that he should, and he may take a reason-
able sum from his estate and employ counsel and retain counsel
for the purpose of assisting him in the proper discharge of his
duty as a bankrupt in court. Further than that he cannot. Or
course it would not be in good faith to the law for him to employ
counsel for any other purpose. He has a right to employ counsel
to assist him in the proper discharge of his duty.

The question in this case will be whether the defendant here
was retained and paid the sum of $1500 in good faith for the pur-
pose of a proper and lawful discharge of his obligations under
the law. If he was retained for any other purpose; if he was
retained for the purpose of hindering, delaying or impeding the
provisions of this act, then that retainer was an unlawful retainer,
which he had no right to make; and, if the defendant knew it,
knew that he was insolvent, and received the money for any such
purpose, knowing that that was the intent on the part of William
F. Wilson, then the retainer was an unlawful retainer, which
in violation of the provisions of this act, and which the assignee
can recover. In order to recover under the provisions of the
act, it must be shown, what is not denied in this case, first
(that is, the first proposition is not denied) that William F. Wil-
son was insolvent at that time, or acting in contemplation of in-
solvency. That proposition there could be no question about.
Was the retainer any part of it, from going to the assignee and being
retainer, or any part of it, from going to the assignee and being
distributed under this act? If it was the purpose of the parties,
and known to be such by both of them, to pay for improper ser-
ces, or to put under the guise and pretence of a retainer a large
m of money in the hands of the defendant, so as to prevent
going to the assignee, or for the purpose of hindering, delay-
or impeding the provisions of law, then the whole act of the
ties would be vitiated by the fraud, and the whole amount can
ecovered in this case. For instance, if the sum of $500 was
per retainer to be paid, and the parties, with the intent to

L. v.

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prevent the other $1000 from going to t
a retainer for $1500, the whole transact
the fraud, and the assignee would have
whole amount. If, then, William F. W
acting in contemplation of insolvency ;
brother, the defendant, as a retainer, and
of that was to prevent that sum, or any
sum, from being distributed under the pr
the defendant knew that William F. Wi
knew, or had reasonable cause to know,
purpose, the plaintiff would be entitled to
point I do not intend to express any opinio
to determine. I have stated the principles
them, applicable to this case, and I leave t
The burden of proof is on the plaintiff on

The jury returned a verdict for the pla
$2491.50; and the defendant alleged excep

E. Avery, for the defendant.

N. B. Bryant, for the plaintiff.

GRAY, C. J. The jurisdiction conferred
the United States as courts of bankruptcy
troversies between the bankrupt and his cred
lection, marshalling and distribution of his as
diction of suits at law or equity between th
ruptcy and any person claiming an adverse i
by a distinct provision of the act of Congr
cidental to the jurisdiction in bankruptcy.
in bankruptcy is exclusively vested in the C
Courts of the United States, and their exer
subject to revision by the Supreme Court of
The jurisdiction of suits by or against assign
is part of the common law and equity jurisdi
courts of the United States, and is subject to t
Supreme Court of the United States by appea
and does not exclude the concurrent jurisdic
courts. U. S. St. 1867, *c.* 176, §§ 1, 2. *War*
Met. 583. *Hanson* v. *Herrick*, 100 Mass. 328, 3
ley, 112 Mass. 100. *Smith* v. *Mason*, 14 Wall.
v. *Knox*, 16 Wall. 551. *Stickney* v. *Wilt*, 23 W

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The effect of the provision of the act of Congress of 1874, c. 390, § 2, is not to confer or take away jurisdiction of the state courts, but simply to allow the federal courts of original jurisdiction to decline to entertain actions at common law, to which the assignee is a party, in which the debt demanded is less than the amount which determines the jurisdiction of those courts in other cases. See U. S. Rev. Sts. §§ 629, 639, 711, 4972, 4979.

The evidence offered by the plaintiff was competent. Evidence having been introduced tending to show that the defendant admitted that the statement made by the bankrupt in his presence was true, the plaintiff certainly might prove what that statement was, and this might be done by any one who heard it. The fact that it was made in the course of the bankrupt's examination before the register did not render it incompetent. *Lynde v. McGregor*, 13 Allen, 182.

The exceptions to the admission of the evidence offered by the defendant cannot be sustained. What the bankrupt said to the defendant, at the time of borrowing money from him, could have no bearing upon the question whether the defendant knew or had reasonable cause to believe the bankrupt to be insolvent at the time of the repayment of the money, some days afterwards. The bill of exceptions does not show that the inquiries as to the claim and attachment of Baker were relevant or material.

The question whether the payment of money to the defendant by way of retainer was lawful and valid was rightly submitted to the jury, under instructions sufficiently favorable to him.

Exceptions overruled.

BOSTON & SANDWICH GLASS COMPANY *vs.* H. K. MOORE.

Suffolk. Nov. 11, 1875. — Jan. 10, 1876. ENDICOTT & LORD JJ. absent.

The following instrument signed by the defendant was delivered to the plaintiff: "I guarantee the sum of five hundred dollars value in glass shades purchased by my A. from B. Terms of purchase to be sixty days from date of invoice, and, if not paid within ninety days, draft to be drawn on me for the amount." *Held*, that was not a continuing guaranty. *Held, also*, that parol evidence of the previous dealings contemplated, between the creditor and the principal

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debtor; or that the guarantor had previously agree
for future advances, and that the goods were sold
that the relations of the principal parties were well
admissible to show that the instrument was othe
transaction.

CONTRACT upon the following written
defendant: "Boston, September 10, 187
eration of the sum of one dollar herein pa
is hereby acknowledged, I guarantee the s
lars ($500) value in glass shades purchas
Moore, from the Boston and Sandwich Gl
of purchase to be sixty days from date of i
within ninety days, draft to be drawn on m

At the trial in the Superior Court, befo
tiff offered to prove that it was a corporat
business in the manufacture and sale of all
and that the two sons of the defendant, C. C
Moore, went into the business of selling gla
leans, Louisiana, and that C. C. L. Moore
United States Navy Yard, in Charlestown, in
and had no means of his own, and that
at New Orleans, and there sold the goods
brother, C. C. L. Moore; that the plaintiff
L. Moore to a considerable extent, prior to
and so continued to deal until that time, h
buying glass shades in small quantities and
and sending them to his brother, F. K. Moore
in New Orleans; that the defendant knew
were between the plaintiff and C. C. L. Moo
September 10, 1872, C. C. L. Moore, with the
defendant, endeavored to obtain from the plai
quantity of goods than formerly, and on a cred
time, and represented to the plaintiff that he
New Orleans were going to extend and build u
in said glass shades in New Orleans, and wan
large quantity of goods, and to establish a credi
length of time; and as the plaintiff was unwill
L. Moore, without security, and to induce the pl
said goods as aforesaid, C. C. L. Moore offered

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fendant give a guaranty to the plaintiff in the sum of $500, on account of the sales that might thereafter be made by the plaintiff to said C. C. L. Moore; and one of the agents of the plaintiff thereupon called upon the defendant and made known to him all the facts, representations and negotiations that had passed between said C. C. L. Moore and the plaintiff, and also what the future course of business and dealing was to be between the parties above spoken of; and thereupon the defendant agreed to give such a guaranty for the purpose of assisting his sons and to build up the said business; that the agent of the plaintiff drew up the guaranty mentioned above, and the defendant signed and delivered it to the plaintiff's said agent, and the plaintiff, relying upon said guaranty, immediately commenced to deliver goods and to charge them to the said C. C. L. Moore, and to ship them at his request to New Orleans, and that goods to the amount of $2049.22 were so shipped between September 13, 1872, and April 19, 1873, of which sum the said C. C. L. Moore paid to the plaintiff $1000 in small sums on account at different times out of funds that he received from his brother in New Orleans; that in June, 1873, one of the agents of the plaintiff called upon the defendant and told him how much the indebtedness of his son, C. C. L. Moore, to the plaintiff was, and that it had been ninety days overdue, and demanded of him payment of the five hundred dollars that he had guaranteed to the plaintiff; and that on July 10, 1874, the plaintiff presented to the defendant a draft drawn by the plaintiff on him for the sum of $500 on the said account, and acceptance and payment of said draft was refused, that the indebtedness of C. C. L. Moore to the plaintiff still remains unpaid, to the amount of about $1100.

The defendant contended that upon the facts offered to be proved, so far as competent, the action could not be maintained; that the guaranty did not remain in force after $500 worth of goods had been delivered to said C. C. L. Moore, and paid for, as stated in the plaintiff's offer of proof; and that the proof offered was not competent and sufficient to show that the defendant was liable for any goods furnished after the $500 worth first delivered under the guaranty were paid for.

The judge, by consent of parties, reported the questions of law so arising for the determination of this court. If the action could

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not be maintained, judgment was to be
otherwise the case to stand for trial.

M. Holbrook, for the plaintiff.

C. D. Adams, for the defendant, was not

COLT, J. The question submitted by t
the instrument declared on is to be const
guaranty which affords security to the plai
to the principal in successive transactions,
fined to one transaction, and therefore sati
chase of the goods named to the specified
payment for the same.

The rules which govern the construction
are to be applied to this; one of which is, th
ambiguity in the terms, the writing itself mus
in ascertaining the intention; parol evidence
is excluded.

In this contract the language, as applied to
discloses no ambiguity. There is nothing in i
rise to the inference that it is intended to appl
purchase. The liability assumed cannot be
ished by evidence of the previous dealings, or o
templated, between the creditor and the princip
the defendant had previously agreed to give th
anty for future advances, and the goods were so
a guaranty; or that the relations of the prin
well known to the surety. The question is not
been a fit and proper contract for the defenda
under all the circumstances, but what contra
This contract is confined to the purchase of a s
goods of a specified value, for which, if not paid
days from the date of invoice, the plaintiff is
defendant for the amount.

In *Hatch* v. *Hobbs*, 12 Gray, 447, cited by t
agreement was to pay for goods drawn out fro
"this guaranty to remain good until further
April 1." In *Bent* v. *Hartshorn*, 1 Met. 24, to
purchased "at any time hereafter." And in *N*
Co. v. *Bottrill*, L. R. 8 C. P. 694, to pay "any a
principal] may have with you; and when to th
will write you." *Judgment for th*

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CHESTER D. PRATT *vs.* HENRY W. PAINE & another, trustees.

Suffolk. Nov. 11, 12, 1875. — Jan. 10, 1876. ENDICOTT & LORD, JJ., absent.

A lease of a dwelling house for five years provided that the lessor might terminate the lease by notice, and that, if this was done during the first three years of the term, the lessee should be paid such sum as a compensation for the loss he may "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing." In an action by the lessee to recover for expenses incurred by him in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that, at the time the lease was made, the building was in thorough repair; but the lessee made some changes in it, and furnished it. *Held*, that the term "fitting up the premises" included not only the fitting up of the building and premises to the uses of the lessee, but the fitting of his furniture to the building, such as carpets, window curtains and the like. *Held, also*, that the measure of the lessee's damages was the loss sustained by reason of his having incurred such expenditures the full benefit of which he had lost by the abridgment of his lease, and not the entire cost of fitting up.

In an action to recover compensation for services in effecting a lease, the plaintiff contended that the defendant agreed to pay him regular brokers' commissions, and put in evidence of what a broker would be entitled to by the custom. The judge ruled, against the defendant's objection, that the custom was a reasonable one, and instructed the jury that they should find according to the custom, if they found that the defendant agreed as alleged; but that, if they found that the services were rendered without an agreement as to compensation, they should find the value of the services. The jury returned a verdict for a less sum than that testified to as allowed by the custom. *Held*, on the defendant's bill of exceptions, that the question of the reasonableness of the custom need not be considered

CONTRACT against the trustees under the will of Isaiah Atkins. The first and third counts were upon a lease whereby the defendants leased to the plaintiff certain premises on Kingston Street, in Boston, for a term of five years from October 1, 1871, "to use and occupy the premises only as a dwelling house," and containing the following clause:

"Provided, however, that the said lessors, or those having their estate in the premises, may, at any time during the term, terminate this lease by giving to the lessee, or those holding under him, three months' notice in writing of their intention so to do; and, if such notice shall be given any time during the term, the lessee, or those having his estate in the premises, shall have the right to continue in occupation of the premises during the three months next ensuing the day on which such notice shall be given, free of all obligation to pay rent; and, if such notice shall be

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given during the first three years of the
having his estate in the premises, besi
aforesaid shall be paid such sum as a con
or they may by such abridgment of the
quence of expenditures incurred by the
premises, and expenses incurred in rem
mined by two appraisers to be appointe
one by the lessee, upon the premises beir
with the notice."

The second count was as follows: "A
defendants owe the plaintiff the sum of ei
cording to the account hereto annexed:
F. Dobson, trustees, to Charles D. Pratt Dr
services in negotiating lease of 17 Kingston
K. Snow and George W. March, 20 years'
num, total rent $80,000, at 1 per cent. $80

Trial in the Superior Court, before *Putn*
bill of exceptions in substance as follows:

The plaintiff hired the premises for the
house, and the premises had been put in t
defendants at the time the lease was given.
upon the premises on the first day of the
to pay them rent, and proceeded at once
throughout with carpets and furniture of v
which was new. The time required to furn
for the reception of the boarders was abou
plaintiff also made some changes in the room
and cut a door through, put in new furnace fl
painted the roof.

On November 18, 1872, the lessors gave
ten notice to vacate the premises in accorda
provision in the lease, and the plaintiff vacat
accordance with said notice. Two persons we
praisers, who were unable to agree upon the
plaintiff, and the plaintiff and defendants wer
upon any other appraisers.

The plaintiff claimed as part of the expen
the phrase "fitting up the premises" the expe
the house as well as the alterations made by h

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the judge to rule that the construction of the phrase "fitting up the premises" depends upon the circumstances of the case and the purpose for which they were to be used, and, the purpose being that of a boarding house, the plaintiff is entitled to recover for loss caused by his expenditures in furnishing the house with such furniture, including carpets, rugs, curtains, as well as alterations to the rooms, so as to render the house suitable for the reception of boarders; that the phrase "fitting up the premises," under all the circumstances of the case, means furnishing all kinds of furniture as well as alterations to the building.

The judge refused so to rule, but instructed the jury that the term "fitting up the premises" meant, all the expenses the lessee was at, during the term, in doing anything to the premises to adapt them to his use, and also the expenses of specially fitting any furniture to the premises, such as carpets, window curtains and the like; that is, the labor and expense of fitting it, and the depreciation in value upon it. The plaintiff excepted to this ruling, and to the refusal to rule as requested.

The defendants requested the judge to rule that the words "fitting up the premises" included only the actual alterations and additions made to the house by the lessee as hereinbefore recited, and did not include carpets or curtains, or any other furniture whatever; but the judge ruled as before stated; to which ruling and refusal to rule as requested the defendants excepted.

In support of the second count, the plaintiff's evidence tended to show that the defendants employed him to procure for them a tenant, and agreed to pay him therefor the regular commission; this was controverted. The only evidence of value of services was that of certain real estate brokers, who testified that by the custom in Boston, the broker who negotiated a lease of twenty years, or of over three years, was entitled to receive from the lessor one per centum on the whole rent, stipulated to be paid by the lessee; that the commission on sale of real estate was one per cent. on price, and that the commission on lease of less than three years was five per cent. on one year's rental. The defendants asked the judge to rule that this custom was unreasonable.

But the judge instructed the jury that the custom was reasonable, and, if they found that the defendants agreed as alleged, they should find according to the custom; but if they found the

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services rendered without an agreemen
they should find the value of the serv
this count $500; the plaintiff claiming
To this ruling and refusal the defendant

The report of an auditor, which was
exceptions, in respect to the second cou
the whole evidence I do not find that t
special contract for regular brokers' co
the lessees upon a new lease. I do fin
engaged by the defendants to procure s
pursuance of the contract he brought the
result was a lease for twenty years, at $4
first ten years, and $5000 per annum fo
find that for this service the plaintiff is
compensation, which reasonable compensa

E. Avery & C. S. Lincoln, for the plain

R. D. Smith, for the defendants. 1. "
ises" as used in this lease includes only t
the realty in the nature of permanent fix
"fitting up" in common use when speakin
office, conveys an idea quite different from
so used by the plaintiff's counsel in the bill
his prayer for instructions. If the plaintiff
to rule that "fitting up" meant putting in "
mind would suppose that furniture was inc
says that fittings means "furniture," the que
why, if that was the meaning to be conveye
use the more common word? The idea con
sion "fitting up a house" is the doing of s
cedes the "furnishing" thereof. It implies
thing which would pass to a subsequent pu
"fittings" implies a fitness, an adaptation of
particular place or thing to which it is fitted,
a thing made for a place, (*fait, facere, fact*, 2
ley 27.) The word "fitter" also occurs in
A gas-fitter is one who puts in gas pipes, an
and fixtures, so called, to a building; he is not
To fit a coat has quite a different meaning from
"Furnish" has come to be a synonym of "s

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meaning of *fingo* is to mould. In all the derivatives of fit the idea of moulding, adaptation by cutting or placing or trying on s present. We submit, then, that fittings means true fixtures ut into a place, adapted to them or to which they are adapted. "The carpenter stretcheth out his rule, he marketh it out with a ine; he fitteth it with planes." Isaiah xliv. 13.

It will doubtless be asked why the parties did not use the word "fixtures," if that would express the idea. The cause is obvious, ixtures has ceased to denote that positive fixation or annexation which its root (*figo*) denotes, and means now quite as often some- hing which can be taken out without disturbing that to which it s annexed, as something which being affixed remains a part of he realty. *Hallen* v. *Runder*, 1 Cr., M. & R. 266. *Gibson* v. *Hammersmith Railway*, 11 W. R. 299. *Sheen* v. *Rickie*, 5 M. & W. 175. It is used in both senses in the two opinions in *Guthrie* v. *Jones*, 108 Mass. 191, 193, 195. In *D'Eyncourt* v. *Gregory*, L. R. 3 Eq. 382, Lord Romilly, to convey his meaning, nas to speak of "fixtures inseparably attached to the freehold," and "not removable by the tenant." Whereas, in the same case, Sir Roundell Palmer and Mr. Jessel in argument use "fittings" and "fitting up" as conveying the idea of permanent fixtures, such as panels, wainscots, &c. The parties to this lease wanted a narrower word than fixture. It is doubtless true that fittings are always fixtures attached to the freehold, but it does not follow that fixtures are fittings. Fitting (*Vitten*) has that more persistent and inherent significance which clings to a Saxon root. It is more precise than fixture or fixure derived from French *fixer*. It is much more definite than the other French word furniture, which it is attempted here to include within it. Therefore as furniture, though fastened to the walls, is distinguished from fix- tures; *Guthrie* v. *Jones*, 108 Mass. 191; so fittings, being one class of fixtures or things fastened, and being of a narrower sig- nificance than fixtures, cannot properly include what is generally termed furniture. The furniture of a house includes curtains, (tapestry and arras,) window shades and carpets, though nailed upon walls or floors. It can scarcely be contended that "fitting up" the premises has a meaning more favorable to the plaintiff than "fitting" the premises, "up" certainly cannot signify tables and chairs. It seems rather to imply putting up partitions, doors

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and floors than nailing down carpets anc
stands. Besides this, the plaintiff con
makes fitting up include alterations, (b
and also all kinds of furniture. The wo
is overworked. He admits that it cover
He attempts to stretch it. *Expressio un*
If this word in this lease was not intend
but was intended to include only that wl
tends, it follows that it was not intended
its ordinary sense. And in this descripti
we submit, be included carpets, mirrors, w
like, fastened with nails to walls or floor
venience; chattels, in the case of boarding
acter most migratory, "usually disappea
quarter day and generally by night."

The language of the lease is inartificial.
to have? It was compensation for loss, occa
of the lease, in consequence of the expendit
lessee. The loss, of course, was not a conse
diture. The meaning is loss by reason of ha
which the abridgment of the lease compels hi
than he would do if the lease expired by l
course, is not, as ruled, the expense of "doi
premises to adapt them to his use," or "the e
fitting any furniture to the premises, such as c
tains and the like; that is, the labor and ex
and the depreciation in value upon it." All tl
premises and fitting of carpets the plaintiff w
anyway. They were expenditures incurred, bu
tained" in "consequence of these expenditures
nation of the lease the lessee did not enjoy the
It seems, then, that the measure of damage m
the cost of the "fittings up," whatever that m
remainder of the term. An examination of th
throw some light upon the meaning of the parti
was to use and occupy only as a dwelling hous
the premises were hired for a boarding house, as
of exceptions, this was not with the consent of
and they cannot be prejudiced thereby. We thi

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ing house" will not be found to mean "boarding house" any more than "fitting up" means "furnishing." See *Gannett* v. *Albree*, 103 Mass. 372.

Again it will be said that, the house being in perfect repair at the time of the demise, excludes the theory that "fitting up" can mean repairs. Nevertheless the lessee at once did some "repairs" which the plaintiff claims are "fitting up." The "fitting up" which is referred to in the lease, is that "which may be done during the term." If the house was in repair, "fitted up," at the beginning, it does not follow it would remain so during the whole term. Upon examination of the language of the lease, it is inconceivable when the parties stipulate concerning expenses of fitting up and expenses incurred in removing, that, in carrying their minds over the entry upon possession to what was to be done at the end of the term, they should have omitted so important a matter as the expenses incurred in furnishing, had it been their intent to include it. The "*In medio tutissimus ibis*" theory has tempted the presiding judge to walk upon a narrow isthmus; and, in balancing between the claims of the parties upon the meaning of "fitting up," he has entirely lost sight of the rule laid down by the lease for estimating damages, and allowed the jury to understand that the entire cost of additions or alterations, of fitting carpets and curtains, and the depreciation in the value thereof, was to be allowed. This is not the rule. The lessee is not to receive as damages the entire cost of "fitting up" which he has enjoyed a year or more, and of which the enjoyment is only abridged by the termination of the lease. We have nothing to do with depreciation. It is compensation for the loss sustained by abridgment of the lease that the case provides for. If depreciation of carpets and furniture were included at all, the damages are only the difference in depreciation between them at the time they are given up and one and one half years later, in proportion to the time they have been in use. It is the shortening of the period of enjoyment. Depreciation would be greater the longer they are used. The jury must have been misled by the use of this language.

The argument on the second count is omitted.

COLT, J. The clause in the lease, the interpretation of which is in dispute, was plainly intended to provide indemnity to the

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lessee for loss sustained by him in case th
a reserved right to abridge the term by
is not to be lost sight of. The words of
the lessee shall be paid such sum as a co
he may, by such abridgment of the term, su
of expenditures incurred by the lessee in f
and expenses incurred in removing," as sh
in the mode provided. These words as use
to the subject matter and the condition of
fairly be interpreted as including only the a
real estate in the nature of permanent fixt
they have a broader signification, and includ
of the building and premises to the uses o
fitting of his furniture to the building. T
adopted by the judge at the trial, and is not
by either party.

But it was urged at the argument by the
jury were nevertheless misled by the languag
in his ruling upon this point. The judge rul
'fitting up the premises' meant all the exper
at, during the term, in doing anything to the
them to his use," and in fitting furniture to t
the labor and expense of fitting it, and the dep
upon it."

Without doubt the true measure of the pl
the loss he has sustained by reason of having
tures, the full benefit of which he has lost by t
his lease. The lessee is not to receive as damag
of a fitting up, the benefit of which he has enjo
the term. It is the shortening of the period of enj
he complains. But we are not satisfied, upon t
tions, that the jury could have been misled by th
as to the true rule of compensation. The ruling v
to at the trial as inaccurate in this respect; it doe
be all the instruction given on this part of the case
open to criticism, it could not have conveyed the i
tion with the clause in the lease, that the jury we
the rule now stated as the true rule. The judge
pointing out the elements which must enter into

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tion in arriving at the loss sustained by the plaintiff, rather than stating the principle upon which compensation should be made, and he must have been so understood.

The second count is upon an account annexed to recover for commissions and services in negotiating a lease of the premises to another party. There was conflicting evidence on the question whether the defendants agreed to pay regular brokers' commissions. The plaintiff relied on the existence of a custom which entitled a broker to charge the lessor on a lease of twenty or over three years, one per cent. on the whole rent stipulated to be paid, while the commissions on sales of real estate were only one per cent. on the price paid.

The court ruled, against the defendants' objection, that this was a reasonable custom. But it is not necessary now to pass upon the question, because the amount of the verdict shows that the jury must have negatived the existence of an agreement to pay commissions, and founded their verdict on the value of the plaintiff's services. This they were warranted in doing under the pleadings, under the instructions given and not excepted to, and upon the report of the auditor, which was before them as evidence.

Exceptions overruled.

IN THE MATTER OF THE FRANKLIN TELEGRAPH COMPANY.

Suffolk. Nov. 16, 1875. — Jan. 10, 1876. COLT & LORD, JJ., absent.

Under the Gen. Sts. c. 68, § 35, authorizing this court "for reasonable cause" to "decree a dissolution of" a corporation, upon a petition by a "majority in number or interest of the members," it is no ground for the dissolution of a telegraph company that it leased its line to another company at a less rent than it might have obtained, fraudulently intending to give the benefit of the lease to the second company, in which the majority in interest of the stockholders of the first company were also interested, if, after the filing of the petition for dissolution, the lease is cancelled by vote of the directors of both companies.

PETITION under the Gen. Sts. c. 68, § 35, filed December 9, 1874, by a majority in number of the stockholders of the Franklin Telegraph Company, a corporation established by the St. of 1865, c. 119. An answer containing a demurrer was filed in be-

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half of the company, and, when the ca
an additional answer was filed by consen
were not disputed. The case was reserv
consideration of the full court upon the
by the demurrer and the additional an
of the court the petition could be mair
stand for trial; otherwise, the petition
substance of the pleadings appears in the

J. R. Bullard, for the petitioners.

S. Bartlett & D. Thaxter, for the Fra
pany.

DEVENS, J. Assuming, without decidi
thority given to this court by the Gen. S
intended to provide not only an easy and c
solving a corporation, when the purposes of
not be successfully prosecuted, but also to in
forfeiture of its charter, when there were fr
be apprehended from its officers, in the int
its affairs, so that the stockholders had rece
after receive less profit, and also that the
properly maintain such a petition, still no rea
order to that effect has been presented here,
requires. Such a power is one of great del
exercised with extreme caution, as the disso
tion must affect seriously not only the propert
and of those by whom such frauds may have
from whom they are to be apprehended, but
holders who are no parties to the controversy as
resented in it only through the corporation it
ing so radical as the destruction of the organ
taken, unless, after careful examination, the co
isfied, whatever the disadvantages and losses
step might be, that in no other way could the r
cent stockholders be so well protected.

Upon the facts as admitted by the demurrer, t
egraph Company leased its line to the Atla
Company at a less rent than it might have ol
lently intending to give the benefit of this lease t
in which the majority in interest of the stock

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Franklin Telegraph Company were also interested; and while the petition alleges certain other acts done, some in fraud and others to the inconvenience of the petitioners, this is the ground upon which it seeks the dissolution of the corporation and the appointment of a receiver. By the additional answer, which is also before us, it appears that, since the petition was filed, the lease in question has been cancelled by vote of the directors of each of the two companies.

The only injury alleged as a sufficient reason for the dissolution has therefore ceased to exist by the abrogation of the lease. But it is now argued that, as the majority in interest has exhibited a disposition to deal unfairly with the rights of the minority of the stockholders, they can no further be trusted, and that, as the court would discharge trustees who had wilfully violated the duties of their trust, so here it should dissolve the corporation. Because the majority had once violated its duties, to destroy, by a dissolution of the corporation, the valuable rights which all the stockholders have by virtue of its charter, would be to apply a remedy which would be much more formidable than any danger to be feared. The mere vague apprehension of some future mischief is not the reasonable cause which by the statute is made the foundation of the action of this court. *Petition dismissed.*

CONNECTICUT TRUST AND SAFE DEPOSIT COMPANY *vs.* HENRY J. MELENDY & another.

Suffolk. Nov. 10, 1875.—Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. One of the indorsers was an attorney at law, and was called as a witness by the plaintiff. Upon cross-examination it appeared that he had aided the plaintiff in the proceeding taken to enforce the note in suit against the defendant. *Held*, that the significance of the witness's acts, as evidence of payment, was for the jury; and that the judge rightly refused to rule, as requested by the plaintiff, that

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the fact that the witness aided in collecting the no
ment.

In an action upon a promissory note against the mal
note matured, an arrangement was made by which a
was given, signed by the indorsers of the note in su
the new note was given in payment of the note in suit
The new note was given in another state, by the law c
issory note was not presumed to be in payment of a
it was a question of fact for the jury, upon the circur
the fact that the new note was credited upon the book
of payment. *Held, also*, the plaintiff having requeste
sumption of law is that the holder did not intend to
and to discharge the maker of the note in suit, and, ur
tinct agreement was made to accept the note in paym
was accepted in payment, and, the instruction being gi
in the words requested, that the plaintiff had no groun

In an action upon a promissory note against the maker,
note matured, an arrangement was made by the agent
new note for the same amount was given, signed by th
suit, and the issue was whether the new note was given
suit or as collateral security for it. The new note was
the law of which the giving of a promissory note w
payment of a preëxisting debt. The plaintiff requested
jury that, unless the indorsers intended to give their note
suit, it would not be a payment. The judge declined to
instructed the jury that the transaction at the time the
only to be considered with regard to what the indorsers
about it; if the plaintiff, who was the real creditor, ch
receive it as payment and surrendered the note in suit, ga
in payment, then it was a payment. *Held*, the judge ha
the jury that the defendant must prove an agreement bet
new note was to be taken as payment of the old one,
ground of exception.

CONTRACT upon a promissory note dated Ju
by Melendy, Dexter & Co., payable three m
the order of the Odorless Rubber Co., and ind
the payee, "by Robert Snyder, Treas.," and b
ner, Samuel Hubbard and C. C. Post. At the
sior Court, before *Aldrich*, J., the jury found f
and the plaintiff alleged exceptions, the substa
pears in the opinion.

G. O. Shattuck & O. W. Holmes, Jr., for the

G. W. Park, for the defendants.

MORTON, J. The defence in this case was
suit was signed by the defendants at the reques

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commodation of the Odorless Rubber Company, the payee, and of Warner, Hubbard and Post, the indorsers, who were officers or stockholders of said company, and that the note had been paid by the indorsers. The evidence tended to show that, after the note matured, Graham, acting for the indorsers, made an arrangement with the plaintiff corporation by which he was to give it their note for the same amount; that he gave it such note, signed by Warner, Hubbard and Post, and the note in suit was delivered to him. The principal question at the trial was, whether the new note was given in payment of the note in suit, or merely as collateral security for it. Upon this issue the court instructed the jury, that, as the transaction took place in Connecticut, it was to be governed by the law of that state; that by that law the giving of a promissory note was not presumed to be in payment of a preëxisting debt, and therefore, before they could find for the defendant, they must be satisfied that, by the agreement of the parties, the plaintiff received the new note in payment of the note in suit. No exception was taken to this instruction by either party, but the only exceptions taken were to the refusal of the court to give certain additional instructions requested by the plaintiff.

1. Warner, one of the indorsers, was an attorney at law, and was called as a witness by the plaintiff. Upon cross-examination, it appeared that he had aided the plaintiff in the proceedings taken to enforce the note in suit against the defendants.

The plaintiff requested the court to instruct the jury "that the fact that Warner aided in collecting the note is no evidence of its payment." The court properly refused this request. It was for the jury to determine what was the significance of the acts of the witness, and how far they tended to contradict his testimony, and thus indirectly bore upon the question of payment. There is nothing in the bill of exceptions to show that the evidence was admitted or applied for any other purpose.

2. The court properly refused to rule that "if it were shown that the new note was credited upon the books of the Trust Company, it would be no evidence of payment." The entries upon the books of the plaintiff, and such explanations as it chose to give, were properly before the jury, and they alone had the right to judge of their weight as evidence upon the issue before them

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3. The third requested instruction was t
of law is, that the company did not intenc
payment, and to discharge Melendy and I
jury find that a distinct agreement was ma
in payment, they cannot find that it was ac

This instruction was given in substance
plaintiff has no ground of complaint, becau
request was fully covered by the instruction

4. At the close of the charge to the ju
about to retire, the plaintiff asked the court
instruction "that, unless Hubbard, Warner
sers, intended to give their note in payment
it would not be a payment."

The court refused this instruction, but
structed the jury that "the transaction at th
was given is not only to be considered with r
ner, Hubbard and Post did and intended to
bank received the new note; if the bank,
creditor, chose to receive it and did receive
surrendered this note in suit, gave it up and r
ment, then it was a payment."

The instruction asked makes the question,
an agreement between the plaintiff and the age
that the new note should be in payment of th
upon the intentions of the indorsers, without
and agreements of the agent. It would tend t
lead the jury, and was properly refused.

The additional instruction given in answer
be considered by itself, as intended to state the
cable to the subject, would be imperfect. But i
so considered. The court had distinctly and rep
the jury that the defendant must prove an ag
the parties that the new note was to be taken a
old one. The additional instruction was given,
strued with reference to these previous instruct
strued, we think it was intended substantially to
instructions, and to instruct the jury that, if th
the new note, under such an agreement, as paym
dered the old note, it was a payment, although th

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have had an undisclosed intention that it should not be payment. In this sense, and we can have no doubt that the jury so understood it, it is not open to just exception.

Exceptions overruled.

ISAAC FARRINGTON & another *vs.* DAVID M. HODGDON & others.

Suffolk. Nov. 10, 1875.—Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

An agreement of creditors "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15," the contract to take effect "provided all merchandise indebtedness accept the same settlement," is an agreement on the part of a creditor, who has sold the debtor merchandise, to compromise the whole claim set against his name, and rests upon sufficient consideration.

Creditors signed an agreement "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15," the contract to take effect "provided all merchandise indebtedness accept the same settlement." A., one of the creditors, held three notes of the debtor, two of which he had previously sold, taken back under false representations by the purchaser, and at the time he signed the above agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take the notes back, which was done before December 15. *Held*, in an action by A. upon the note not sold, that A. not being in possession or having control of the two notes sold, the debtor was not obliged as to them to tender the settlement notes. *Held*, also, as to the note in suit, that the debtor was not obliged to tender a settlement note of seventy-five per cent. on that note after the transfer of the other two notes, which the debtor had paid to the purchaser. *Held*, also, that evidence of conversations, tending to show the understanding of parties as to the notes sold, prior to the execution of the agreement, was not admissible to vary the written contract.

CONTRACT by Isaac Farrington and John G. White, doing business under the firm name of the Eagle Woollen Mills, upon a promissory note for $2236.82 dated November 7, 1872, and made by the defendants payable to their own order and indorsed by them. At the trial in the Superior Court, before *Pitman*, J., without a jury, the following facts appeared:

The plaintiffs sold the defendants merchandise, for which, on November 7, 1872, they received three notes, signed and indorsed by the defendants, each payable in six months from its date: one

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dated October 25, for $2236.82; one da
$2236.84; and the third the note in suit.
ber 9, the plaintiff sold the first two of the
a note broker, and received his check for th
the great fire in Boston occurred. On M
check was presented but was not paid; and
accordingly visited Smith, who informed hi
to pay his check, but that he had heard Hod
ing that he should pay all his debts in full
favors. The plaintiffs, believing this statem
duced to take the notes back and return S
next day they learned from Hodgdon that th
true; that the conversation never occurred;
have to compromise with his creditors. T
manded of Smith that he should take the not
several interviews, succeeded in forcing him
ber 6.

On November 18, the following agreement
signature by the creditors of the defendants,
thereafter was signed for the plaintiffs by Whi

"Boston, November 18, 1872. We, the und
of Messrs. D. M. Hodgdon & Co., agree to accep
five per cent. of the amount of indebtedness a
respective names, said 75% to be paid in two,
from December 15th, with interest at 7% per a
said D. M. Hodgdon & Co. The amount due in
to thirteen thousand dollars to be also extend
chandise indebtedness, and provided all merchan
accept the same settlement. Eagle Woollen M
White, Tr., $6710.48." The defendants learn
notes had been sold to Smith before the fire, an
tiffs had been induced on Monday, by false re
take them back, within a day or two after the fir
compromise paper was drawn up, and knew tha
were making efforts to get Smith to take back the
they knew that the plaintiffs expected to succeed

At the trial the plaintiffs offered the note in
ture and indorsement were admitted; they prov
fendants were partners, and rested. The defenda

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the agreement. The plaintiffs objected to the competency of the paper, but the judge overruled the objection and admitted it, to which the plaintiffs excepted. It was admitted that the notes, which, by the terms of the agreement the defendants were to give in settlement of their debts, were never given or tendered to the plaintiffs.

The judge found as facts that the figures set against the business name of the plaintiffs on the agreement were so placed by them to represent the aggregate indebtedness of the defendants on the three notes; that sometime before December 15, 1872, and after signing the agreement, the plaintiffs had parted with the ownership and possession of two of the notes, and so notified the defendants; that the holder of the notes insisted on payment in full, and that the defendants were compelled to pay the same at maturity to save suit, and their property from attachment; that they had notified the plaintiffs beforehand that they should be compelled so to do unless the plaintiffs protected them; that the defendants had always been ready to give the settlement notes provided for in the agreement, if the three notes were surrendered by the plaintiffs, but that they had always refused to give a settlement note for the one now in suit unless they were protected against the other two; that when the note in suit matured, one of the defendants called on the plaintiffs and offered to pay "the difference between the amount that had been paid by the defendants on the first two notes, and seventy-five per cent. of the whole indebtedness on the three notes," which was refused; and that, two days after, a formal legal tender was made of $559.20, as and for the balance due upon such an adjustment, which was also refused.

The judge found that this was not a correct legal computation upon the defendants' theory. But no question appeared to have arisen between the parties, except the principal one in the case. The judge also found that the agreement had been signed by most of the creditors before the plaintiffs signed; that it was executed by all the other creditors, and that, except as to the plaintiffs, all of its terms and provisions had been fully complied with by the parties thereto.

The plaintiffs offered evidence of conversations between them and their agent on the one part, and the defendants on the other,

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tending to show the understanding of th
notes aforesaid, and their oral agreemen
cluded all such evidence of conversation
of the agreement as inadmissible to vary a
defendants made an offer of judgment for

The plaintiffs asked the judge to rule: "
on which the defendants relied was not a
contract to extend the time for the paym
debts, and therefore was no defence to thi
at all, was only valid as supporting an actio
contract.

"2. That if it was an agreement to recei
for the whole, it was without consideration

"3. That at most it was a contract to re
from their original debts upon their giving
notes specified in the agreement, and that, it
these notes were never given or tendered, th
defence.

"4. That there was no evidence of a waive
tender by the plaintiffs.

"5. That the three notes were three sepa
that the defendants were bound to give or tend
for by the agreement for seventy-five per cent
that as this had not been done there was no
in suit."

The judge refused so to rule, and did rule
tract was supported by a sufficient considerati
agreement to release the defendants by the sub
contract which the agreement specified; that
give the notes therein specified was not sever
fendants were not bound to give any new notes
render of all the old ones; and that, upon th
acts of the plaintiffs had rendered it unnecessa
ants to do anything further to entitle them to t
composition agreement."

The defendants made no question as to the r
tiffs to recover in this form of action the balanc
whether on notes or otherwise; and the judge
for the plaintiffs in the sum of $717.63 only, a
ment accordingly

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To all these rulings and refusals to rule, the plaintiffs alleged exceptions.

M. Storey, for the plaintiffs.

E. Avery & G. M. Hobbs, for the defendants, were not called upon.

DEVENS, J. The plaintiffs contend that the agreement signed by them is to be construed as one to receive payment of a certain portion of their debts in a particular manner, while it did not affect the remaining portion thereof, and therefore that such portion was to be paid in the ordinary manner, and upon the terms on which the debts were originally contracted. It does not admit of this construction. The party signing agreed to "accept" seventy-five per cent. of the indebtedness to him which was to be paid in a manner specified, and this implied that the sum provided for was to be received instead of the full debt. The contract was also to take effect "provided all merchandise indebtedness accept the same settlement," and thus distinctly recognizes that the proposed transaction is a "settlement" of the plaintiffs' claims.

This agreement rested also upon sufficient consideration, if it was completed and became binding, by the fact that other creditors became parties thereto, because it became part of a composition by which the creditors stipulated mutually to release a part of their claims to their common debtor, and the rights and interests of all had become involved in the arrangement. *Perkins* v. *Lockwood*, 100 Mass. 249, and cases cited. If the defendants have since done all which by this agreement to release them from their original indebtedness, by the substitution of a new contract therein specified, they were bound to do, they are now entitled to avail themselves of it in defence to a suit brought upon one of the original notes.

It is argued that there was no tender of the notes proposed to be given in settlement, without which the transaction would be a mere executory agreement, and further, that there was no evidence upon which the court could properly find such a waiver of tender as would excuse this failure. It appears, however, that before December 15, at which date the interest upon the proposed new notes was to commence, the ownership and the possession of two of the three notes, which the plaintiff had assumed to settle,

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had been transferred to Smith, and that position to enforce payment of them in f did so; and further, that the defendants ha to give the settlement notes, if the three n the claim of the plaintiffs were surrendere could be protected against the effect of th The law does not require idle and useless ce v. *Brackett*, 16 Mass. 161. *Webster* v. *Coffin*, v. *Moody*, 17 Mass. 145. *Buttrick* v. *Holden*, therefore, the plaintiffs had rendered it imp part to surrender the notes included in the cl to release, it must be deemed that by so do tender to them of the settlement notes. If do acts which he afterwards renders himself un thereby dispenses with the performance of c to such acts. *Mayne's case*, 5 Rep. 20 *b*.

Nor were the defendants under any obligat tlement note of seventy-five per cent. on the after this transfer. To have compelled them have compelled them to pay much more than they were bound to do. They were willing a difference between the amount that had been p ants on the first two notes, and seventy-five per indebtedness, which was refused. The contract was an entire one; they had treated their who single debt, although in fact it was made up of the court correctly ruled that the obligation to settlement was not severable.

The evidence of conversations, tending to show ing of parties as to the Smith notes prior to the agreement, was rightly excluded as inadmissil written contract. Even if it was known to the the plaintiffs were endeavoring to induce Smith notes under their alleged sale, it was competent written agreement to contract that the defendan leased from them, on compliance with the term scribed.

As the defendants make no question as to th plaintiffs to recover in this action the balance of the

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after deducting from the seventy-five per cent. on the whole claim the balance due after payment of the Smith notes, no question as to the form of the action need be considered.

Exceptions overruled.

HENRY E. TURNER & others *vs.* WILLIAM T. WENTWORTH & others.

Suffolk. Nov. 10, 1875. — Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

Upon the trial of a petition to enforce a mechanic's lien, the question whether the certificate required by the Gen. Sts. *c.* 150, was filed within thirty days after the work was completed or materials furnished under the contract, or whether work was done within the thirty days colorably, for the purpose of reviving the lien, is a question of fact, upon which the finding of the judge, who tries the case without a jury, is final.

On the trial of a petition to enforce a mechanic's lien, the question whether labor was performed and materials furnished by the petitioner upon each of three houses in a block under an entire contract, or under separate contracts, is a question of fact, upon which the finding of the judge, who tries the case without a jury, is final.

On the trial of a petition to enforce a mechanic's lien, the petitioner claimed a lien for furnaces and ranges furnished by him. The judge who tried the case without a jury found that the petitioner was entitled to the lien. *Held*, that the question was one of mixed fact and law: that if the transaction between the petitioner and the owner of the buildings was merely a sale of the furnaces and ranges as personal property, there would be no lien; but if by the contract the furnaces and ranges were to be furnished as parts of the houses, and they were in fact so applied, there would be a lien; and that, it not appearing that the judge erred in applying these principles of law, exceptions alleged to his finding could not be sustained.

PETITION to enforce a lien under the Gen. Sts. *c.* 150, for labor performed and materials furnished, in the construction of a block of three houses in Boston. Trial in the Superior Court, before *Putnam*, J., without a jury, who allowed a bill of exceptions in substance as follows:

The petitioners were dealers in furnaces and ranges. The respondent Wentworth was the owner of the land, and the builder of the three houses in a block in Clarendon Street, in Boston. In February, 1870, the petitioners contracted orally with Wentworth to furnish three portable furnaces, pipes and registers, com-

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plete, and three ranges, with utensils compl
for the price of $285 for each house. Wen
brick, and do the carpenter and mason work
in materials furnished by the petitioners.
those usually known as portable furnaces, a
the houses by the petitioners, the builder co
work or base on which each was set. Th
each furnace was set in mortar upon the bric
chamber between the furnace and the found
that it could not be removed without disturb
connection. With the exception of what th
March 15, following, hereinafter referred to
ranges had been put into the houses; and son
sioned by changes ordered by the builder wa
June 8, 1870; and the charges were made
by the petitioners.

On March 15, 1871, one of the houses
a tenant, and the other respondents having t
set forth in the petition, which were all rec
1870, the petitioners were requested by Went
the jobs, and accordingly sent two or three me
the furnace in each of said houses, and the pots
utensils for each of said ranges, together with
also four or five short pieces of tin hot-air pip
with the furnaces. As originally contemplated,
isters were to rest horizontally in stones set in t
the changes made on or before June 8, at Wen
one of these stones in each house was transferre
and set in an upright position. No charge wa
change, the petitioners testifying that Wentwort
have such changes made. When the registers w
on March 15, it became necessary to drill holes i
in the partition, and to insert some screws to ret
in their places. This work was done on that day
occupied by the tenant, two registers only were
the work of setting a register in an upright ston
scribed, by drilling holes and inserting screws, wa
done in that house on that day, except that of le
nils for the range

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The certificate of a lien was filed on April 14, 1871. At the hearing, the original petition appeared to have been lost, and could not be found, and the hearing proceeded against the respondents' exceptions, upon a certified copy, the judge reserving the rights of the respondents.

The respondents contended: "1. That the materials furnished and work performed by the petitioners were completed on June 8, 1870, as represented in their several bills of particulars, and that the petitioners were bound by their representations in said bills of particulars, and estopped thereby to claim for what was done in March following.

"2. That the materials furnished, and labor performed in connection therewith, did not come within the provisions of the Gen Sts. *c.* 150.

"3. That what was done on March 15, 1871, the thirtieth day preceding the filing of the certificate of lien, could not be regarded as ceasing to labor on or furnish materials for a building or structure within the provisions of § 5 of said statute.

"4. That as the contract was to furnish certain articles at a specified price for each of the several houses, as set forth in each of three bills of particulars, the prayer of the petition 'that all the land and buildings may be sold,' could not be granted."

"5. That no decree or order could be made in the absence of the original petition."

Upon the issues of fact and of law, the findings of the judge were as follows:

"1. That the petitioners furnished both labor and materials upon all of the houses in question, as late as the 15th of March, 1871, and so that the certificate was seasonably filed, and the action seasonably brought.

"2. That the contract was entire and indivisible to do work and furnish materials upon an entire estate, that is, upon the block of three houses, at $285 per house, and that the lien attaches to the whole estate.

"3. That the mortgagees take their title subject to the lien.

"4. That the furnaces and ranges were fixtures, and so that the petitioners are entitled to their lien.

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"5. That the petitioners are entitled to e
said lien is established for the sum of $80
the date of filing of the petition."

To the foregoing rulings, opinions and
law, the respondents alleged exceptions.

C. R. Train & A. Russ, for the responde
on the land. 1. The fundamental idea rur
statutes for the enforcement of this class of
the mechanic to be paid for his labor and ma
to a lien the identical structure, with the la
nexed, which structure he has contributed to
so it has been held that the lien applies only
ing v. *Cushing*, 1 Gray, 576.

2. The statute should be construed accord
to be remedied, which was that by the commo
who erected, constructed or repaired fixed or st
structures or buildings, was without that safe a
sation which a specific lien on the machiner
building would afford. But with reference to
implements or chattels, the common law affor
plete security to the mechanic by leaving ir
property if he chooses to make his sale upon th
ulations or conditions, or he may retain the
Phillips on Mechanics' Liens, § 178. *New En
Co.* v. *Baltimore & Ohio Railroad*, 11 Md. 81,

3. The case finds that the petitioners were
and furnaces; that the materials they furnishe
were portable furnaces. These are personal
nearest they get to the realty is when they ar
the character of removable fixtures, not necessa
tance, but convenient and useful to the tenant
Court of Maine, in construing the language of a
with ours, say, that to come within this provis
must be so applied as to constitute a part of th
not be merely a fixture for its more convenient
v. *Pike*, 33 Maine, 141. *Truesdell* v. *Gay*, 13
Phillips on Mechanics' Liens, § 175.

In February, 1870, the petitioners contracted t
articles; they were put into the houses, and so

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occasioned thereby was performed on or before June 8, 1870; the charges were made therefor on June 8, 1870; no charge is subsequently made. The learned judge therefore erred in law when he found as a fact that the petitioners furnished labor and materials upon these houses as late as March 15, 1871. A trivial addition at the expiration of a period of ten months, too insignificant to be regarded worthy of a charge, cannot bring to life a defunct lien. The petitioners show a completion of their contract on June 8; they show all the extra work considered worthy of a charge to have been then performed and charged. They made their record, completed their charges; they made no subsequent or additional charge; no debt was subsequently created, and it is to secure a debt that they claim a lien. The sale by the petitioners of these portable furnaces and utensils did not entitle them to a lien, for the case finds that Wentworth, who was the owner of the land and buildings, and one of these respondents, was to furnish brick and perform all the carpenter and mason work used in connection therewith. The case also finds that on June 8, 1870, the petitioners charged for some extra work not contemplated in their contract of sale, occasioned by some changes ordered by the builder; in consequence of these changes a trifling amount of mechanical work, not considered worthy of a charge, was performed on March 15, 1871. This labor performed on March 15, 1871, was connected only with the extra work made the subject of extra charge in the petitioners' bill of particulars, and so could draw after it only that extra work; and if a lien can be maintained at all, it must be for the amount of this extra work which was independent of the sale of furnaces and ranges. As against these mortgagees, who took their title after the apparent completion of these buildings, these petitioners ought to be estopped by the record in their own books, the completion of their charges and accounts made up to June 8, 1870; they obviously regarded the work as completed; and some trifling changes which they considered the builder as entitled to have made without charge, and the delivery of a few utensils, cannot, under any just construction of the statute, entitle them to supersede the title of these mortgagees.

H. D. Hyde & *M. F. Dickinson, Jr.*, for the petitioners, were not called upon.

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MORTON, J. In cases which are trie
jury, each party has the right to except
ings of the court upon matters of law, i
with the same effect as upon trial by ju
the court upon matters of fact are conclu
as the verdict of a jury, and this court ha
vise such findings upon a bill of exceptio
the exceptions alleged by the respondent
ure of objections to the findings of the
matters of fact, than of exceptions to his d
matters of law.

1. The question whether the certificate
the clerk of the city was seasonably filed
The statute provides that the lien shall be
person claiming it files the certificate "wi
he ceases to labor on or furnish labor or mat
ing upon which he claims a lien. The evid
petitioners did some labor, and furnished so
the erection of the building, within the thirt
done in good faith, for the purpose of compl
and not colorably in order to revive their
would begin to run from the time they thus p
furnished materials. This presented purely
upon which the finding of the presiding judge

2. The petitioners claim a lien for three
ranges set by them, one in each house, in a blo
If the labor and materials for which they clai
formed and furnished under an entire contract,
their favor to the entire estate. *Wall* v. *Rob*
429. *Worthley* v. *Emerson*, 116 Mass. 374. T
judge who heard the case, "that the contract w
divisible to do work and furnish materials upon
cannot be revised by this court.

3. The only other question argued to us is as t
of the finding of the presiding judge that the
entitled to a lien for the furnaces and ranges fur
The question before him upon this subject was a
of law and fact. If the transaction between the
the owner of the building was merely a sale by th

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furnaces and ranges as personal property, they would have no lien upon the building in which they were put by the purchaser. But if by the contract of the parties the furnaces and ranges were to be furnished as parts of the several houses in which they were put; if it was the intention and understanding that they should be, and they were in fact, applied so as to constitute parts of the buildings, the petitioners would have a lien for them. They would be, within the statute, materials furnished and used in the erection of the buildings. There was competent evidence which would justify the finding that they were furnished under the contract, as parts of the buildings, and that they were annexed to and became parts of the realty, and there is nothing in the bill of exceptions to show that the presiding judge did not correctly apply the rules of law to the facts proved. His finding, therefore, upon this question is conclusive.

4. The exception to the ruling that the hearing might proceed upon a certified copy of the petition, the original having been lost, was not pressed at the argument, and we consider it as waived. *Exceptions overruled.*

CARLYLE PETERSILEA *vs.* AMOS STONE.

Suffolk. Nov. 15, 1875. — Jan. 11, 1876. ENDICOTT & LORD, JJ., absent.

Service of notice of intention to take the poor debtor's oath was made by a person who had been duly appointed and qualified as a constable of the city of Boston, and had held the office for several consecutive years, but the term of whose appointment had expired at the time of service. He was generally known as a constable, and at the time was notoriously acting as such, having an office in Boston, on the door of which was his name with the addition "constable." The debtor delivered the notice to him believing him to be a constable. *Held*, that he was an officer *de facto*, and that the validity of the service could not be collaterally called in question, in an action on the recognizance given by the poor debtor.

CONTRACT upon a poor debtor's recognizance entered into by Abraham B. Shedd, as principal, and the defendant as surety. The case was submitted to the Superior Court, and after judgment for the defendant, to this court on appeal, or on agreed statement of facts in substance as follows:

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It is agreed that the defendant entered i
declared on, and that all the proceedings had
of the judgment debtor, Shedd, for the bene
relief of poor debtors, were valid and regul
vice upon the plaintiff of the notice of Shed
oath provided for in such cases, the plaintiff
service of the notice by Ephraim W. Farr, d
a constable of the city of Boston, was not su
tion of the sufficiency of service by Farr is th
in this case.

It is agreed that Farr was duly nominated
constable of the city of Boston, and received
tificate, gave a bond, as required by law, in o
to serve civil process, and was duly sworn and
ber 16, 1873, the bond reciting that Farr had
constable of the city "for one year from Septer
until another be appointed in his place," and
discharge of his duties as constable.

At the general appointment of constables,
nually, on September 28, 1874, Farr was nomina
but failed of confirmation at the time of general
was afterwards confirmed on November 9, 187
aforesaid, and was duly sworn and qualified o
1874, his certificate bearing date November 9, 1
referred to above was seasonably served on Octol

Farr had been for several consecutive years a
city, duly qualified to serve, and serving, civil
generally known as such, and on that day, befor
and after the service, he held himself out and
acting as such constable, as he had done since Sep
having an office in Boston, and on the door there
the addition of "constable." Shedd delivered
Farr for service at his office, and then and until
service believed that Farr was duly qualified as s
serve the notice. Farr arrested Shedd on the ex
suance whereof the recognizance was taken, and at
ceiving and serving said notice held said execution

If admissible, the plaintiff can prove that Far
had failed of confirmation as constable on Septem

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greed that he and Shedd both acted in good faith, both be-
ing that Farr was duly authorized to serve said notice.

he number of constables for the city of Boston varies from
to year, and the time for their appointment is not fixed, the
ber of constables and the time for their appointment and
rmation being regulated solely by the discretion of the mayor
aldermen. Appointments and confirmations were in fact
e on several different days between September 28 and De-
ber 31, 1874, and on October 5, 1874, there was a large
ber of constables duly appointed and qualified to serve civil
ess in said Boston.

the service of said process was sufficient, judgment was to be
red for the defendant; otherwise, for the plaintiff.

. *F. Buswell*, for the plaintiff.

. *Robinson, Jr.*, for the defendant.

EVENS, J. If Farr was an officer *de facto*, the validity of the
ice by him of the notice to take the poor debtor's oath cannot
nquired into collaterally. *Coolidge* v. *Brigham*, 1 Allen, 333.
rder to show that he was not, the plaintiff relies upon the
ement of Bigelow, C. J., in *Fitchburg Railroad* v. *Grand*
tion Railroad, 1 Allen, 552, 557, that "the exact distinction
een an usurper or intruder, and an officer *de facto*, is this:
rmer has no color of title to the office; the latter has, by vir-
of some appointment or election." If this were intended as
neral definition of an officer *de facto*, it would be incomplete,
he inquiry there presented to the court was as to the validity
rtain acts done by one who acted under a commission *prima*
valid, and issued by an authority apparently empowered to
t him with the legal rights and powers of the office to which
as appointed, and it is to be limited to the case then before
ourt. The reason of public policy, upon which it is held that
acts of an officer *de facto* are not to be called in question col-
ally, but are valid as to third persons, may apply even to the
where such officer is a usurper and intruder. This principle
been applied in England to the most important office; after
ward IV. obtained the crown, the kings of the line of Lan-
er, who had preceded him, were spoken of as "*nuper de facto*
on de jure reges Angliæ, but although Henry VI. had been
lared a usurper by act of Parliament, attempts against his

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authority (not having been in aid of th
itally punished. 1 Bl. Com. 204. 4
sons, from the nature of the case, cann
right of one assuming to hold an impo
to see that he has color of title to it by
ment or election. If they see him publi
ity, if they ascertain that this is generall
entitled to treat him as such officer, and,
such, should not be subjected to the da
collaterally called in question. *Brown* v.
State v. *Carroll*, 38 Conn. 449. If the par
officer *de facto* were aware that such offi
ment or election, it would strengthen his
he would be justified in believing that an a
cised and assented to was rightfully assume
Wend. 231. The definition of an officer
Lord Ellenborough, in *The King* v. *Bedfor*
which he generalizes from that of Lord Hol
1 Ld. Raym. 658, 660, is "one who has the
the officer he assumes to be, and yet is not a
of law," and the above suggestions are in a
definition. In the opinion in *People* v. *Col*
relied on by the plaintiff, it is held that the co
acts were there in question, were officers *de f*
into their office by color of title; and it is a
well settled principle of law that the acts of
valid when they concern the public, or the ri
sons who have an interest in the act done."

The principle, upon which the acts of officers *d*
held valid, has sometimes been extended, so far as
under certain circumstances, when they have be
ceeded against. The question then presented is
that where the rights of third persons only are
such cases it would not be sufficient that they ha
cised such office, but they might properly be calle
they did so by virtue of some appointment or electi
had a right to believe valid, even if it were other
Carroll, *ubi supra*.

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It was shown in the present case that Farr was "notoriously acting" as constable, having an office in Boston, and upon its door his name with the addition of the word "constable;" and as to third persons he must be deemed an officer *de facto*.

Were it necessary in order to maintain his proceeding to show that he had color of title by some appointment or election, it would not perhaps be difficult to do so. Farr had originally a proper appointment, and even if he, who wrongfully holds over after the term for which he is appointed has expired, and this known to him, cannot be said to hold by color of title, there are many cases where this expiration cannot be clearly ascertained. He who thus continues to hold his office erroneously but under a claim of right honestly and reasonably made has color of title from his original appointment or election. *Crew* v. *Vernon*, 2 Pro. Car. 97. These considerations have rendered it unnecessary to determine whether Farr was an officer *de jure*.

Judgment affirmed.

WILLIAM FUNCHEON *vs.* A. W. HARVEY & another.

Suffolk. Nov. 21, 1874.—Jan. 29, 1876. DEVENS & LORD, JJ., absent.

In an action to recover the freight due under a charter party, by the terms of which the plaintiff is to take a cargo on board with all convenient speed, and proceed direct to the port of delivery, and the declaration alleges that the plaintiff performed all things in the charter contained on his part to be performed, and the cargo is delivered in a damaged condition, and the issue is whether the vessel unnecessarily delayed in her port of departure before sailing and deviated upon the voyage, the burden of proof is upon the plaintiff to show that he had complied with the terms of the charter party on his part to be performed.

CONTRACT to recover the freight due under a charter party, excepting loss by perils of the seas. The other terms of the charter party and the pleadings in the case appear in the opinion.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff introduced evidence tending to show that he took on board at St. John's, Newfoundland, in good condition, a cargo of Newfoundland dry codfish packed in drums, and proceeded with it thence to Havana, Cuba; that the loading was completed on February 17, and the vessel sailed on February 25, and arrived

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at Havana on May 21, following, and ther
specie to the consignees; that there was n
any injury whatever by sea-damage on th
that the fish appeared to be heated and w
the consignees at Havana refused to pay t
of the damage to cargo.

The defendants introduced evidence tend
fish was in excellent condition when shippe
nearly destroyed by heating and decay, and
and was sold on the wharf at auction for ma
loss; that the vessel unnecessarily delayed i
sailing, and on the voyage deviated unnecess
and usual route, and was so negligently and u
and managed as greatly and unnecessarily to
prolonged the voyage, and thereby caused the

The defendants contended that the burden
plaintiff to show that he had performed the st
the proper route and in due season, and that
and was navigated to her destined port in the
unnecessary delay or deviation, and requested
rule. The judge declined so to rule, so far as
den of proof, but did rule that the liability of t
by heating and decay was a peril of the sea, and
in the charter party, and the plaintiff was not
unless such result was due to unskilful naviga
diligence in the voyage, or some negligence or
master or mariners; and that the burden of pro
fendants to show this, and that negligence had ma
peril operative.

The jury returned a verdict for the plaintiff;
ants alleged exceptions to the above ruling.

C. T. Russell, for the defendants.

O. W. Holmes, Jr. & W. A. Munroe, for the pla
settled that freight is earned by the delivery of the
Libby v. *Gage*, 14 Allen, 261, 263. And although
been injured by the negligence of the carrier, the ru
Davidson v. *Gwynne*, 12 East, 381. *Gibson* v. *St*
622, 632. *Dakin* v. *Oxley*, 15 C. B. N. S. 646, 66
Melhuish, 4 Jur. N. S. 943. 1 Pars. Ship. 206 n.

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damage to cargo is a counter claim, which in England cannot set off, but must be established in a separate action. *Dakin Oxley, ubi supra.* The principle as to the burden of proof is affected by allowing the defendant to prove his counter claim the action for freight. In the language of Mr. Justice Willes, his allowance of set-off affects procedure only." *Dakin* v. *ey, ubi supra.*

This is therefore to be considered as an action on the charter y by Harvey & Co. for the heating and decay of perishable cles inside their casks, alleged to be caused by the undue gth of the voyage, which is attributed to the master's bad nanship. In such a case the burden is on Harvey to prove the master was in fault. No bad stowage is alleged, and no tion as to stowage was raised; there was no pretence that the s did not remain whole; and the defendants themselves at- ute the loss to heating and decay. The proximate injury was decay of the fish inside the casks, a thing for which even com- carriers are not responsible unless caused by their fault. The ground of charging the master would be that the immediate es of the loss would not have time to work but for the length he voyage, a thing for which carriers are not generally respon- e. and that this was due to the bad seamanship of the master. all the cases are agreed that when the proximate injury is of nd for which carriers are not liable, the burden is on the er of the goods to show that it was occasioned by the carriers' t. *Clark* v. *Barnwell*, 12 How. 272, 280, 282. *Lamb* v. *Park-* , 1 Sprague, 343, 353, 354. *The Invincible*, 1 Lowell, 225. *nsportation Co.* v. *Downer*, 11 Wall. 129. *Czech* v. *General m Navigation Co.* L. R. 3 C. P. 14, 19. *Ohrloff* v. *Briscall*, R. 1 P. C. 231, 238. *The Cleveland*, Newb. 221.

NDICOTT, J. The charter party requires that the plaintiff all with all convenient speed take on board" the cargo of sh, "and being so loaded proceed therewith to a port either uba or Porto Rico, direct, and there deliver the same." The tiff alleges in his declaration that he did so, "and proceeded t to a port in Cuba, namely, Havana," and that he had ormed all things in the charter contained on his part to be ormed. The answer denies each and every allegation of the aration, except the payment by the defendant of a portion of

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the freight. The further allegations and
do not set up any defence not open under t
various forms the answer denies that the pl
stipulation of the charter party, which requ
venient speed to take on board the cargo, s
Havana direct; and that by reason of the f
so to do, the codfish were wholly destroyed.
directly raised upon the pleadings was whe
performed his contract in this particular;
sides, as reported, was directed to that issue
the burden was upon the plaintiff. He was
he had performed that stipulation, as well as
of the charter party. The instruction reques
have been given; it related only to that prov
party.

Upon the question, whether the failure to p
tion (if the jury should find it was not per
injury and destruction of the goods, the defe
structions. As the presiding judge refused
tions asked for, so far as related to the burde
necessary to consider the rulings actually given

Exce

MARGARET TIGHE *vs.* CITY OF L

Middlesex. January 12.—13, 1876. COLT & EN

One who, being upon a highway merely for play, meets with a
a defect therein, cannot maintain an action for damages ther
town bound to keep the highway in repair for travellers.

TORT for personal injuries occasioned by a d
street, in the defendant city. The alleged def
ditch excavated for a sewer, into which the plaint
her arm.

At the trial in the Superior Court, before *Pitm*
tiff, who was six years old at the time of the a
that she did not remember much about getting
was standing by the side of the sewer and fell i

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tag with another little girl; that she went out from her
s house, near by, to play with this little girl, and that she
going anywhere else.

judge ruled that there was no evidence which would au-
the jury to find that the plaintiff was a traveller upon the
y at the time of the accident, and directed them to return
t for the defendant; and after verdict reported the case
consideration of this court. If upon the evidence the
was entitled to go to the jury, the verdict was to be set
otherwise judgment was to be rendered thereon.

. *F. Swan*, for the plaintiff, contended that the case should
en submitted to the jury; and cited *Stickney* v. *Salem*, 8
374; *Hamilton* v. *Boston*, 14 Allen, 475, 483.

. *Richardson*, for the defendant, was not called upon.

HE COURT. The evidence at the trial showed that the
was using the highway as a play ground, and the case is
d by *Blodgett* v. *Boston*, 8 Allen, 237.

Exceptions overruled.

ALANSON FOLSOM *vs.* WILLIAM H. CLEMENCE.

ex. January 12. — 13, 1876. COLT & ENDICOTT, JJ., absent.

gment for the conversion of certain chattels, an action cannot be main-
or the conversion of other chattels taken by the same act, but accidentally
in the former action.

for the conversion of certain furniture and store fixtures.
ated September 20, 1873.

e trial in the Superior Court, before *Pitman*, J., without
it was admitted that the alleged conversion was at the
me and by the same act as that of the stock in trade in
e store, for which the plaintiff had recovered judgment
the defendant in a former action, reported 111 Mass. 273.
plaintiff offered to prove the same title and facts as in the
action; that the property which was the subject of the
action was not included in the former one, through the
tal omission of the plaintiff's attorney, the mistake not

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being discovered until after judgment; and ment of the judgment therein, the plaintiff n of the omission, and demanded payment for t This evidence the judge excluded, and rule had but a single cause of action for the tak erty, and that the prior action and judgment remedy, and upon this ground gave judgmen The plaintiff alleged exceptions.

R. B. Caverly, for the plaintiff.

A. F. Jewett, for the defendant.

BY THE COURT. The taking by one act of the same person will not sustain more than judgment in the first action is a bar to this. Gray, 221. *Bennett* v. *Hood*, 1 Allen, 47. *& New Haven Railroad*, 2 Allen, 331.

Excep

AARON HUNT, executor, *vs.* THOMA

Middlesex. January 12. — 13, 1876. COLT & EN

In an action by the executor of A. for a bond lent by A. to th A. took a receipt, there was evidence that A. afterward, wl verbally a gift of it to the defendant, without any other deli promised to return the receipt when he should be able to get that, upon the above evidence, as matter of law, there had livery of the bond to constitute a valid gift, even if such was that this ruling was erroneous; and that the question wheth livery was a matter of fact to be tried.

CONTRACT by the executor of Cyrus Hunt for received by the defendant to the use of the testat alleging the delivery of a bond of the value of $1 tator to the defendant; a promise on his part to r demand and refusal. Answer, a general denial.

At the trial in the Superior Court, before *Pitm* a jury, the plaintiff offered in evidence the fo signed by the defendant: "Brighton, Nov. 15, 1 Cyrus Hunt, bond of one thousand dollars, No. 2 am to return to him, or its equivalent in currency."

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e defendant contended that the bond in question had been to him by the plaintiff's testator. It appeared in evidence he was the half-brother of Cyrus Hunt, who was in the habit isting him pecuniarily from time to time; that the bond in on had been lent to him about the time the receipt in evi- was given. The defendant testified that, at the time of the the plaintiff's testator signified his intention of giving the in question to him; that afterwards he did give the bond n; that at the time of the gift the bond was already in the ssion of the defendant; that the testator was sick in bed at me and unable to get the receipt in question, but said that apers in his possession were to be given up to him if he d come up some day when the testator was able to get them. inister of the testator's parish also testified that the testator nade inquiries of him concerning the children of the defend- who had attended school under the witness, and said he in- ed to do something for the defendant and his children; that testator afterwards told him that he had provided for the dant and his children by giving a bond to the defendant. plaintiff offered evidence tending to show that the testator ot intend a gift.

on this evidence, the judge, having found that the bond was ally a loan, ruled that as matter of law there had been no ery of the bond by the plaintiff's testator to the defendant, ient to constitute a valid gift, even if such were proved to been intended; and found for the plaintiff accordingly; and efendant alleged exceptions to this ruling.

T. Lovering, for the defendant.

Rutter, for the plaintiff.

THE COURT. The ruling that, even if the testator intended ke a gift to the defendant of the bond in the possession of tter, the evidence in the case was insufficient as matter of o prove such delivery as was necessary to constitute a valid *nter vivos*, was erroneous. The question whether there was delivery was a matter of fact, which should have been tried e court below. *Exceptions sustained.*

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JOSEPH W. TUFTS *vs.* JAMES C

Middlesex. January 14. — 20, 1876. COLT &

The time for pleading to a writ of error may be enlarged court.

Under the Gen. Sts. c. 115, § 7, a bill of exceptions must as well as filed with the clerk, within the time therein s the judge is not obliged to allow them.

Whether a judge errs in disallowing a bill of exceptions cannot be affected by oral evidence of his reasons.

On a writ of error to reverse a judgment of the Superio being the disallowance of exceptions, taken by the plaint contract brought against him in that court, because n within the time required by law, whereas, as it was alleg they were presented in time, the question arising on the which a single justice of this court cannot try or reserv exclusive jurisdiction of the full court.

WRIT OF ERROR to reverse a judgment of in an action of contract brought by Newton a error assigned was that exceptions taken by T that action before the jury were disallowed by t because not presented to him within the time whereas the record showed that they were pr time required by law.

The docket and files of that action (no exte produced) showed that the verdict was returned ton October 15, 1874; that Tufts filed his bill o the clerk October 16, 1874; that the court was week day until October 22, 1874, when *Bac* signed this certificate thereon: "Presented to 1874. Disallowed, because these exceptions we to me for allowance within the time required by to extend said time was refused by the plaintiff."

Newton did not appear or plead to the writ of days after the return of the *scire facias*, and moved for a default. But *Wells*, J., afterwards, allowed Newton, against the objection of Tufts, plead *in nullo est erratum*; and made a report of stated the facts above set forth, and further sta duly saved and alleged exceptions and reduced th

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but did not present them to the judge (otherwise than by g them with the clerk) until October 22, 1874, and that, "if petent evidence in this proceeding, it was admitted that said e stated orally, as one of the reasons for refusing to allow exceptions, that they had not been presented to him season- and that he thought he had not the right then to allow them, out the consent of Newton, or to extend the time for the entation of exceptions to the court, after the three days al- d by statute had expired." The report concluded as follows: he case having been submitted to me upon the foregoing facts offer of proof, I thereupon adjudged that said judgment of Superior Court should be affirmed, and, at the request of the ntiff in error, report the case for the consideration of the full rt."

V. G. Sprague, for the plaintiff in error.

V. S. Stearns, for the defendant in error.

RAY, C. J. The time for pleading to a writ of error is not d by statute, but depends upon the rule of court, which ex- sly reserves the power to restrict or enlarge the time. Gen. *c.* 146, §§ 1-10. Rule 29, 104 Mass. 564. The plea was efore duly filed.

he statute which regulates bills of exceptions clearly requires , not only to be filed with the clerk, and notified to the other y, but to be presented, within the time specified, to the judge made the ruling excepted to, and who is to examine the bill sign with his own hand a certificate allowing or disallowing. The exceptions in the case at bar not having been presented e judge within that time, he was not obliged to allow them. Sts. *c.* 115, §§ 7, 8. *Barstow* v. *Marsh*, 4 Gray, 165. *Sawyer Vale Iron Works*, 116 Mass. 424, 432. *Commonwealth* v. *enlaw*, *ante*, 208.

Whether the judge erred in disallowing the exceptions was a ter of record, and could not be affected by oral evidence of his ons. *Brown* v. *Bull*, 8 Mass. 211. *Fleming* v. *Clark*, 12 n, 191. The question arising upon the record was an issue in which a single justice of this court had no authority either to or to reserve, but which is within the exclusive jurisdiction of full court. Gen. Sts. *c.* 112, § 5. In the exercise of that juris- ion, it is ordered that the judgment of the Superior Court be

Affirmed.

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LORING PARKER, executor, *vs.* LEONARD

Middlesex. January 19. — 20, 1876. COLT &

An executor, who has no title as such in the real estate c
not allege that there is any personal estate in his ha
maintain a bill in equity to obtain the instructions of t
tion of the will of the testator, although the bill alle
"that there is and was left by said testator personal est

BILL IN EQUITY by one of the executors
Parker, against the heirs at law and legatees
first named defendant being also an executor

The bill alleged that the testator died on
ing no widow, and that his will, dated April
admitted to probate on September 16, 1873;
named therein were duly appointed and quali
construction of the will was doubtful in so ma
need the aid and direction of this court to de
and the duties of the executors concerning th
ceased and the rights and interests of the se
ested therein; that "there is and was left by
sonal estate and lands;" that the plaintiff de
of the court "in the following particulars and
may be material to the parties in respect to the
erty and titles to the estate real and personal
under the provisions of said will." Then followe
in regard to the construction of the will, and a
other direction and instruction as to the constru
and the rights and estates of the parties under
be proper and necessary."

A copy of the will was annexed. Under the
court it is only material to state that no propert
bequeathed to the executors, in their representati

Hearing before *Morton*, J., who found that th
the bill were true, and reserved the case for the
the full court.

D. S. Richardson & G. F. Richardson, for the

F. A. Worcester, for the defendants.

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HE COURT held that the executor had no title in the real te, and that it did not appear that there was any personal perty in his hands for distribution among the defendants, and therefore no case was shown for the exercise of the jurisdic- of the court, and *Dismissed the bill.*

ABITANTS OF WALTHAM *vs.* INHABITANTS OF BROOKLINE.

llesex. Jan. 11, 12. — 21, 1876. COLT & ENDICOTT, JJ., absent.

action under the Gen. Sts. c. 73, § 25, by a town, for expenses paid for the port of a lunatic committed to a state hospital, against the town where he has ettlement, the plaintiff must show that the lunatic was a pauper at the time the ef was furnished.

ORTON, J. This is an action to recover the amount of a bill by the plaintiff to the State Lunatic Hospital at Worcester, he board, from July 22, 1870, to August 20, 1872, of Ste- W. Adams, a lunatic committed to said hospital on August 1869, and alleged to have his settlement in the defendant . It appears from the bill of exceptions that "there was idence in the case that, before and upon August 10, 1869, s was a pauper, nor that he had ever been supported by eived any aid from any place as a pauper; nor that at or his commitment, or after that time, he was a person in s needing immediate relief."

he burden of proof was upon the plaintiff to show that, at time the relief was furnished, Adams was a pauper; and as re was no evidence of this fact, the court should have ruled, requested by the defendant, that the plaintiff could not main- n this action. The statute provides that "every city and town ying expenses for the support or removal of a lunatic commit- l to either hospital, shall have like rights and remedies to re- er the full amount thereof, with interest and cost, of the place his settlement, as if such expenses had been incurred in the linary support of the lunatic; and the lunatic, if of sufficient ility to pay the same, and any kindred obligated by law to aintain him, shall be liable for all such expenses paid by any ty or town in either case." Gen. Sts. c. 73, § 25.

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Although the word "pauper" is not use plain intent of the Legislature was to give expenses of a lunatic, committed to either st rights and remedies against the place of his expenses had been incurred in the ordinary Such has been the uniform construction of t the previous statutes, of which this is a re v. *Wareham*, 9 Cush. 585. *Andover* v. *Ea* 390. *Amherst* v. *Shelburne*, 11 Gray, 107.

The same rules of law, therefore, apply to t been a suit to recover the expenses of the or pauper. In order to maintain the action, tl quired to prove that the person supported or r was a pauper, and that his settlement was in t *New Bedford* v. *Hingham*, 117 Mass. 445.

As for these reasons there must be a new deemed it necessary to consider the other quest bill of exceptions. *Excep*

B. B. Johnson, for the plaintiff, was first call

M. Williams, Jr., for the defendant, was stop

WILLIAM E. HEALEY *vs.* INHABITANTS O

Middlesex. January 18. — 21, 1876. COLT & END

The posting by the selectmen of a town of a notice of their i town way, as required by the Gen. Sts. c. 43, § 61, is a sufficie section to the owner of the land taken, though a resident of t ership be not known to the selectmen.

TORT for breaking and entering the plaintiff's the soil, and laying out a highway across it, by t the defendant town. The case was submitted t Court, and to this court on appeal, on agreed fact as follows:

On October 1, 1870, the selectmen of Newton iss notice of their intention to lay out the way over th tion, and a meeting was appointed to be held on th

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ober 17, 1870, and a notice was posted in conformity with the
. Sts. c. 43, § 61, more than seven days before this meeting
he time of this notice the record title of the land had, since
il 6, 1869, stood in the name of Joel M. Holden, who held it
ne Dennison and one William Claflin, under an agreement
ansfer it to them or to others, upon their request. The land
870, and prior to that time, was taxed to Holden, who paid
tax bills, and was repaid by Dennison and Claflin. No per-
l or written notice was given to Holden of the laying out of
way, and he was not recognized as owner of the land in any
by the selectmen, or known by them as such, although he
a well known resident of the town. They gave notice to
nison and Claflin, supposing them to be the owners of the
l, more than seven days before the meeting, at which Denni-
was present and advocated the laying out of the way. Hol-
had not authorized Dennison in any way to act for him in re-
on to the land. On February 11, 1871, at a meeting adjourned
n October 17, 1870, the selectmen staked out the way, and
February 17 made and filed in the town clerk's office a report
heir doings. On March 4, 1871, Holden, at the written re-
st of Dennison and Claflin, conveyed the land in question to
plaintiff. On April 3, 1871, the town, at a legal meeting,
pted the selectmen's report, and subsequently the selectmen,
ng as the surveyors of highways, entered upon the land and
tructed the highway across it.

Putnam, J., ordered judgment for the defendant upon the fore-
g facts; and the plaintiff appealed.

. *D. Van Duzee*, for the plaintiff.

. *Robinson, Jr.*, for the defendant.

Y THE COURT. If Dennison and Claflin were the authorized
nts of Holden, notice to him might be served on them; if
were not, then, Holden not being known to the selectmen
wner of the land, the notice might be served by posting.
. Sts. c. 43, § 61. In either alternative, therefore, there was
cient notice of the laying out of the way; and this fact, be-
conclusive in favor of the defendant, renders it unnecessary
nsider the other grounds of defence.

Judgment for the defendant affirmed.

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EDWARD G. LYNES *vs.* FREDERICK A. HI

Middlesex. January 20. — 21, 1876. COLT &

The jurisdiction of the Probate Court under the Gen. St specific performance of a written agreement for the c concurrent with that of this court under the Gen. Sts. by the same rules.

A. by an instrument in writing agreed to convey to B., "f of land, situated on Walden Street and Vassal Lane, bounds are fixed and the street laid out." The street laid out or the bounds fixed during A.'s lifetime. *Held* too indefinite to be enforced under the Gen. Sts. *c.* 117,

APPEAL from a decree of the Probate Cou tion under the Gen. Sts. *c.* 117, § 5, for the sp of the following agreement, signed by Washi the defendant's intestate:

"Cambridge, July 20, 1871. In considerati me paid by E. G. Lynes, of Cambridge, and o siderations, I herein agree to deed to said Lyne to twenty-eight thousand feet of land situate and Vassal Lane in said Cambridge, when the and the street laid out, the street to be forty f hundred feet long, said deed to be subject to tl mortgage running to Fordyce M. Stimpson, an Middlesex deeds."

The decree of the Probate Court ordered the c certain parcel of land situated on Walden Street in Cambridge, and bounded as follows: 'Beginni Walden Street, and at the easterly side of Vassal L running northeasterly on Walden Street one hun and 60-100 feet; thence running southeasterly heirs of said Washington F. Somerby, one hundr two and 20-100 feet; thence running southwest said heirs of said Somerby one hundred and eight feet, to Vassal Lane; thence northerly on said Va seven 90-100 feet; thence northwesterly on said V hundred and forty-seven 60-100 feet to the point containing by actual survey twenty-six thousand land and no more.'"

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ing before *Morton*, J., who reserved the case for the ation of the full court upon the following facts: It ap- that Somerby in his lifetime signed the above agreement; ere was an adequate consideration paid, and that the six thousand feet claimed by the petitioner was a fair and le portion of seventy-one thousand feet on the corner of Street and Vassal Lane, owned by Somerby at the time leath. It was admitted that Somerby died seised of the of the seventy-one thousand feet, and that the mortgage to Stimpson has been removed, so that Somerby's title is m incumbrances. There was some evidence tending to at Somerby in his lifetime pointed out the proposed street per place to locate the same, to open up the land for im- ent, but no determination of the location of the proposed as made during Somerby's life.

Brown, for the appellee.

Jacobs, for the appellant, was not called upon.

, C. J. The jurisdiction to enforce specific performance en agreements of persons deceased, conferred upon the Court by the Gen. Sts. *c.* 117, § 5, is concurrent with the ion of this court in equity under the Gen. Sts. *c.* 113, § 2, t be governed by the same rules.

agreement signed by the intestate describes the bounda- he land by the adjoining streets on the northeast and st only, and looks to the fixing of the bounds, and the ut of another street, before the conveyance. The report at the bounds were not fixed, nor the location of the pro- treet determined, in his lifetime. The agreement is too te to be specifically enforced. *Boston & Maine Railroad ock*, 8 Cush. 228. *Pray* v. *Clark*, 113 Mass. 283. *Grace ison*, 114 Mass. 16. *Jordan* v. *Fay*, 40 Maine, 130.

Petition dismissed.

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WILLIAM E. WHITEHEAD & another *vs.*

Middlesex. January 17.—22, 1876. COLT & :

This court has no jurisdiction in equity of a bill by the pa an injunction against a person falsely representing tha fringes upon a patent owned by himself, and thereby d chasing the plaintiff's invention.

BILL IN EQUITY alleging that the plaintiff of the United States for a new and useful imp ing mechanisms for cotton-openers," which head was the inventor of and had assigned his and the other plaintiff jointly; that the pla manufacture this invention and to introduce and expended much time and money in so d fendant, his attorneys, servants and agents, fa sundry persons who would be likely to buy t tion, that the plaintiffs' patent interfered wit by the defendant, and that the plaintiffs coul or use their improved mechanism without infri ant's patent, and that all persons who should u liable to the defendant as infringers of his pa these false representations many persons were chasing said improved mechanism. The bill pr injunction and further relief.

The defendant demurred for want of equity tained the demurrer, and the plaintiff appealed.

D. H. Rice, for the defendant.

F. T. Greenhalge, for the plaintiffs.

BY THE COURT. The case stated in the bill jurisdiction of a court of equity. *Boston Diatit Manufacturing Co.* 114 Mass. 69. *Prudential Knott*, L. R. 10 Ch. 142.

Demurrer sustained, and

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RLES MILLER *vs.* COUNTY COMMISSIONERS OF BARNSTABLE.

able. Oct. 27, Nov. 12, 1875. — Jan. 8, 1876. MORTON & LORD, JJ., absent.

e St. of 1873, c. 261, providing that application for a jury may be made by n to the Superior Court, in all cases in which it is provided by law that a 's jury may be had, the tribunal to which the first application is duly made s exclusive jurisdiction of the subject matter.

ITION for a writ of mandamus. The petition was filed in able County, and notice issued there returnable in Suffolk, the case was heard by *Ames*, J., who reserved for the con- ion of the full court the question whether a peremptory mus should issue, or the petition be dismissed, upon the ing facts :

July 1, 1874, Charles Miller applied to the county commis- s to estimate his damages by the location and construction, his lands in Falmouth, of the railroad of the Cape Cod Rail- Company, of which corporation the Old Colony Railroad pany was the successor, and had the duties and obligations. ecember 31, 1874, after notice to this corporation and a hear- he county commissioners estimated his damages at $875.

January 1, 1875, the corporation filed a petition in the office of the Superior Court for the county of Barnstable, enting that it was aggrieved by the estimate of the county ssioners, and praying for a jury to assess the damages at r of that court; and on the same day filed with the clerk county commissioners a statement that it had filed such a n in the Superior Court. On January 12, the clerk of the or Court issued an order of notice thereon, returnable at erm 1875, which was served on January 20, by delivering sted copy to the attorney of record of Miller, who resided he Commonwealth. On May 14, 1875, a further order of returnable at October term 1875, was issued in like man- l on May 21, served by leaving an attested copy at Miller's g house in the city of New York.

April 13, 1875, Miller filed a petition with the county com- ers, alleging that he was aggrieved by their estimate of

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his damages, and praying for a w
assess the same; and upon this pet
county commissioners to the railroa
May 4, and on that day the corpora
up the filing of its petition in the Su
appeared and were heard before the c
Miller's petition.

T. M. Stetson, for the petitioner.

G. Marston & J. H. Benton, Jr., fo

GRAY, C. J. The damages, occasi
person by the laying out, making and
are to be estimated in the first instanc
sioners, and either party, if dissatisfied
within one year after it is returned, appl
damages. Gen. Sts. *c.* 63, §§ 21, 22. Un
such application could only be made to th
and the trial had before a sheriff's jury.
& seq. But by the St. of 1873, *c.* 261, "
is provided by law that a sheriff's jury m
pose, application for a jury may be made
perior Court; and thereupon, after such no
order to the adverse party or parties, a tr
bar of said court, in the same manner [as
there tried by jury."

By whichever party the application for
matter to be tried is the same, being the am
to be paid by the corporation to the land
River Railroad v. *Clapp*, 1 Cush. 559. *N*
ampton Co. v. *Northampton*, 102 Mass. 116, 1
applied to the same tribunal, a warrant for
haps be properly ordered upon each applicati
one party should fail to take out his warrant
it, the other party might nevertheless proceed
both parties proceeded, only one trial would
verdict returned upon both warrants. *Parker* v
Railroad, 3 Cush. 107, 111. But in cases like t
attachment or custody of property is necessary,
apply to distinct tribunals of concurrent jurisdi
state, that tribunal to which the first applicati

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ires exclusive jurisdiction of the subject, and so long as pro-
ngs thereon are pending before it, no action can be had by
ther. *Stearns* v. *Stearns*, 16 Mass. 167. *Powers* v. *City*
cil of Springfield, 116 Mass. 84.

the St. of 1874, *c.* 283, petitions for the assessment of dam-
required by previous laws to be filed in the Superior Court
th the county commissioners, may be filed with the clerk of
tribunal when it is not in session, and such filing is to be
ed a commencement of proceedings. It follows that by the
on filed by the railroad corporation in the clerk's office of
uperior Court that court acquired exclusive jurisdiction of
se, and that the county commissioners rightly refused, upon
bsequent application of the landowner, to issue a warrant
sheriff's jury.

is possible that the landowner, in order to secure his right of
by jury, notwithstanding the limitation of one year, in case
ailroad corporation should abandon the petition in the Su-
r Court, was entitled to file with the commissioners his ap-
tion for a jury, and that the commissioners erred in dismiss-
that application. But the remedy for that error, if there
one, is by certiorari and not by mandamus.

Writ of mandamus refused.

NSTABLE SAVINGS BANK *vs.* RUSSELL A. BALLOU & others.

able. January 25. — 26, 1876. ENDICOTT & DEVENS, JJ., absent.

tion by a savings bank upon a promissory note, against one signing as surety
n, parol evidence that the defendant signed the note solely at the request of
asurer of the bank, because of a rule thereof as to the number of the names
ed upon a loan, and upon the assurance that the bank would not look to him
yment, is inadmissible as contradicting the written contract.

TRACT against Russell A. Ballou, S. J. Ballou, and Ben-
B. Newhall, on two promissory notes, signed by the first
defendant as principal, and by the other defendants as
es. The first note was as follows:

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"$5000. Boston, August 31st, 1872. For valu
R. A. Ballou, as principal, and S. J. Ballou and Be
as sureties, promise to pay the Barnstable Savings
five thousand dollars in one year from date, with
paid semi-annually at the rate of eight per cent. p
at the same rate until full payment of said sum."

The second note was similar in form, dated Septe
for the sum of $10,000, and signed by the same
defendants, R. A. Ballou and S. J. Ballou, were de
answer of the defendant Newhall alleged that the
sideration for his signature to the notes: that he
become surety thereon, at the sole request of, and
count of, the following inducements and representa
Scudder, then the treasurer and authorized agent
in lending the money and taking the notes: that
him at the time he signed, and before signing the n
were entirely good, and amply secured by collateral
wanted Newhall as surety because the rule of the
required three names to procure a loan; that he
take no risk by so signing, and gave him to under
bank would not look to him to pay any part of
that he had no interest in said notes, and was in
fited by signing them.

At the trial in the Superior Court, before *Pitm*
fendant offered to prove the allegations in his an
judge ruled that such proof would constitute no de
fendant disclaiming fraud, and ordered a verdict for
and the defendant alleged exceptions.

H. P. Harriman, for the defendant Newhall.

J. M. Day, for the plaintiff, was not called upon.

By the Court. The parol evidence offered b
tended to contradict the written contract which he
and was rightly rejected. *Exceptions*

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KERON CURLEY *vs.* JOHN CHADBURNE & another.

olk. January 25. — 31, 1876. COLT & ENDICOTT, JJ. absent.

rd under the Gen. Sts. c. 147, was properly inclosed and sealed up by the ator and transmitted to the court by the hands of the counsel of the party in favor it was made, who deposited it unopened with the papers in an action tract brought upon it. It appeared that the award was not opened by the of the court, nor by either counsel, and it did not appear by whom it was l. There was subsequently found among the papers in the suit one purport- be an award by the same arbitrator between the same parties, opened, with- velope or wrapper, or aught to show when or by whom it had been opened l. The Superior Court held that the award had not been so returned, filed pened, as to warrant its acceptance or recommitment; and that there was not ward before the court. *Held*, on a bill of exceptions setting forth the above that there was nothing to show that the judge erred in holding that the Gen. 147, § 8, had not been complied with.

TION in the Superior Court to accept the award of an arbi- under the Gen. Sts. *c.* 147. The objection made to its tance was that it was not returned, filed and opened in liance with § 8 of that chapter.

e paper offered for acceptance was an instrument dated De- er 26, 1873, purporting to be an award in favor of the plain- nder a submission before a justice of the peace, which was ed to it. There was nothing about it to show how, when ere it was returned, excepting the words "Filed October 8, " written on its back.

vas proved by oral testimony that the arbitrator inclosed ard in an envelope properly indorsed and directed to the of the Superior Court, and intrusted it to the plaintiff's l, who deposited it, unopened, at April term 1874, with pers in an action of contract brought by the plaintiff the defendants upon the award, the essential parts of had been communicated by the arbitrator to the parties; award was not opened by the clerk of the court, or by nsel, or any other person within the clerk's knowledge, hin ten days after the entry of the above named action ndant's counsel found among the papers belonging to it submitted for acceptance, opened, and with no traces of velope or wrapper; that when the above named action n for hearing, the paper was then found among those of the

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suit, opened, and without envelope or wrapper; that after the determination of the suit by judgment for the defendant on the same day entered, or reëntered, with a petition for acceptance, and that then the clerk wrote on its back "Filed October 8, 1874."

On the above facts, *Allen*, J., ruled that the award had been so returned, filed and opened, as to warrant either acceptance or recommitment; and that there was not in fact an award before the court. The plaintiff alleged exceptions to the ruling.

E. Davis, for the plaintiff.

W. F. Estey, for the defendants.

By the Court. There is nothing in the bill of exceptions to show that the judge erred in holding that the provisions of Gen. Sts. *c.* 147, § 8, had not been complied with.

Exceptions overruled.

Frances Torrey *vs.* Israel W. Munroe.

Norfolk. January 27. — 31, 1876. Endicott & Devens, JJ., absent.

The question of the position of the boundary line of adjacent parcels of land cannot be submitted to arbitration under the Gen. Sts. *c.* 147, § 1.

An award by arbitrators under the Gen. Sts. *c.* 147, determining a boundary line, cannot be enforced by judgment of the Superior Court under § 10 of that chapter.

Appeal under the Gen. Sts. *c.* 147, § 12, from an order of the Superior Court accepting an award made and returned into court in pursuance of a submission under that chapter.

The demand submitted was "the determination and establishment of the true and original division line between the estates of said Torrey and Munroe, situated on Washington Street, in said Quincy, said line having been long in dispute."

The award determined and established the line, describing it and referring to a plan annexed and made part thereof.

The defendant moved to set aside the award for the following reasons: "1. That the said arbitrators have no jurisdiction of the subject matter submitted to them, the same involving the

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to real estate, and being neither the subject of a personal
at law or suit in equity.

That the award was such that no judgment can be ren-
upon it which can be enforced in this court."

Hewins, for the plaintiff.

E. Tirrell, for the defendant.

AY, C. J. The judgment of the Superior Court, accepting
ward, was erroneous: 1st. Because the matter in contro-
could not be the subject of a personal action at law, or of
in equity, and therefore could not be submitted to arbitra-
y agreement before a justice of the peace under the statute.
Sts. c. 147, § 1. *Hubbell* v. *Bissell*, 13 Gray, 298. 2d. Be-
the award could not be enforced by any judgment that the
ior Court could render. Gen. Sts. c. 147, § 10. *Brown* v.
, 6 Allen, 333. *Award set aside.*

SARAH LYONS *vs.* INHABITANTS OF BROOKLINE.

olk. January 28. — 31, 1876. COLT & ENDICOTT, JJ., absent.

injured, while sitting upon the sidewalk of a public highway, by the falling
her of a stone left there to be used as a curb-stone, is not a traveller upon
ighway.

which places stones insecurely in a highway is not liable to a person injured
e of the stones falling upon him, the fall being caused by the act of a third
n.

T for personal injuries sustained through an alleged defect
ghway in the defendant town.

he trial in the Superior Court, before *Dewey*, J., there was
e tending to show that the plaintiff, a child between three
r years old, was permitted by her parents to go out into a
highway in the defendant town, for the purpose of walking
; that she sat down on the sidewalk with her feet in the
near some stones that had been placed there by the de-
to be used as curb-stones; that there were other young
n playing about these stones, and that in consequence of
s of these other children one of the stones, which had been
ely placed, fell over and broke one of the plaintiff's legs
jured the other.

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The judge instructed the jury to return a verdict for the defendant if they should find the facts to be as above stated. The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

A. B. Berry, for the plaintiff.

M. Williams, Jr., for the defendant, was not called upon.

BY THE COURT. The jury, under the instructions given them, having found that the plaintiff was not travelling in the highway, and that the injury to her was caused by the act of third persons, the town is not liable. *Tighe* v. *Lowell*, *ante*, 472. *Kidder* v. *Dunstable*, 7 Gray, 104. *Exceptions overruled.*

GEORGE W. RIDER *vs.* T. D. PEASE & others.

Hampden. Sept. 29, 1875.— Feb. 29, 1876. AMES, DEVENS & LORD, JJ., absent.

A. and B., members of a firm, assigned a patent right to C. and D., and by a contract, made the same day with C. alone, agreed that, if C. should become dissatisfied with the purchase within a certain time, they would repurchase of him the patent right and repay him the amount paid therefor, provided he should give them notice thereof within a certain time. In an action on this contract by C. against the firm, it appeared that C. became dissatisfied and gave the defendants notice thereof, requiring them to repurchase. The plaintiff testified that, within the time agreed, he asked A. what he would do about the contract, who said he would try to get another member of the firm to help the plaintiff out of it, and that, after the action was brought, the one, with whom the conversation was had, refused to repurchase. The plaintiff also testified that, after the expiration of the time stated in the contract, but before the action was begun, he had a conversation with B., who said he could do nothing about the repurchase, as he was too poor to raise money. The judge ruled that there was not sufficient evidence of a refusal to repurchase on the part of A. to warrant the jury in finding a waiver of a tender of a deed, and that the refusal of B., on the ground of his poverty, did not bind A., directed a verdict for A. and reported the case to this court, a new trial to be ordered if the ruling was incorrect. *Held*, that there was evidence sufficient to warrant the jury in finding that the defendants had refused to perform the contract; that the ruling was incorrect, and that a new trial must be granted.

CONTRACT against T. D. Pease, William Thayer and Thomas Campbell, copartners doing business under the firm name of the New England Washer Company, upon an agreement signed by

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company, and dated October 11, 1872, which, after reciting
le by the defendant to the plaintiff of "the right to make,
nd vend a certain patent right for improvement in wash
s granted to J. C. Tilton by letters patent of the United
," proceeded as follows:
ow, therefore, the said New England Steam Washer Com-
in consideration of the premises aforesaid, hereby promises,
nts and agrees to and with the said George W. Rider, that
the said Rider, shall, at the end and expiration of one
om and after the date of these presents, become and be
sfied with his said purchase above mentioned, then said
England Steam Washer Company will purchase of said
said patent right, and repay to him the amount by him
o said company for said patent right, less and deducting
said amount so paid by said Rider the amount of all such
as said Rider may have made of said patent right for said
ory above mentioned, or any part thereof, at a rate not
han ten dollars for every one thousand population living
the territory which may be by him sold, and in case said
shall sell said patent right for said territory, or any part
of, for any sum or sums at a less rate than ten dollars for
one thousand of population living upon said territory sold,
said Rider shall allow to said company and deduct from the
nt to be paid him by said company, a sum of money equal
dollars for every thousand people living on said territory,
may by him be sold as aforesaid; always provided, that, if
Rider shall require the said company to repurchase of him
ght by said company sold to him, as above mentioned, he
do so within fifteen days from the expiration of one year
he date of these presents: and if he shall fail to do so
the time above mentioned, then said company shall be
d and discharged from all liability, duty and obligation
nd by virtue of this agreement." Writ dated March 24,

declaration set forth the contract, and alleged that at the
ion of one year from the date of said contract the plaintiff
ne, and was dissatisfied with his said purchase, and within
days from the expiration of one year from the date of said
ct, he gave the defendants due notice of his dissatisfaction,

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and that he required them to repurchase said patent right, which they refused to do." Service of the writ was not made on Campbell. The answer of the other defendants was a general denial.

Trial in the Superior Court, before *Colburn*, J., who, after verdict, reported the case to this court in substance as follows:

It appeared in evidence that on October 11, 1872, the defendants, each signing his own name, assigned the patent right to the plaintiff and Edward E. Rider, who were father and son; that the father paid the entire consideration for the purchase of the territory; that the plaintiff became dissatisfied with his purchase within the year, and on October 20, 1873, caused to be served on each of the defendants notices signed by him, of which the following is a copy:

"To the New England Steam Washer Company: Please take notice, that having become dissatisfied with my purchase of the right to make, use and vend a certain patent right for improvement in wash boilers, granted to J. C. Tilton by letters patent of the United States, numbered 119,063, in, for and over the territory of the county of Providence in the State of Rhode Island, excepting the town of Foster in said county, I require you to repurchase from me said right, in accordance with the stipulations in your agreement with me, bearing date the 11th day of October, A. D. 1872."

The plaintiff testified that he called on the defendant Pease, after service of said notice, on October 20, 1873, or the day following, and that Pease told him that he and Thayer were the moneyed men of the partnership, and that Campbell did the business for the firm. "I asked Pease if he had not received his part or portion of the consideration for the purchase of the patent and he replied that he had, after deducting the expenses. I asked him what he would do about the contract. Pease replied that he knew nothing of the contract until informed of it by one Phillips. He said he would try to get Campbell to help me out of it." The plaintiff testified further that he had a conversation with Campbell and Pease after this action was brought, in the autumn of 1874, and that both refused then to repurchase the patent.

It was in evidence, also, that after the expiration of the year and fifteen days from the date of the contract, and some time be-

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the bringing of this suit, the defendant Thayer called at the of the plaintiff's attorneys, in answer to a letter from them, there stated that he was a member of the Steam Washer pany; that he had paid in $1000; that Pease and Campbell with him; that he was to share in the profits of the busi- but was not to be called on for any more money; that he ed no money from this sale, and could do nothing about the chase of the territory under the agreement, as he was too to raise money. This was all the evidence of the plaintiff the question of tender and refusal to repurchase, and the dants rested their defence upon the plaintiff's evidence.

on this evidence the defendant Pease asked the court to hat the plaintiff could not recover, because there was no nce that the plaintiff had offered to reconvey the patent conveyed to him and Edward E. Rider, as aforesaid, nor of adiness so to do, as the record title stood in the name of the tiff and his son, as appeared by the deed.

he plaintiff contended that there was sufficient evidence to go e jury upon the question, whether there had been such a re- on the part of Pease as to amount to a waiver of tender of d of reassignment, and that the refusal of Thayer amounted waiver of a tender, and was binding upon his other copart- It was further contended by the plaintiff that if the jury that he made a demand on the defendants for the perform- of their contract, an offer to perform on his part might be ed and understood; and that the neglect of the defendants mply with the plaintiff's demand, without offering any rea- r non-compliance, the jury might regard as dispensing with ecessity of tender.

judge ruled that there was not sufficient evidence of a re- o repurchase on the part of Pease to warrant the jury in a waiver of a tender of a deed, and that the refusal of r on the ground of his poverty was not binding on the nembers of the firm, for whom he did not profess to speak. plaintiff did not wish for a verdict against Thayer alone, e court directed a verdict to be rendered by the jury for fendants, which was done. The question was reported, by nsent of the parties, to this court for a decision of the law ed. If the ruling was correct, the verdict to stand; other- a new trial to be ordered.

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N. A. Leonard & W. S. Greene, for the plaintiff, cited *Rawson* v. *Johnson*, 1 East, 203; *Howland* v. *Leach*, 11 Pick. 151, 155; *Tinney* v. *Ashley*, 15 Pick. 546, 552; *Adams* v. *Clark*, 9 Cush. 215; *Cook* v. *Doggett*, 2 Allen, 439; *Smith* v. *Boston & Maine Railroad*, 6 Allen, 262, 273; *Hapgood* v. *Shaw*, 105 Mass. 276; *Carpenter* v. *Holcomb*, 105 Mass. 280, 284; *Scanlan* v *Geddes*, 112 Mass. 15.

G. M. Stearns, for the defendants. 1. The plaintiff was bound to reconvey to the defendants if he required them to repurchase. He could not recover the contract price without showing readiness and an offer on his part to perform his part of the contract. *Smith* v. *Boston & Maine Railroad*, 6 Allen, 262. *Collins* v. *Delaporte*, 115 Mass. 159. *Hunt* v. *Livermore*, 5 Pick. 395. *Dana* v. *King*, 2 Pick. 155.

2. The facts disclosed do not show that the plaintiff ever offered to convey to the defendants the patent rights, or that he ever realized that it was incumbent upon him to do so. Nor do they show that he was ready to perform. On the contrary it appears that he was only owner of one half the rights to be conveyed. There was no evidence that the plaintiff could get the other half to convey. In *Carpenter* v. *Holcomb*, 105 Mass. 280, 285, it appeared that the incumbrance was such that the plaintiff had the right to discharge it, and that it was understood by both parties he offered to do so. In this case the plaintiff had no power over the other half. For all that appeared Edward E. Rider would not sell his half.

3. There was no evidence of such a refusal to accept performance, if offered by the plaintiff, as would warrant the jury in finding a waiver of the right to require performance or an offer of performance. To warrant such a finding, there must be evidence of an "unqualified refusal," the plaintiff having the ability to perform and the defendant knowing he can perform. *Carpenter* v. *Holcomb*, *ubi supra*. *Pomroy* v. *Gold*, 2 Met. 500. *Cook* v. *Doggett*, 2 Allen, 439. In *Carpenter* v. *Holcomb*, the court find evidence that the refusal was unqualified on the part of the defendant, he knowing of the mortgage and not doubting the plaintiff's ability to remove it. In the case at bar the defendant Pease did not refuse absolutely, he only delayed. Neither of the defendants can be said to have waived the plaintiff's want of readi-

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and ability to perform, for there was no allusion to the con-
n of the title and no positive knowledge on their part as to
position of the title. The language of refusal was much
ger in *Pomroy* v. *Gold*, cited above, than in this case. It
ield no waiver. The statement of Thayer was not a positive
al to perform. He only declared, by reason of poverty, his
nt inability to raise the money. But, if there was a refusal
e part of Thayer, the ruling of the court was correct. The
iff, by the contract, was to notify the defendants, if he
red the repurchase, within a year and fifteen days. The
dants had the right to repurchase at once upon notice. The
iff must, therefore, be ready to convey when he gives notice
ne requires the repurchase and repayment. If there was no
to reconvey, or waiver on the part of the defendant, within
time, the plaintiff cannot recover. Furthermore, the plain-
lid not wish a verdict against Thayer alone. He therefore
l have no verdict, unless what occurred between Thayer and
plaintiff's attorney affected the other members of the firm.
her party treated the interview as anything more than one
ing to his private affairs. The deed of the patent was
ed by each member separately. The plaintiff had given
a notice long before. Thayer was at the office of the attor-
in answer to a letter to him individually. It does not appear
etter was about this business. He was not asked to repur-
. The plaintiff's attorney did not in fact speak to him
the matter. He volunteered some information about the
tion of his private finances and what he could not do. He
ot say that the firm would not or could not repurchase. At
it appears that he was not asked in behalf of the firm to
hase. It was necessary the plaintiff should have requested
mance and offered to perform on his part. *Tasker* v. *Bart-*
Cush. 359.

THE COURT. We are of opinion that the evidence of the
ff's conversations with Pease and with Thayer was suffi-
o warrant a jury in finding that the defendants had refused
orm the contract. It follows that the ruling of the learned
in favor of the defendants was incorrect, and, by the terms
report, there must be a *New trial.*

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BOSTON AND MAINE RAILROAD *vs.* PORTLAND, SACO AND PORTSMOUTH RAILROAD COMPANY.

Suffolk. Nov. 15, 1875. — Feb. 28, 1876. ENDICOTT, DEVENS, & LORD, JJ., absent.

Where a person, answerable in contract to two jointly, settles with one of them so that that one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone.

Where A., answerable in contract to B. and C. jointly, makes an agreement with B., by which B. agrees to pay, release and discharge all A.'s debts, and to indemnify him against all demands, such agreement puts an end to all real interest of B. in the claim of B. and C., and C. may maintain an action at law alone against A.

CONTRACT. The material facts, as they appeared from the pleadings and a report of the case by *Devens*, J., were as follows:

The plaintiff and the Eastern Railroad Company made a joint contract with the defendant, in 1847, by which they had possession of the defendant's railroad and other property, under an agreement to run and operate the same, paying the defendant a fixed dividend on its capital stock therefor, and taking to their own use all the income and profits of working the road. They further agreed to make all betterments, improvements, and additions to the equipment which they should find necessary or expedient, and the defendant promised to pay them for such betterments, improvements and additions, at the termination of the contract. The contract was terminated, according to its provisions, in January, 1871; and the plaintiff contended that there was due to the plaintiff and the Eastern Railroad Company at that time, from the defendant, about one million of dollars for such betterments and additions; and in this action sought to recover one half thereof.

In May, 1871, the Eastern Railroad Company made a new agreement with the defendant for the exclusive possession and running of the defendant's road, which agreement contained the following clause:

"In furtherance of the objects and purposes of the parties hereto, the said Eastern Railroad Company agrees with the said Portland, Saco and Portsmouth Railroad Company that the said

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ern Railroad Company will forthwith assume and will pay, se or discharge all the debts, liabilities and obligations of y description of the said Portland, Saco and Portsmouth oad Company, by reason of any matter or thing heretofore , suffered or transacted by said Portland, Saco and Ports- h Railroad Company, or which it may hereafter become lia- nd bound to pay or do, by reason of any acts or omissions of aid Eastern Railroad Company as the agent of the said Port- Saco and Portsmouth Railroad Company, under this con- and will at all times save and keep the said Portland, Saco Portsmouth Railroad Company harmless and indemnified and against all claims, penalties and forfeitures, suits and nds, for or by reason of any of the said debts, obligations abilities, and all debts, obligations, liabilities, penalties and itures arising from any of the acts or omissions of the said ern Railroad Company, as agents as aforesaid or otherwise, hat the said Portland, Saco and Portsmouth Railroad Com- y shall not suffer any loss or injury thereby, and will obey orders, judgments and decrees of any and all courts having diction in the premises, and save and keep the said Portland, o and Portsmouth Railroad Company, its property and fran- e, from loss or injury thereby and protected fully therefrom."

efore bringing the action, the plaintiff requested the Eastern oad Company to join therein as a party plaintiff, and it re- l to do so.

he judge reserved the question, for the consideration of the ourt, whether the plaintiff could alone maintain the action s share of the amount due under the contract. If the ac- could be maintained, it was to stand for trial, after having sent to an auditor; otherwise, judgment for the defendant, the court should be of opinion that by any amendment in rm of proceedings the plaintiff might maintain the action.

W. Paine & E. R. Hoar, (*C. F. Choate* with them,) for aintiff.

Lincoln, Jr., for the defendant.

AY, C. J. It nas long been a settled rule in this Common- , in accordance with the law as understood in England at me of our Revolution, that when a person, answerable in ct to two jointly, settles with one of them, so that that

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one has no longer any real interest in the matter in dispute, it is a severance of the cause of action, and the debtor is liable in an action at law to the other alone. Lord Mansfield, in *Garret* v. *Taylor* (1764), and *Kirkman* v. *Newstead* (1776), 1 Esp. Dig. 117. 1 Chit. Pl. (2d Am. ed.) 7. *Austin* v. *Walsh*, 2 Mass. 401, 405. *Baker* v. *Jewell*, 6 Mass. 460, 461. *Holland* v. *Weld*, 4 Greenl. 255. *New Braintree* v. *Southworth*, 4 Gray, 304, 306. *Sawyer* v. *Steele*, 4 Wash. C. C. 227, 228.

A rule of practice, long recognized and acted on, and so simple and convenient, enabling a court of law to do justice between the parties, without joining as a formal plaintiff one who has no real interest in the controversy, or compelling a resort to equity, should not be reversed upon technical grounds, or because the modern rule in England is different. See *Hatsall* v. *Griffith*, 4 Tyrwh. 487; *S. C.* 2 Cr. & M. 679.

The original agreement of this defendant was with the plaintiff and the Eastern Railroad Company jointly. But the subsequent contract of that corporation with the defendant to pay, release and discharge all its debts, and to indemnify it against all demands, while it did not amount to a formal release, did put an end to all real interest of the Eastern Railroad Company in the liability sought to be enforced in this action.

There being nothing in the report to show that the application of the Massachusetts rule will produce any inconvenience or danger of injustice, the case, according to the terms of the reservation, is *Referred to an auditor.*

HENRY FURNAS *vs.* EDMUND DURGIN.

Suffolk. Nov. 11, 1875. — Feb. 29, 1876. ENDICOTT & LORD, JJ., absent.

An entry upon a mortgaged estate, upon breach of condition, for foreclosure, is, without actual ouster, an eviction for which a warrantee can recover upon his covenant.

The certificate of an entry upon a mortgaged estate to foreclose the mortgage under the Gen. Sts. c. 140, § 2, duly recorded, is sufficient evidence of eviction to sustain an action for a breach of a covenant of warranty.

Upon an action for breach of covenant of warranty upon the eviction of the warrantee by an entry of the mortgagee for foreclosure, the measure of damages is the amount of the mortgage debt and interest, if that is less than the full value of the estate.

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acceptance by a grantee of a deed of land containing a clause stating that it is ject to a mortgage "which the grantee hereby assumes and agrees to pay with interest now due thereon," constitutes a contract by the grantee not merely to emnify the grantor, but to pay the debt, if it be the debt of the grantor.

mise to pay the debt of the promisee, no time being specified, is a promise to it when due, or forthwith if it is already due.

an action upon a promise to pay a debt of the promisee brought after it is due, before any payment by the promisee, the measure of the damages is the amount he debt and interest.

an action of contract against a grantor for a breach of the covenant of warty in a deed which contained a release by his wife of her right of dower and estead, there was evidence that the deed was signed by the wife before the ription of the land or any other writing had been made in the deed, and that never saw it afterward, and did not redeliver it after the description and the r parts had been written in. *Held*, that this did not invalidate the deed as nst the grantor.

an action of contract for a breach of warranty in a deed by the defendant to plaintiff of land in W. R., and the non-payment of a mortgage debt of the ntiff as stipulated in a deed of the plaintiff to the defendant, of land in H. P., ppeared that the parties had bargained to exchange the land in H. P., and land B. belonging to the plaintiff, for the land in W. R. belonging to the defendant. e execution of this exchange was disputed by the defendant. The plaintiff induced his deed to the defendant of the land in B., and was permitted, against defendant's objection, to put in an agreement signed by the defendant, and ted two days after the latter deed, whereby the defendant agreed to convey to plaintiff the same land in B. *Held*, that the paper, as evidence that the dedant, after the date when the plaintiff contended that the deeds were delivered, l treated the land in B. as his own, tended to show that the bargain had been ried out.

ONTRACT in several counts, some for breach of a covenant of anty in a deed from the defendant to the plaintiff, and others reach of an agreement to pay mortgages subsisting upon an e conveyed by the plaintiff to the defendant. Trial in the rior Court, before *Pitman*, J., who allowed a bill of exceptions substance as follows:

e defendant by his deed dated August 19, 1872, conveyed e plaintiff in fee simple a parcel of land in West Roxbury, the following covenants: "And I do hereby, for myself and eirs, executors and administrators, covenant with the said ee and his heirs and assigns, that I am lawfully seised in fee e of the granted premises; that they are free from all inances except a mortgage from M. E. Bowe to F. D. Osgood, ree hundred and fifty dollars and interest; that I have good to sell and convey the same as aforesaid; and that I will, ny heirs, executors and administrators shall, warrant and

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defend the same to the said grantee and his heirs and assigns f ever, against the lawful claims and demands of all persons."

This deed also contained a release by the defendant's wif her right of dower and homestead in the usual form.

The breaches of covenants alleged in the declaration were besides the mortgage mentioned in the deed the land was su to a mortgage made by Michael E. Bowe, a former own Freeman D. Osgood, for $3000, with interest at 8 per cent. able in one year, dated June 1, 1871, and duly recorded this mortgage had been duly assigned to Betsy J. Pope, w entered upon the land for possession for breach of the co of the mortgage and to foreclose; and that the plaint thereby lost possession. The plaintiff introduced in evide above mentioned deed and mortgage, the assignment of t gage by Osgood to Pope, dated July 6, 1871, duly recor a certificate of entry under the statute to foreclose the sa December 9, 1872, and duly recorded. It appeared tha ment had been made upon the mortgage from the date its assignment; also that in March, 1873, the defendan offer to the attorney of Pope to redeem the mortgage; ing further was shown as to payment or amount due reduce the consideration of the assignment, and to claim made by the plaintiff.

The plaintiff by his deed dated Augnst 19, 1872, du edged and recorded, conveyed to the defendant a pa in Hyde Park, "subject to mortgages amounting to $ the grantee hereby assumes and agrees to pay, and now due on existing mortgages on said property, the taxes due on the same." Among these mort for $1500, payable in one year, dated September recorded, made by the plaintiff to George D. Cox, payment of the plaintiff's promissory note payable of Cox, for the same amount and time, and of t The note and mortgage were assigned by Cox to J by deed of the same date, duly recorded.

The breach of contract alleged in the declarati payment of this note and mortgage. They were, ment, put in evidence by the plaintiff.

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e only evidence offered as to the payment or non-payment id note and mortgage was the testimony of Mr. Kittredge, testified that as attorney at law he called on the defendant ference to this mortgage within three days after maturity of ote, and that the defendant said he would pay it in a few and that he went two or three times after and received the answer.

e defendant introduced evidence tending to prove that he gave or delivered the deed of the West Roxbury estate, hat it was obtained from his office by fraud and in his ab- and without his knowledge or consent; also evidence tend- o prove that the plaintiff never delivered the deed of the Park estate to the defendant, and that said deed never was ed by the defendant, and that the defendant refused to ac- he deed with any clause in it whereby the defendant was to e and pay any mortgages, and that the plaintiff caused said to be recorded without the knowledge or consent of the de- nt. The plaintiff's testimony was to the contrary on all points.

e defendant testified that the deed of the West Roxbury was signed by Lucretia D. Durgin, his wife, by his own rement, before the description of the land or any other writ- ad been made in the deed, and that said Lucretia D. never t afterwards, and did not deliver it or redeliver it after said iption and other writing had been written in said deed.

appeared in evidence that the parties had bargained together change the real estate aforesaid in Hyde Park, and an estate awmut Avenue, Boston, both belonging to the plaintiff, for eal estate in West Roxbury, the property of defendant, and laintiff introduced the deed of said Shawmut Avenue estate himself to defendant, dated August 19, 1872, and duly ded. The plaintiff was allowed, against the objection of lefendant, although it was not alluded to in the declara- to put in an agreement signed by the defendant, dated Au- 21, 1872, whereby he agreed to convey to the plaintiff the mut Avenue estate, subject to the mortgages thereon, for .

e defendant requested the judge to instruct the jury as fol-

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"1. If the jury believe upon all the evidence that Lucretia D. Durgin signed the deed of the estate in West Roxbury before the description of the property and the other written parts thereof were written in, and that there was no redelivery thereof by said Lucretia D., then the conveyance would be void.

"2. If the jury are satisfied upon all the evidence that there was a good and legal delivery of the deed of the West Roxbury estate, and that there has been a breach of the covenants by defendant, then the measure of damages which the plaintiff would be entitled to recover would be the amount he had fairly paid to remove the incumbrance, and if he has paid nothing towards relieving the incumbrances he can recover only nominal damages.

"3. If the jury are satisfied upon all the evidence that there was a good and legal delivery of the deed of the Hyde Park estate to the defendant and accepted by him after knowing its contents, and that the plaintiff is entitled to recover, the measure of damages would be the amount which plaintiff has paid to remove the incumbrance, and if he has paid nothing on said $1500, he would be entitled to recover only nominal damages."

The judge refused to give these instructions; but, after appropriate instructions as to what the plaintiff must prove, ruled that the measure of damages for breach of the agreement to assume and pay the mortgage on the Hyde Park estate would be the amount of the note and interest; and that the measure of damages for breach of warranty in reference to the West Roxbury estate would be the amount necessary to redeem the same, namely, the mortgage debt outstanding, including interest.

The jury returned a verdict for the plaintiff, and assessed damages in the sum of $2740.30; and the defendant alleged exceptions.

F. A. Perry, for the defendant.

H. N. Shepard, for the plaintiff.

DEVENS, J. The plaintiff relies, to maintain his action, upon a breach by the defendant of the covenant of general warranty in the deed of the West Roxbury estate of the date of August 19, 1872, — this estate being at the time of its execution subject to a mortgage originally made to Michael E. Bowe, for the sum of $3000, and by intermediate assignments transferred to Betsy J. Pope, — and further upon an eviction by Mrs. Pope, who on De-

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er 29, 1872, made an entry upon the premises in order to
ose the said mortgage.

e certificate of entry produced at the trial is made by the
e evidence of the fact of such entry. Gen. Sts. *c.* 140, § 2.
am v. *Rutland*, 4 Cush. 172. *Thompson* v. *Kenyon*, 100
108. There was no other evidence of eviction or of any
ouster of the plaintiff from the occupancy of the premises,
e defendant contends that this entry was not an eviction
will enable the plaintiff to recover upon his covenant of
ity. But that it is so is settled by the law of this Com-
ealth. *Tufts* v. *Adams*, 8 Pick. 547.

White v. *Whitney*, 8 Met. 81, 89, the facts, as stated in the
n of the chief justice, are not distinguishable from those
present case. The entry to foreclose was made under the
ons of the Rev. Sts. *c.* 107, §§ 1, 2, which do not vary from
of Gen. Sts. *c.* 140, and it was held that the "taking actual
sion of the premises, by means of which the plaintiff was
," was a breach of the warranty. That case did not show,
ore than the one before us, any actual ouster from occu-
of the holder of the equity of redemption, but from the
f such entry the legal possession was that of the mortgagee,
er the occupant might be. Permitting the mortgagor to
n in occupancy during the three years, does not render the
any less effectual for the purpose of foreclosure. *Ellis* v.
, 8 Allen, 161. *Fletcher* v. *Cary*, 108 Mass. 475. The
ent that, if the covenantee upon such eviction may recover
l damages, he may keep them and not devote them to the
ent of the mortgage debt, leaving the covenantor still per-
y liable thereon, is one of force; but it is equally true that
covenantee cannot recover his full damages when a step is
which, if not arrested, must deprive him of his estate, he
se it simply because by reason of the mortgage upon it he
e without the means of raising money upon his only secu-
The covenantor can avoid this difficulty by doing what he
namely, paying the debt at any time before judgment, thus
g the damages to those merely nominal.

rule of damages, as given by the court, was also correct.
neral rule is that, where the grantee becomes seised, the
having passed by force of the conveyance, and is after

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wards evicted by a paramount title, the value of the estate at the time of eviction is the measure of damages. *Gore* v. *Brazier*, 3 Mass. 523, 543. *Norton* v. *Babcock*, 2 Met. 510. It has been held, however, in favor of the covenantor, that when the mortgage is less than the value of the land, and it would be plainly for the interest of the holder of the equity of redemption to redeem, the covenantee on such eviction shall recover only the amount of the mortgage, with interest, and not the full value of the estate. *Tufts* v. *Adams*, *ubi supra*. *White* v. *Whitney*, *ubi supra*.

The plaintiff also claimed to recover of the defendant for breach of the agreement in the deed of the Hyde Park estate to the defendant, which was accepted by the defendant, and contained this clause: "Subject to mortgages amounting to $6500, which the grantee hereby assumes and agrees to pay, and all interest now due on existing mortgages on said property, together with the taxes due on the same."

For the debt secured by the mortgage the plaintiff was liable, and the question presented is whether the plaintiff is entitled to recover nominal damages only, as contended by the defendant, or whether he may recover the amount of a mortgage upon the estate of $1500, with interest, which neither party has paid. The precise question involved here was raised in *Brewer* v. *Worthington*, 10 Allen, 329, but it was not there necessary to decide it. If the agreement is to be treated as one merely to indemnify the plaintiff against any loss or damage by reason of this mortgage, it would be necessary to show that he had been in some measure damnified thereby. *Little* v. *Little*, 13 Pick. 426. But there is no reason why an agreement may not be made which shall bind the party so contracting to pay the debt which another owes, and thus relieve him or his estate from it, and, if the promise thus made is not kept, why the promisee should not recover a sum sufficient to enable him so to do. Such is the construction to be given to the agreement in the case before us. As a consideration for the property conveyed to him, the plaintiff conveyed the Hyde Park estate to the defendant, who contracted not to indemnify the plaintiff against, but to pay the mortgages upon it, and, if he has failed to do this, the plaintiff should be entitled to recover the amount which the defendant thus agreed

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y. It is a portion of the consideration money due the plain-
hich he was to receive by payment of a debt for which he
iable, which he thus recovers, when the defendant fails to
rm his promise. That the plaintiff should be kept subject
lebt from which the defendant agreed to relieve him is a
uing injury for which a sum of money which will enable
o discharge it is an appropriate remedy in damages.

at a promise to pay a debt due from the promisee, even
e it has not been paid by him, is one upon which an action
be maintained and damages recovered to the amount of such
is held by many authorities. *Holmes* v. *Rhodes*, 1 B. & P.
Cutler v. *Southern*, 1 Saund. 116, Wms.' note. *Toussaint*
artinnant, 2 T. R. 100. *Martin* v. *Court*, 2. T. R. 640.
son v. *Bell*, 7 T. R. 97. *Thomas* v. *Allen*, 1 Hill, 145.
emore v. *Radford*, 9 M. & W. 657. *Penny* v. *Foy*, 8 B. &
1. In *Lethbridge* v. *Mytton*, 2 B. & Ad. 772, the defend-
by a settlement made upon his marriage, conveyed an estate
certain trusts, and covenanted with the trustees to pay off
nbrances on the estate to the amount of £19,000, within a
and it was held, upon his failure to do so, that the trustees
entitled to recover the whole £19,000 in an action of cove-
, although no payment had been made by them, and no
al damage was laid or proved. Whether the contracts in
of these cases were anything more than contracts of indem-
and therefore whether there could under our decisions have
any recovery, might perhaps be questioned. *Cushing* v.
s, 15 Mass. 69. *Little* v. *Little*, *ubi supra*. That, however,
not now be considered, as we treat the agreement before us
ne not for indemnity merely, but for payment. Nor is it im-
ant that the cases above cited are those in which the promisor
ed to pay on a particular day, or within a specified time.
t cannot affect their application. An agreement to pay a
t, no time being specified, is an agreement to pay it when due,
rthwith, if it be already due. Here it appears that the prom-
was made on August 19, 1872, that the mortgage debt which
defendant was to assume and pay became due on September 1,
2, and that the action was brought on March 10, 1873. That
action may be brought upon a promise to pay a debt due from
promisee, and, although he has not paid the same, full dam-

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ages recovered, is recognized clearly by the case of *Goodwin* v. *Gilbert*, 9 Mass. 510. The question is not there discussed in the opinion of the court, which treats another inquiry as the only one important in the case, but, having disposed of that in favor of the plaintiffs, judgment was rendered for the full sum.

There is an embarrassment undoubtedly where the agreement is to pay a debt due from the promisor as well as the promisee. It is similar to that heretofore considered, where there is an eviction by one holding a mortgage title, and the covenantee is allowed to recover in damages the amount of the mortgage upon which the covenantor is personally liable. As the Hyde Park estate, now the property of the defendant, is charged with the payment of the mortgage debt, if the plaintiff should not devote the sum recovered by him to its payment, the defendant might hereafter, in order to relieve his property, be compelled to pay the amount a second time. There is no mode, at law, by which this difficulty can be avoided, and the plaintiff enabled to receive the benefit of his contract. *Loosemore* v. *Radford*, *ubi supra*. Perhaps in equity, where a proper case for its interference was shown, a remedy would be afforded, that would secure the party paying under such circumstances from having the payment made by him devoted to any other object than that which would relieve him or his estate from further responsibility. Howeve[illegible] be, the want of elasticity in the forms of the common [illegible] does not enable us to make such a decree here as wo[illegible] the rights of all parties, should not prevent us from gi[illegible] plaintiff the benefit of the contract which he has made, [illegible] him to remain subject to the burden of the debt, whi[illegible] fendant has agreed to extinguish. As was suggested [illegible] other part of the case, the defendant may, if he will, pe[illegible] agreement and pay the debt at any time before final [illegible] and the damages then to be recovered will be nominal o[illegible]

The other exceptions argued by defendant may be b[illegible] posed of.

Whether the bargain, which there was evidence t[illegible] show had been made for an exchange of certain real [illegible] Hyde Park and a house on Shawmut Avenue, both o[illegible] the plaintiff, for an estate in West Roxbury, owned by th[illegible] ant, had ever been carried out and the deeds delivered wa[illegible]

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a dispute at the trial, and evidence that, after the date when plaintiff claimed the deeds to have been delivered, the de- ant had treated the estate on Shawmut Avenue as his own, mately tended to show that such bargain had been actually leted, although the suit brought by the plaintiff did not re- o an alleged breach of covenant as to that estate.

ere was evidence that the signature of Lucretia D. Durgin, of the defendant, who released thereby her right of dower of homestead in the West Roxbury estate, had been made e any description had been written in the deed, and that she r saw it and did not redeliver it afterwards. But even if would render the deed invalid as to her, it would not relieve lefendant from the covenants in the deed which bound him

Exceptions overruled.

MAS UPHAM, trustee, *vs.* HARRIET M. EMERSON & another.

lk. Nov. 16, 1875. — Feb. 29, 1876. COLT & LORD, JJ., absent.

ator left property in trust to pay one third the income to his widow for life, the other two thirds to his daughters, and in case of the death of either daugh- her share was to be paid to her heirs. The widow waived the provisions of will, under the St. of 1861, *c.* 164. *Held*, on the death of a daughter, that widow, although an heir of the daughter, could take no beneficial interest, as h heir, under the will.

tator devised all his estate, real and personal, to a trustee in trust to pay of the income thereof one third to the wife of the testator during her life; and the aining two thirds, and, after the death of the wife, the whole of said net in- me, to his daughters A., B. and C., during their lives, and, after the death of or more of them, to pay over the proportion of said net income, to which said eased would have been entitled if living, to the legal heirs of such deceased; l, upon the death of the wife and all the daughters, to convey all the said real l personal property in fee to the legal heirs of the daughters, in equal propor- ns, by right of representation. The testator left a widow, two daughters by a mer wife, one of whom was the daughter A. named in the will, and one daugh- by his then wife, who was the daughter C. named in the will. After the death the testator, and in the same year, A. died without issue, and C. afterwards d without issue. The wife of the testator seasonably waived the provisions of e will in her favor, under the St. of 1861, *c.* 164. *Held*, that after the widow d received the personal estate to which she was entitled, and one third of the in- me of the real estate as dowress, the remaining two thirds of the income of the al estate, and the whole income of the remaining personal estate, were to be

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divided, upon the death of A., between the surviving sisters equally, and that upon the death of C. the sister still surviving should receive three fourths of the whole income, the remaining one fourth to be added to the income afterwards to be distributed.

BILL IN EQUITY by the executor of, and trustee under, the will of William P. Emerson, against Harriet M. Emerson, the widow of the testator, and Helen W. Beseler, his daughter, to obtain the instructions of the court. The case was reserved by *Devens*, J., for the consideration of the full court, upon the bill and answers. The facts of the case appear in the opinion.

O. Stevens & H. Stevens, for the widow.

S. B. Allen & J. D. Long, for the daughter.

DEVENS, J. William P. Emerson died April 19, 1871, leaving a widow, Harriet M. Emerson, two daughters, Helen W. Beseler, wife of William Beseler, and Adelaide A. Emerson, children by a former wife, and Emily U., daughter by said widow, and no other issue. By the will, all the estate, real and personal, was devised and bequeathed to the trustee in trust to pay of the net income thereof one third to the wife of the testator, Harriet M. Emerson, during her life, and the remaining two thirds, and, after the death of the widow, the whole of said net income, to the daughters Helen, Adelaide and Emily, in equal shares, during their lives, and, "after the death of one or more of them, to pay over the proportion of said net income, to which such deceased would have been entitled if living, to the legal heirs of such deceased; and, upon the death of my wife and all of my said daughters, to convey assign and transfer all my said real and personal property to the legal heirs of my said daughters, in equal proportions, by right of representation, to have and to hold to them, their heirs and assigns, forever."

After the death of the testator, and in the same year, Adelaide died without issue, and Emily died without issue in April, 1875. The widow in due season waived the provisions of the will in her favor. By this waiver, the rights of the widow in the estate of her deceased husband, both real and personal, were the same as those which she would have had if he had died intestate, St. 1861, *c.* 164, subject to the limitations imposed by that statute, which in no way affect the present inquiry. Such a waiver must be treated as depriving her of any beneficial interest under and by virtue of the provisions of the will.

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e the death of Adelaide, she not being a child of the
the share of income to which she would have been enti-
living has been divided between her surviving sisters.
ts. c. 91, § 5. To this, neither the widow nor surviving
bjects, and it was undoubtedly correct. It is now con-
on behalf of the widow, that the proportion of the in-
which Emily would have been entitled if living, and
he has received since the death of her sister of the half
Adelaide, should be hereafter divided between herself and
viving sister, while the latter claims the whole of such

provision of the will as to the payment of the income must
rued as directing the income of each share to be paid, at
ease of each daughter, to those who should be at that time
l heirs, and who are then to be ascertained. The widow,
ence to her daughter, is properly included within the term
' Gen. Sts. c. 91, § 1. But if she is to take at all, it
e as a purchaser under the will. She can take nothing in
ome by descent from her daughter; that daughter's estate
ted with her life, and there was nothing to be inherited
one. The widow is one of a class of persons who are to
independent objects of the testator's gift, and the term
dicates those who, upon the occurrence of the contingency
decease of the daughter, are to take the income as such.
v. *Cordis*, 4 Allen, 466. *Loring* v. *Thorndike*, 5 Allen,

e widow had been expressly named as one of those who
be entitled to take, as if the will had provided that in case
death of either sister without issue, the share of income
d to be paid to her should be thereafter paid to her mother
viving sister, in equal parts, it would hardly be contended
e mother must not take, if at all, by force of the will; and
ile the language might then be more direct and explicit,
e idea is expressed here with entire clearness. It is not
y to hold that the widow, by renouncing the provisions in
r, is to be held to have renounced the benefits which she
eceive by reason of her relation to some devisee or legatee
he will; so that if there had been an absolute devise or
o her daughter, she would be prevented by her waiver

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from receiving what she would otherwise be entitled to as heir No such case is here presented, but her waiver must be deemed to deprive her of her right to take as one of a class who are to take by virtue of the will, and who have been described simply by the relation in which they stand to her daughter. She therefore is not entitled to half of the income to which Emily was entitled.

In regard to the claim of Helen W. Beseler to the whole of the income, to recur to the illustration used above, it must be treated as if she and her mother had been named as those who were to take the income of the share of Emily in case of her decease; and thus considering it, her claim to more than one half the income of Emily's share cannot be supported. If the widow were not living, this would pass to her, as she would then constitute the whole class who were entitled to take; but as one of the class is living, and entirely able to take, except for the reason that she has waived the provision entitling her to do so, that waiver cannot be interpreted as being for the benefit of the other. Where a devise or bequest is made to a number of persons as tenants in common, if one of them dies in the testator's lifetime, his share does not pass, because, having given to each a certain proportion of his property, it would not be consistent with the testator's declared intention to give to the survivors a larger proportion; and where there is a bequest to more persons than one, by words showing that their enjoyment of the same is to be several and not joint, the share of one who dies before the testator does not pass, but remains as undevised estate. *Lombard* v. *Boyden*, 5 Allen, 249. The same principle is applicable here, and that is that, having received all to which she was entitled in the contingency that has occurred under the will, Helen is not to receive more because the bequest to another has failed. What was thus bequeathed must pass into and be added to the remainder, which is to be distributed at the decease of the widow and daughters. In the case of a lapsed legacy, it is the remainder of the estate which is to receive the benefit of it, there being no person capable of taking it; so here, neither the widow nor the daughter Helen being entitled to take the share of income appropriated to the widow, — the one, because she has waived the provisions of the will; the other, because the contingency when she can do

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not arrived, — it must be added to that which is hereafter distributed.

not important to discuss whether the effect of the waiver widow has operated to increase or diminish the share of to which Helen would otherwise be entitled. The tes- must have been aware that it was in the power of his by waiving the provisions of the will, to receive the por- the estate to which she would have been entitled if he ed intestate, and must be deemed in what he did to have plated it.

lying the rules we have indicated to the case before us, he widow had received the personal estate to which she titled, she would as dowress continue entitled to one third income of the real estate. Two thirds of the income of l estate and the whole income of the remaining personal ty would constitute the income to be divided between the ers. Until the death of Adelaide, this should have been l into three parts, and each sister should have received one of the whole. Upon the death of Adelaide, each surviv- ter should have received one third and one half of the third Adelaide would have received if living, or, differently ex- d, one half of the whole income. Upon the death of , the surviving sister, Helen, is to receive one half of the income and one half of that which Emily would have re- if living, that is to say, three fourths of the whole income, the remaining fourth of the income is to be added to the ader, which is to be distributed hereafter.

Decree accordingly.

JOHN G. DAY *vs.* ASA H. CATON.

Nov. 19, 1875. — Feb. 29, 1876. COLT & LORD, JJ., absent.

ion to recover the value of one half of a party wall erected by the plaintiff on his estate and partly on that of the defendant, the jury may, in the ab- of an express agreement as to payment on the defendant's part, infer a to pa , if the plaintiff undertook and completed the wall with the ex

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pectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection.

CONTRACT to recover the value of one half of a brick party wall built by the plaintiff upon and between the adjoining estates, 27 and 29 Greenwich Park, Boston.

At the trial in the Superior Court, before *Allen*, J., it appeared that, in 1871, the plaintiff, having an equitable interest in lot 29, built the wall in question, placing one half of it on the vacant lot 27, in which the defendant then had an equitable interest. The plaintiff testified that there was an express agreement on the defendant's part to pay him one half the value of the wall when the defendant should use it in building upon lot 27. The defendant denied this, and testified that he never had any conversation with the plaintiff about the wall; and there was no other direct testimony on this point.

The defendant requested the judge to rule that, "1. The plaintiff can recover in this case only upon an express agreement."

"2. If the jury find there was no express agreement about the wall, but the defendant knew that the plaintiff was building upon land in which the defendant had an equitable interest, the defendant's rights would not be affected by such knowledge, and his silence and subsequent use of the wall would raise no implied promise to pay anything for the wall."

The judge refused so to rule, but instructed the jury as follows: "A promise would not be implied from the fact that the plaintiff, with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation and allowed him so to act without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff."

The jury found for the plaintiff; and the defendant alleged exceptions.

H. D. Hyde & M. F. Dickinson, Jr., for the defendant.

F. W. Kittredge, for the plaintiff.

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ENS, J. The ruling that a promise to pay for the wall not be implied from the fact that the plaintiff, with the ant's knowledge, built the wall, and that the defendant , was substantially in accordance with the request of the ant, and is conceded to have been correct. Chit. Con. Am. ed.) 86. *Wells* v. *Banister*, 4 Mass. 514. *Knowl-Plantation No.* 4, 14 Maine, 20. *Davis* v. *School District dford*, 24 Maine, 349.

defendant, however, contends that the presiding judge in-y ruled that such promise might be inferred from the fact e plaintiff undertook and completed the building of the th the expectation that the defendant would pay him for defendant having reason to know that the plaintiff was with that expectation, and allowed him thus to act with-ection.

fact that the plaintiff expected to be paid for the work certainly not be sufficient of itself to establish the exist-a contract, when the question between the parties was r one was made. *Taft* v. *Dickinson*, 6 Allen, 553. It e shown that, in some manner, the party sought to be l assented to it. If a party, however, voluntarily accepts ails himself of valuable services rendered for his benefit, e has the option whether to accept or reject them, even if s no distinct proof that they were rendered by his author-request, a promise to pay for them may be inferred. His dge that they were valuable, and his exercise of the option l himself of them, justify this inference. *Abbot* v. *Hermon*, nl. 118. *Hayden* v. *Madison*, 7 Greenl. 76. And when nds by in silence and sees valuable services rendered upon l estate by the erection of a structure, (of which he must rily avail himself afterwards in his proper use thereof,) ilence, accompanied with the knowledge on his part that ty rendering the services expects payment therefor, may e treated as evidence of an acceptance of it, and as tend-show an agreement to pay for it.

maxim, *Qui tacet consentire videtur*, is to be construed in-applying only to those cases where the circumstances are t a party is fairly called upon either to deny or admit his . But if silence may be interpreted as assent where a

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proposition is made to one which he is bound to deny or admit, so also it may be if he is silent in the face of facts which fairly call upon him to speak. *Lamb* v. *Bunce*, 4 M. & S. 275. *Conner* v. *Hackley*, 2 Met. 613. *Preston* v. *American Linen Co. ante*, 400.

If a person saw day after day a laborer at work in his field doing services, which must of necessity enure to his benefit, knowing that the laborer expected pay for his work, when it was perfectly easy to notify him if his services were not wanted, even if a request were not expressly proved, such a request, either previous to or contemporaneous with the performance of the services, might fairly be inferred. But if the fact was merely brought to his attention upon a single occasion and casually, if he had little opportunity to notify the other that he did not desire the work and should not pay for it, or could only do so at the expense of much time and trouble, the same inference might not be made. The circumstances of each case would necessarily determine whether silence with a knowledge that another was doing valuable work for his benefit, and with the expectation of payment, indicated that consent which would give rise to the inference of a contract. The question would be one for the jury, and to them it was properly submitted in the case before us by the presiding judge. *Exceptions overruled.*

BENJAMIN DERBY *vs.* FRAMINGHAM AND LOWELL RAILROAD COMPANY.

Middlesex. Jan. 13. — Feb. 14, 1876. COLT & ENDICOTT, JJ., absent.

A railroad corporation, desiring to take lands outside the limits of its road, filed its location over a lot of land whose owner afterwards conveyed a part of the lot to the corporation. The county commissioners, subsequently, on the petition of the corporation, ordered that it have leave to take the land included within the location. *Held*, under the Gen. Sts. c. 63, § 19, providing that railroad corporations shall not take lands without the limits of their railroad without the consent of the owner, unless the county commissioners first prescribe the limits within which the same may be taken, that the corporation acquired no right in the land under its location, and that the corporation was bound, under the Gen. Sts. c. 63, § 43, to erect suitable fences between the land conveyed to it and the rest of the lot.

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TITION IN EQUITY, under the Gen. Sts. c. 63, §§ 43, 44, to
el the respondent to erect suitable fences between its land
ne land of the petitioner. The answer alleged that the land
the petitioner desired to have separated by a fence was
l by the respondent. The case was submitted to the judg-
of the court upon an agreed statement of facts, in substance
ows:

March 23, 1872, the petitioner was the owner of a certain
of land in Concord, containing about ten acres. On that
the respondent filed in the office of the clerk of the county
issioners of Middlesex County its location over the whole
d tract of land, and on the same day presented a petition
e county commissioners to approve of and confirm the loca-
f its road over the land of the petitioner. On October 10,
the petitioner conveyed to the respondent a portion of the
ontaining four acres. On July 23, 1873, the county com-
oners ordered that the respondent have leave, in accordance
its petition, to take the lands embraced in the location filed
. The petitioner, who owned no land adjoining the land
aced in the alleged location, contended that the respond-
nould erect a fence between the parcel of land conveyed by
eed and the remainder of the tract embraced in the alleged
ion. *Wells*, J., entered a decree for the petitioner; and the
ndent appealed.

Hoar, for the petitioner.

A. Torrey, for the respondent.

RAY, C. J. A railroad corporation has no right to take and
opriate to its own use lands of any person without a strict
liance with the provisions of the statutes which authorize it
do. The Gen. Sts. c. 63, § 19, expressly provide that lands
out the limits of its railroad shall not be taken without per-
ion of the owner, unless the county commissioners "first
cribe the limits within which the same may be taken." As
uch limits were prescribed by the commissioners before the
ondent in this case filed its location over the land in question,
equired no right, against the will of the owner, in any part of
land outside the limits of its road; so much of this land as
not been conveyed to the corporation by the owner remained
; and no reason is shown why he should not have a decree

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tenant Ellen McCarty paid from the earnings of her labor the sum due upon the mortgage of Barney Smith to Elizabeth Dawson, for which a receipt was given on the back of the mortgage, and, in consideration of that payment, Walter Adams, administrator of the estate of Elizabeth Dawson, deceased, assigned the mortgage to the tenant Ellen McCarty, on May 10, 1875. Barney Smith, by his warranty deed of February 15, 1870, conveyed the premises to his son, William Smith, (deceased before service of the demandant's writ) and Lawrence Smith, but the demandant did not join in this deed.

The demandant on October 1, 1870, demanded in writing of William Smith and Lawrence Smith dower and homestead in the premises.

Upon the foregoing facts, the judge ruled that the demandant was entitled to dower in the premises described in the writ, and ordered judgment for her; and the tenants alleged exceptions.

H. L. Hazelton & W. Adams, for the tenants.

A. Cottrell, for the demandant.

MORTON, J. It appears by the bill of exceptions that the land in which the demandant claims dower was conveyed to her husband by George Warren on November 30, 1858, and that on the same day her husband mortgaged it to Elizabeth Dawson, to secure the payment of his note of one hundred dollars procured by him of her for the purpose of paying for this land. But this does not necessarily show that he had only an instantaneous seisin. It must be shown that the deed to him and the mortgage by him were parts of one and the same transaction. *Webster* v. *Campbell*, 1 Allen, 313. *Hazleton* v. *Lesure*, 9 Allen, 24. *King* v. *Stetson*, 11 Allen, 407.

The presiding judge, who tried this case without a jury, may have found upon the evidence before him that the deed and mortgage were not parts of one act or transaction, and therefore that the seisin of the demandant's husband was not instantaneous, in which case the demandant, as she did not sign the mortgage, is entitled to dower in the whole estate. Without considering the other point taken by the demandant, that the mortgage was paid and discharged, these exceptions cannot be sustained because the bill does not show any error of the court below in matter of law. *Exceptions overruled*

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F W. CRAFTS & others *vs.* CHESTER JUDSON & another.
STER JUDSON & another *vs.* J. C. STANTON & others.

sex. Jan. 18. — Feb. 29, 1876. COLT & ENDICOTT, JJ., absent.

s sold bounded on a private way belonging to the grantor. No way was
aid out, though a culvert was built by the grantor across a piece of the land
d by him and a fence erected. A plan of the land showing a way had been
nsly recorded in the registry of deeds, but the deed made no reference to
n. *Held*, that the plan did not control, and that the location of the way
matter of fact, in determining which the conduct and declarations of the par-
e nature and position of the fence and culvert, and the purposes for which
ere built were competent evidence.

BILLS IN EQUITY. The first was brought by Relief W. Walter Crafts, J. C. Stanton, Charles F. Tuttle and Patea, the owners of land lying on the westerly side of a priay in Newton, against Chester Judson and Christopher am, owners of land on the east side of said way, to restrain fendants from obstructing the way.

second was brought by Chester Judson and Christopher am against J. C. Stanton, Patrick Shea and Charles F. , to restrain the defendants from obstructing the same way. lands of the plaintiffs and of the defendants were sepaby a private way forty feet wide, running northerly from ngton Street, and the question in dispute was whether the he points of the beginning of which were not in controran north 28¼° west or north 31¼° west.

cases were referred to a master who found the facts to be ows: In 1846, Judson was the owner of all the land now by the parties to these suits. Subsequently he divided his nto lots and made a plan thereof, which was publicly exd in Newton and recorded in the Middlesex Southern Dis. egistry of Deeds, on August 23, 1846. This plan showed y in dispute running in the direction, which the defendants first case contend is the true direction.

August 1, 1849, Judson gave to Nathan Crafts, through the plaintiffs in the first case claim, a bond for deed of Newton, and on November 1, 1851, conveyed the land to a deed describing the land as lying on the northerly side hington Street and bounded "southerly by Washington

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Street; westerly by land of W. Parks; northerly on land of Andrew J. Allen; and easterly by my own land, (or by the line of a road laid out through my land from Washington Street northerly to Andrew J. Allen's line.") The deed also contained the following clause: "The road laid out by me from Washington Street, northerly to Andrew J. Allen's line, and being the eastern boundary of the above described land, is to be kept in order by parties who may own and abut on said road while it remains a private way, reserving to myself the right to allow it to become a public road, should I see fit so to do. Said Crafts, his heirs and assigns to have the privilege of said road in common with me, my heirs and assigns."

Neither the bond nor the deed contained any reference to the plan; nor was the private way then laid out; though there was evidence that a copy of the plan was given to Crafts before he bought. A brook ran through the land conveyed to Crafts, and also through the remaining land of the grantor. After the bond was given and before the deed was executed, Judson built a culvert, for the brook to run through, across what the plaintiffs in the first case contend is the way, and put up a fence on the line thereof. This fence, Judson testified, was put up without making any measurements and for the temporary purpose of pasturing cattle. Part of the fence remained until 1862, and part until 1866. No question as to boundaries arose in the lifetime of Nathan Crafts, who died in 1857. The report of the master also set forth certain deeds of Judson of the land on the east of the way, bearing on the question of fact where the line of the way was on that side, and also conflicting testimony as to declarations made by Judson in regard to the location of the way.

Hearing before *Morton*, J., who decided that the location of the private way was the same as laid down on the recorded plan, and that the location had not been altered by the fence and culvert; and entered a decree for the defendants in the first case, and for the plaintiffs in the second; and the adverse parties appealed.

I. D. Van Duzee, for the appellants.

N. C. Berry, for the appellees.

DEVENS, J. At the time when a bond for a deed was given by Judson to Nathan Crafts, the land agreed to be conveyed was

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case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts, in substance as follows:

In May, 1862, Sarah H. Ward bought and became possessed of this land of the assignee in insolvency of the estate of her husband, Andrew H. Ward, and she held it until her decease October 6, 1873. She left a husband and several children. Her will, dated July 22, 1862, and duly admitted to probate, after certain specific bequests of personal property, proceeded as follows:

"I give to my son, Joseph W. Ward, all the remaining part of my furniture not previously disposed of, consisting of looking glasses, pictures, crockery, bedsteads, feather beds, bolsters, pillows, mattresses, blankets, comforters, bed-quilts, portable mahogany wash sinks and wash stands, tables, bureaus, sideboard, portable closets, wardrobe, fire grates and stoves, my own personal library, and everything belonging to me, of household furniture and stuff, not otherwise disposed of.

"I constitute and appoint Joseph W. Ward my residuary legatee.

"The property bequeathed me by my brother, Hon. David Henshaw, and the property I have in expectation from my sister, Mrs. Elizabeth Dodge, and any other property that may come into my possession, I will, and ordain, and bequeath, as follows, viz. that it may all be divided equally into four parts and shares, one fourth share or part to Joseph Walter Ward, and his heirs; one fourth share or part to Andrew Henshaw Ward, Jun'r., and his heirs; one fourth share or part to David Henshaw Ward and his heirs; one fourth share or part to Frances Antoinette Danforth and her heirs."

The land in question was not included in the property bequeathed to her by her brother, David Henshaw, nor did she ever have any of it in expectation from her sister, Elizabeth Dodge. A part of the property bequeathed to the testatrix by her brother, David Henshaw, was real estate of which she was seised at the date of the will and of which she died seised.

The plaintiff's title comes through mesne conveyances from Joseph W. Ward named in the will, the son of Sarah H. Ward who derives his title solely from this will. If by the will Sarah

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ard's title to the land passed to Joseph W. Ward, judgment
o be entered for the plaintiff for the sum of fifty dollars;
vise for the defendant.

W. Hammond, for the plaintiff.

G. Pope, for the defendant.

VENS, J. That it was the intention of the testatrix to dis-
of both her real and personal estate, is sufficiently indicated
e clauses of the will which dispose of the property be-
hed to her by her brother and "any other property that
come" into her possession. The word "property" includes
estate, and there was real estate upon which the first of these
es could operate. Nor would the use of the word "be-
thed," in describing the property which came to her from
brother, instead of the words "devised and bequeathed,"
an intention to confine the operation of the will to personal
erty only, especially when used in connection with the sub-
nt clause. *Doe* v. *Lainchbury*, 11 East, 290. *Doe* v. *Mor-*
6 B. & C. 512. *Edwards* v. *Barnes*, 2 Bing. N. C. 252.
v. *Hunt*, 4 Gray, 190, 193.

hen, therefore, the testatrix, owning real estate other than
which came to her from her brother, constitutes Joseph W.
her "residuary legatee," it must be considered that by this
she intended that the residuum of her estate, both real and
al, should pass to him. The words she used were sufficient
s purpose. *Hunt* v. *Hunt*, *ubi supra*. *Hardacre* v. *Nash*,
R. 716. *Day* v. *Daveron*, 12 Sim. 200. *Evans* v. *Crosbie*,
n. 600. *Davenport* v. *Coltman*, 9 M. & W. 481.

eph W. Ward being entitled, under the will of his mother,
e real estate which the plaintiff agreed to sell, it follows
the plaintiff could make a good title to it by virtue of the
yance to him. He is, therefore, entitled to judgment.

Judgment for the plain tiff.

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INHABITANTS OF EASTHAM *vs.* CORNELIUS ANDERSON.

Barnstable. Jan. 25. — Feb. 29, 1876. ENDICOTT & DEVENS, JJ., absent.

A warrant for a town meeting contained an article, "to see if the town will sell the Herring Brook for three years or more, as the town may deem proper, to the highest bidder." Under this article, Herring Brook was sold to the defendant for three years, for $170 a year, he being the highest bidder. *Held*, in an action by the town to recover the price agreed, in which it appeared that the defendant had enjoyed the fishery, that the sale by the town was in the nature of a lease, and that the defendant was estopped to deny the title of the town or its right to sell the fishery, unless he was evicted or interrupted by some one having a paramount title; and that the questions how far the brook was understood to extend, and whether it was navigable where the defendant took fish, were for the jury.

The St. of 1871, *c.* 281, § 2, providing that "the proprietor of any unnavigable tidal stream, where the same empties into salt water, and in which fishes are lawfully cultivated or maintained, shall control the fishery of said stream within his own premises, and also beyond and around the mouth of said stream, so far as the tide may ebb: provided, it does not ebb more than eighty rods," applies only to cases where the waters of a stream are inclosed by the proprietor for the purpose of cultivating fishes.

The lessee from a town of the right of fishery in a brook is liable for the stipulated rent, if he has enjoyed the premises, notwithstanding the statute of frauds, although his promise is not in writing.

CONTRACT. The declaration was as follows: "And the plaintiff says, that, being the lawful owner of a certain herring fishery in said town of Eastham, which by law the plaintiff had the right to manage, control, have, use and dispose of, the defendant purchased of the plaintiff the right to have said fishery, and the beneficial use of said fishery, and the profit to take the fish in said fishery for the fishing season of the year 1873, and agreed to pay therefor to the plaintiff the sum of $170, which the defendant owes the plaintiff."

The answer contained a general denial, and also denied that the plaintiff was ever the lawful owner of any herring fishery in the town of Eastham; that the plaintiff ever had the right to manage, control, have, use or dispose of any herring fishery in said town; that he purchased of the plaintiff the right to have any fishery or the beneficial use of any fishery or the profit, or the right to take fish in any herring fishery in said town of Eastham for the fishing season of the year 1873. The answer also set

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at the herring fishery, alleged by the plaintiff to have been
ased of it by the defendant, belongs to and is owned by the
of Joshua Cole of said Eastham, deceased; that the sale of
erring fishery, alleged to have been made to him by the
iff, was not in writing, and that said alleged sale was void
the Gen. Sts. *c.* 105, § 5.

ial in the Superior Court, before *Bacon*, J., who allowed a
f exceptions in substance as follows:

e plaintiff introduced as evidence of the sale the following
cts from the records of the town of Eastham: "March 8,
. To see what the town will do with the Herring Brook.
d to choose a com. of five to confer with the owners of the
near the Herring Brook. Voted that Philip Smith and
ua Cole be added to the com. of last year on Herring Brook.
ch 24, 1873. To see if the town will sell the Herring Brook
three years or more, as the town may deem proper, to the
est bidder." The plaintiff also introduced the testimony of
auctioneer who sold the same in open town meeting, "that
defendant was the highest bidder at such sale, bidding $170
for, and that the same was struck off to him," and this was
nly evidence of said sale.

e plaintiff also introduced evidence that the defendant had
the fish from said Herring Brook, without interruption,
g the fishing season of 1873, and also evidence that the
of the fish had been usually taken and were taken by the
dant below the edge of the bank or rising where the Her-
Brook empties into the salt water or bay, and where the tide
d into the outlet of said brook below the bank where the
k runs out, and continued through the beach shore and flats
w the bank as the tide ebbed. The plaintiff also offered
ence tending to show that the brook and the fishing therein
existed as long as the memory of the oldest witness who was
d, being seventy-four years of age, and there was evidence
the owner of the land through which the brook runs had
er exercised or claimed any right of several fishery there be-
said sale. The plaintiff introduced no evidence of any right
itle of said town of Eastham in said Herring Brook, except
foregoing.

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evidence tending to show t
a Cole, Jr., who claimed with
ased, to be the owners of the
hich, said brook runs from t
evidence, that was not cont
l Joshua Cole, Jr., from pa
that he, Cole, should hold
controverted that he was p
brook, and it was contende
n of Joshua Cole, Jr., was
im and the defendant wit
wn in this action. The d
e title of said Joshua Cole,
l over which, or through wh
pond to the bay, as far as
meets the bay at high wate
oshua Cole, Jr., and said ot
t controverted. The defend
d Herring Brook is dry f
nd also that the tide only flo
bank at extreme high water.
the court to instruct the
er the pleadings and the ev
owned or had title to said
control the taking fish in the

vidence that the plaintiff own

w, on the evidence, the term
t portion between the pond a
here the same empties into the
dence that the said Herring

satisfied that the brook in que
then the owner of the land ov
has the exclusive right to take
beyond and around the mou
empties into the salt water, as f
ded it does not ebb more than ei

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unless the town proved title to the same, either by legisla-
grant or otherwise."

he judge refused to give any of the foregoing requests for in-
tions; and instructed the jury, against the objection of the
ndant, that said sale by the town to the defendant was in the
re of a lease, and that under the pleadings and evidence the
ntiff was not bound to prove that it owned or had any title
id brook, or any right to manage, control or sell the right to
the fish therein; that the plaintiffs were entitled to a verdict
n the evidence in the case, unless the defendant satisfied the
, upon the whole of said evidence, that he was prevented from
ng the fish from said brook by the lawful owner or owners
said land and brook, and that the burden of proof was upon
defendant to show that he was so prevented; and declined
rule that the act of the lawful owner forbidding the defend-
to pay the town, as he would be held responsible, would con-
te such prevention, but left the question to the jury to deter-
e whether he was so prevented by the owner; that the sale
aid Herring Brook to the defendant, if proved, was in the
re of a lease, and that the defendant was estopped under the
lings in this case from denying that the town of Eastham
any title in said brook, or the right to sell the fishery in the
; but if he took the fish, he must satisfy the jury, the bur-
of proof being on him, that he was prevented by the owner
id brook from taking the fish therein, and compelled to take
ame under the owner of the land, and did actually take the
under said owner.

he defendant also requested the judge to instruct the jury
said sale of said brook to him was void under the statute
rauds, the same being for an interest in lands, and not in
ing. The judge refused so to instruct the jury.

here was no other evidence in the case material to the fore-
g rulings and requests to rule. The jury found for the plain-
; and the defendant alleged exceptions.

I. P. Harriman, for the defendant.

. Marston, for the plaintiff.

MORTON, J. The warrant for the meeting of the plaintiff
n held March 24, 1873, contained the article, "To see if the
n will sell the Herring Brook for three years or more, as

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the town may deem proper, to the highest bidder." Under this article, Herring Brook was sold in open town meeting to the defendant for three years, for $170 a year, he being the highest bidder. Though the warrant and the record speak of the sale of Herring Brook, there is no question that the right of fishing in the brook was intended and understood as the subject of the sale. It appeared at the trial that the defendant had taken the fish from Herring Brook during the fishing season of the year 1873, and the presiding judge ruled that the sale by the town was in the nature of a lease, and that the defendant was estopped to deny the title of the town or its right to sell the fishery, unless he was evicted or interrupted by some one having a paramount title.

We are of opinion that this ruling was correct. The case of *Watertown* v. *White*, 13 Mass. 477, is decisive of this point. That was an action, to recover the rent of a fishery, brought upon a contract similar to that proved in the case at bar, and it was urged, as one of the grounds of defence, that the plaintiff had not the right, or the exclusive right, to the fishery which was supposed by the parties when the contract was made. The court say: "The answer which has been made to this argument is, we think, conclusive. The defendant, having enjoyed the fishery by the permission of the plaintiffs, cannot be permitted, on this ground, to excuse himself from the payment of the stipulated rent. Such an evasion of a fair contract would be gross injustice, and a reproach to the law, if it were allowed. But the law is not liable to such a reproach. It is a well settled rule, that the tenant shall never be suffered to impeach his landlord's title. Thus, in an action for use and occupation, which is analogous to the case under consideration, the plea of *nil habuit tenementis* is not admissible. This rule is founded in good sense, wise policy, and the plainest principles of fair dealing. The plaintiff's right to the fishery cannot, then, be properly brought in question in this action. It is immaterial whether they have an exclusive right, a right in common, or no right at all."

In the case at bar, therefore, the defendant was estopped to deny the plaintiff's right to lease the fishery, and the first and second requests of the defendant for instructions, which were to the effect that the plaintiff must prove its title, were properly refused.

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The third and fourth requests involve matters of fact, and were perly refused. It was for the jury to say what was under- od by the term "Herring Brook" in the contract, and whether vas navigable.

The fifth request was also rightly refused. It was based upon theory that the owner of the land on the brook has the ex- sive right to take fish around the mouth of the stream as far the tide ebbs and flows, provided it does not ebb more than hty rods. The defendant relies in support of this claim upon St. of 1871, *c.* 281, but that statute applies only to cases here the waters of a stream are inclosed by the proprietors for e purpose of cultivating fishes, and has no application to the se at bar. The only other exception insisted on is that to the fusal of the court to rule that the sale or lease to the defendant s void under the statute of frauds, because there was no mem- andum of it in writing, signed by the defendant. The ruling the court was correct. As in other cases of parol leases, the fendant having enjoyed the premises, his promise to pay the ulated rent, if by parol, is not void by the statute of frauds. As no error in matter of law is shown, the plaintiff is entitled etain its verdict. *Exceptions overruled.*

CHARLES W. RUSSELL *vs.* HORACE A. LATHROP.

folk. Jan. 26. — Feb. 16, 1876. ENDICOTT & DEVENS, JJ., absent.

Superior Court has no authority, under the St. of 1869, *c.* 438, to report a case fore verdict to this court, for its opinion upon the whole course of the trial and on the admissibility of every piece of evidence offered, without any ruling of the urt below upon its competency, or stating that evidence with sufficient precision enable its competency to be determined.

WRIT OF REVIEW of a judgment recovered by the defendant review against the plaintiff in review on the following contract writing, dated January 22, 1870, and signed by the plaintiff review and James T. Frary:

'It is agreed between H. A. Lathrop of Sharon, and James Frary and Charles W. Russell of New York, that for services

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op to said Frary and R
n & Goodnow Manufac
ufacture at his said Lat
not elsewhere, and sell
the patent granted to J
to the said company
; which license the sai
the said Frary and Rus
; and further, that the
cense by said company
three thousand dollars
ave obtained a decree or
id patent; and said La
eavors to aid in establi
er he shall be called up
said company."
case, reported 117 Mass.
Court, before *Dewey*, J.,
ion of this court, in subst

he agreement, and a den
ll before bringing the pre
so introduced in evidenc
ught by the Lamson &
the United States cou
the use of the inventio
d to in said agreement.
sell & Co., Landers, Fr
espectively, by bills in e
, 1867. The several de
rein, setting up, among
e invalid; that the inve
defendants in said suit
ent that said bills migh
th sides had been previ
der was entered in each
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lence, the defendant in review contended that he was entitled ecover. The judge declined so to rule.

The defendant in review then offered parol evidence to prove the decrees in one or all three of said suits in New York, e the decree or decrees contemplated by the parties to this on, understood and intended by them to be the "decree" ned in the contract upon the making or "obtaining" of which $3000 would become payable. The defendant in review also ered to prove that before and at the time of the making the tract sued on, the said Russell declared to the said Lathrop t the decrees to be made in these three cases, or any one of m, was or were the decrees upon the making of which the re- irement of the contract for a decree would be complied with, d said that the court, in which the suits were pending in New rk, would sit the ensuing spring and pass upon these cases, and said sum of money would become payable, and paid to said throp; that after the making of said decrees, said Russell paid ge sums of money to the complainants, Lamson & Goodnow, account, and in payment or part payment of the damages med in the suit against him and his company; that on Jan- y 26, 1870, said Russell wrote to Gardner, who was a mem- of the Lamson & Goodnow Manufacturing Company, the owing letter: "New York, Jan. 26, 1870. Mr. Jos. Gardner: r Sir, As our agreement for the use of your patent of 1860 kes our payment contingent upon a court decree being issued ur case, we hereby give you notice that we waive that con- gency, and pay our agreed price when we confine the use of patent to the licensed parties. If this should not be satis- tory, we will sign further papers. Truly, J. Russell & Co." at after said decrees he stated to the plaintiff and to others t the patent was valid, and could not be successfully con- ted; that he had used and exhausted every means of im- ching it; had fully obtained all the information bearing on matter, and that the patent could not be resisted, and advised ers to pay damages for the infringement, who did so in reli- ce upon his statements. That after making decrees, the said fendant in review repeatedly called on said Russell, and de- nded payment, and claimed that it was due, and that said ssell, on every such occasion, acknowledged that it was due,

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and said that it ought to be paid to said Lathrop, and assigned as the only reason why he did not pay it, that Lamson & Goodnow had promised to pay the same to him, Russell, but had not done so, and he promised to see them at once and have the payment made; that he said the same to others.

That no decree or judgment adverse to the said letters patent had ever been rendered; that the reason why said suits were not further prosecuted to final judgment and decree was the reception of the letter from Russell to Gardner, and the agreement of Russell and the other defendants to pay, and the payment in part or whole of the damages said Lamson & Goodnow had suffered by the infringement complained of in said suits. That said Lathrop was not a party, nor had any knowledge of such agreements or payments, except that said Russell told him at the time of contracting with said Lathrop that he had come to the conclusion, or thought that he should come to the conclusion, that he could not successfully resist said patent, and expected he should have to pay some $12,000 or so for damages for past infringement. As to the other suits, or any settlement thereof, the said Lathrop had no knowledge or information, and he was in no way a party to, connected with or concerned in any of said suits, or the settlement thereof, except that he had given his deposition as a witness.

The plaintiff in review contended that the above evidence offered was not competent, and if any portion of it was competent for any purpose, it would not authorize the finding of a verdict for the defendant in review, and, by consent of the parties, the case was taken from the jury, and the question whether the defendant in review was entitled to a verdict upon the evidence which was introduced by him, and the questions as to the admissibility and the effect of the evidence offered by him (but not admitted) were reserved for the consideration of the Supreme Judicial Court.

If in the opinion of the court, upon the evidence introduced, and such portion of the evidence offered as the court shall deem admissible, the defendant in review would not be entitled to recover, judgment is to be entered for the plaintiff in review otherwise the case is to stand for trial.

C. Allen, for the plaintiff in review.

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. *Churchill*, for the defendant in review.

RAY, C. J. This report is not within the authority conferred
n the Superior Court by St. 1869, *c.* 438. It is not confined
report of specific rulings of the court below, or of the ques-
whether the whole evidence will in law warrant a verdict.
it undertakes to obtain the advice of this court in advance
n the whole course of the trial, and upon the admissibility of
n and every piece of evidence offered, without any ruling of
court below upon its competency, and without even stating
t evidence with sufficient precision to enable its competency to
determined. *Noble* v. *Boston*, 111 Mass. 485.

Report dismissed.

FRANKLIN PORTER *vs.* WILLIAM H. WARREN.

folk. Jan. 26.— Feb. 29, 1876. ENDICOTT & DEVENS, JJ., absent.

s in the possession of a mortgagee were attached as the property of the mort-
gor under the Gen. Sts. *c.* 123, § 67, and the mortgagee summoned as trustee.
e goods were then sold by the attaching officer as perishable property under the
n. Sts. c. 123, §§ 73–77, and the proceeds of the sale, after deducting the expenses
reof, were less than the amount of the mortgage, though the market value of
goods at the time of the attachment was greater than the mortgage. After
sale the attaching creditor discontinued against the trustee. *Held*, in an ac-
n of tort by the mortgagee against the attaching officer, that the Gen. Sts.
23, § 67, applied only to an attachment of goods in the possession of the mort-
gor; that the attachment was void; that the attaching creditor could not by a
continuance against the trustee turn the attachment into one under the Gen.
s. *c.* 123, § 62; that the officer was a trespasser *ab initio*, and liable for the
nount of the mortgage debt.

ORT, by a mortgagee of personal property against an attach-
officer, for the conversion of the mortgaged property. Trial
the Superior Court, before *Allen*, J., who, by consent of the
ties before verdict, reported the case for the consideration of
court on the question whether judgment should be entered
the plaintiff for the sum of $827.46, the amount of the mort-
e debt, or for the sum of $775.25, the net proceeds of the sale
the goods by the defendant, who sold them as perishable prop-
y under the Gen. Sts. *c.* 123, §§ 73–77. The facts of the case
pear in the opinion.

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facts in this case are as
gee of certain goods, too
ges for a breach of the
is a deputy sheriff, on M
the possession of the
two writs against the m
y. One was a writ in
e plaintiff was summoned
it of attachment in favor
plaintiff duly made a de
amount due under his mort
. 123, §§ 62, 63, but no pa
unt due under the mortgage
25, 1872, the defendant, upo
ies not consenting, sold the
he Gen. Sts. c. 123, §§ 73–7
ucting expenses, amounting
the plaintiff's mortgages.
the Superior Court, judgm
tgagor, and the executions is
roceeds of said sale in the h
owell, in which this plaintiff
owell, on October 1, 1872, be
against the trustee.
hat the attachment made in
he failure of the attaching cred
which the property was liable
s after it was demanded. G
tachment, therefore, cannot a
n of his acts, but he must re
attachment made in the suit o

nodes in which a creditor may at
his debtor which is subject to a

ession of the mortgagee, he may
common form, in which the mort-

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ee is summoned as trustee of the mortgagor, and, upon paying amount due the trustee, the latter is required to deliver the erty to the officer who holds the execution. Gen. Sts. c. 142, 5–59. *Hooton* v. *Gamage*, 11 Allen, 354.

second mode is provided by the Gen. Sts. c. 123, § 62, by h the creditor may attach the personal property of his debtor h is subject to a mortgage, whether it be in the possession of mortgagor or mortgagee, in the same manner as if it were ncumbered, provided he pays or tenders to the mortgagee the unt for which the property is liable within ten days after same is demanded.

ection 67 of the same chapter provides, as the third method, , if the property is in the possession of the mortgagor, it may attached in the same manner as if it was unincumbered, and mortgagee may be summoned in the same action in which the erty is attached as the trustee of the mortgagor, to answer questions which may be put to him by the court in their r touching the consideration of the mortgage and the amount thereon.

is clear that in this case the creditor attempted to avail him- of the third mode above stated. He made an attachment n actual seizure of the property, and in the same suit sum- ed the mortgagee as trustee of the mortgagor. This remedy t open to him unless he brings himself within the provisions 67, above cited. But this section applies only to cases e the property is in the possession of the mortgagor, and in case it is shown that the property, at and before the time of attempted attachment, was in the possession of the mort- e. It follows that the attachment in the suit of Nowell was al. The plaintiff in that suit mistook his remedy. He at- pted to make an attachment in a manner not authorized by The officer was a trespasser *ab initio*, and the mortgagee, se rights were invaded, could at any time after the seizure he property maintain an action of tort for its conversion, or eplevin for its recovery. *Boynton* v. *Warren*, 99 Mass. 172. ut the defendant contends that having discontinued against alleged trustee, because upon his examination it was dis- ed that he was a mortgagee in possession, he has the right to t the attachment as made under § 62, cited above. The an-

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ot make his attachment in the manner
n, which gives no authority to summon
e. The mortgagee had a right to ass
opted by the attaching creditor was,
remedy provided by § 67. The righ
gee are vitally affected by the form
reditor elects to adopt. If he proceed
ty under § 62, it is the right and duty
writing a true account of the debt d
and, if the creditor does not pay this a
it is demanded, the attachment is dis
dopts the method provided in § 67,
and summoning the mortgagee as tru
tter is not required to state an accou
n the creditor, and he cannot by su
ditor to pay the debt; but the validity
ount due thereon is to be adjudicated
ury at the election of the creditor.
81. In this case the creditor elected
ttaching the property and summo

He cannot afterwards, by discha
to another remedy, to which differ
es attach.

lt of these considerations is that the
the value of the goods converted, t
mortgagee. As the attachment wa
officer had no right, as against the
the fact that the proceeds of the s
to the plaintiff is immaterial.

o consider whether, as urged by the
dictum in the closing sentence of t
lcord, 114 Mass. 60, 62, if the atta
fficer could sell the property withou
The attachment being illegal and
ht to sell the goods either with or
f.

e plaintiff is entitled to judgment
he auditor.

Judgment for the plaintiff accordi

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EPHRAIM F. BELCHER *vs.* W. A. H. LOVELAND.

rfolk. Jan. 26. — Feb. 29, 1876. ENDICOTT & DEVENS, JJ., absent.

plaintiff bought certain stock of the defendant at a price named. The plaintiff d defendant entered into an agreement in writing, by which, in consideration of e purchase, the defendant agreed to pay to the plaintiff, at the expiration of ree years from the date of the agreement, all loss he might sustain in consequence the purchase, including ten per cent. interest on the price paid, and the plaintiff greed to pay to a third person one fourth of all profits he might receive from div- lend or sale of the stock, deducting ten per cent. interest on the cost of the stock. *Held*, that there could be no breach of the agreement until the expiration of the hree years; that the defendant was liable to the plaintiff at the end of the three ears for loss sustained by him in consequence of depreciation in the value of the tock up to that time; and that the plaintiff was not required to sell the stock to letermine its value, which could be proved by other modes.

CONTRACT upon the following agreement under seal, signed the plaintiff and the defendant and W. B. Wentworth, and ted March 20, 1868:

" Know all men by these presents, that Ephraim F. Belcher, of ndolph, has this day purchased from W. A. H. Loveland, of lden City, C. T., forty shares of the stock of the Golden City neral and Land Co., upon the following terms and conditions, wit: The said E. F. Belcher has paid the said Loveland ten ndred and forty dollars, at the rate of 26 dollars per share for l forty shares. Now, in consideration of the said E. F. Belcher ing made such a purchase, the said Loveland and W. B. ntworth, of Randolph, do hereby agree that they will sever or jointly pay to E. F. Belcher, at the expiration of three rs from date, all loss he may sustain in consequence of pur- se of said stock, including 10 per cent. per annum interest on 0 dollars paid by him for said stock; and further, the said F. Belcher, in consideration of the premises, agrees to pay to B. Wentworth one fourth of all profits he may receive from vidend or sale of said stock, after deducting 10 per cent. per num interest on cost (26 dollars per share) of said stock."

At the trial in this court, before *Ames*, J., the plaintiff offered idence, which was not controverted, tending to show that the rty shares of stock in the Golden City Mineral and Land Com- ny, purchased by him of said Loveland, under said agreement, d never paid any dividend, and had within and during the

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ears therein mentioned very greatly depreciated in value, that the
ch below the price paid by him therefor; and
ck, after the expiration of the three years, beca
d is now wholly worthless, and that he thereby
um by him paid therefor; and he thereupon cla
the whole amount paid by him for the stock, and
, as provided in said agreement; and that if he
led, yet he was in any event entitled to recover th
ation of the value of said stock during or at the
said three years, and interest thereon. The de
nd, when said agreement was made, and ever since
in Golden City, Colorado Territory. At the first t
e came to this Commonwealth, but after said three y
day before the writ in this action was served, the p
handed of him payment of his loss under said agreem
ered to return to him the stock. The writ was dated
24, 1874. The plaintiff did not sell, but still holds
f stock, although the same are now of no value.
defendant contended, upon the foregoing evidence,
ntiff could not recover anything, because he had not
d shares during or at the expiration of the three y
ed in said agreement, and requested the judge so to r
case was reported for the consideration of the whole c
he foregoing facts. If the plaintiff was entitled to
r the whole or any part of the depreciation of said st
hing, in the case, judgment was to be rendered in
nd the case sent to an assessor to determine the damag
se, judgment to be rendered for the defendant.

. *Russell*, for the plaintiff.

. *Hutchins*, for the defendant.

s, J. By the terms of the agreement, the defendant u
to indemnify the plaintiff, at the end of three yea
any loss which he might sustain in consequence of
e of the stock. There could be no breach of the agr
n the defendant's part until the expiration of the thr
and nothing then became payable from him, except t
to that time. His guaranty did not extend to any lat

A sale of the stock at the end of the three years, su
t to be fairly conducted, might have furnished a conve

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ient measure of its value at that time, but there is nothing in the contract requiring such a sale, and the value of the stock is susceptible of proof in other modes. If, since the expiration of the agreed time, the stock has risen in value, the defendant may perhaps be entitled to the benefit of such rise. Good faith would require of the plaintiff, so long as the stock remained in his hands, to get the best price he could for it, and so reduce the ultimate loss to the lowest amount practicable. But if there has been no such rise, and it appearing from the report that the stock is now worthless, the measure of the plaintiff's damages would be the difference between the price paid, with interest for three years at ten per cent. per year, and the market value of the stock in March, 1871, with interest on such difference.

Judgment for the plaintiff; damages to be assessed.

VIS FELLOWS & another, executors, *vs.* MILES MINER & others.

hire. *Sept. 15, 1875.* — March 1, 1876. AMES, DEVENS & LORD, JJ., absent.

t to a town in trust, directing the town to appoint some suitable person or to receive and invest the fund, and annually at the annual town meeting int some suitable person or persons to collect the income of the fund, and y, at such time as the town shall direct, to pay over the same to such of the d infirm native-born inhabitants of the town, and maiden ladies who are orn inhabitants of the town, although they be not aged, as shall be deemed or them most needy, and to each one such a sum as he or they shall think t and equitable, and providing that no part of the said income shall be ny person who is receiving support as a pauper, is a valid charitable beder the laws of this Commonwealth.

e bequest in trust by a resident of this Commonwealth to a town in anis not void because the town, at the time the bequest is made, is incader the laws of that state, of taking the trust; and the fund may be orbe paid over to the town upon its being enabled, by a subsequent act of the re of the other state, to administer the trust according to the will.

living in this Commonwealth, and having property here, devised it to a New York in trust for charitable uses, directing the town annually to apits annual town meeting some person or persons to administer the trust n being then incapable under the laws of New York of taking the trust

the Legislature of that state empowering the town to
y in trust, and authorizing the supervisor and justices
appoint one or more suitable persons to receive the pr
rust. *Held*, that such administration by persons appoi
by the act would not be according to the will of the te
lature of New York should, within a reasonable time, p
ute for the administration of the trust according to th
dered to be paid to the town.

Y, by the executors of the will and codi
r, against Miles Miner and Harriet, his
r the will and the parents of the testator
tants of the town of Kinderhook, in the
devisees in trust under the will, to obtain
court. The case was reserved by *Colt*, J.
of the full court, and was as follows:
resident of Great Barrington, in this Com
will on January 6, 1872, which, after cer
proceeded as follows:
the residue of my estate, both real and
y own at my decease after the payment of
expenses, and the expenses of settling my est
hereinafter named, I give and bequeath to
ok, New York, in its corporate capacity, in tr
urposes following: I direct said town to appo
on or persons to demand and receive the sa
utors, and to invest the same as he or they sh
ther direct that said town of Kinderhook sh
annual town meeting, appoint some person
the interest and income thereof annually, a
me as follows: First, I direct that he or the
y, on the first day of May, to each of my pa
and Harriet Miner, his wife, the sum of o
long as they both shall live. At the death
, I direct that he or they shall pay to the su
he hundred and fifty dollars annually during h
time above stated. Second, I direct that he o
ly, at their discretion, expend the sum of fo
r the purpose of keeping the cemetery in sa
emains of my beloved wife and her parents a
der, and in keeping and preserving the mon

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ments erected at their respective graves in a suitable and proper condition, and in keeping and maintaining the fence inclosing said cemetery in good order. The remainder of said interest and income shall be annually, at such time as said town shall direct, paid over to such of the aged and infirm native-born inhabitants of said town, and maiden ladies who are native-born inhabitants of said town, although they be not aged, as shall be deemed by him or them most needy, and to each one such a sum as he or they shall think most just and equitable, provided always that no part of said interest or income shall be paid to any person who is receiving support as a pauper."

The testator afterward made a codicil to his will, altering the sum to be expended upon the cemetery and the annuities to his parents, but not otherwise affecting the above provisions.

The testator died on June 13, 1872, and on July 15, 1873, the will and codicil were duly admitted to probate. The testator was a widower, and died without issue, his father, the defendant Miner, surviving him. He left real estate in Great Barrington, and personal estate; and after the payment of his debts, the expenses of settling the estate, and the other legacies, there was a considerable sum to be disposed of under the seventh clause of the will.

On April 29, 1875, the following statute was passed by the Legislature of New York:

"An Act to authorize the town of Kinderhook to take a legacy under the will of Edward G. Miner, deceased.

"SECTION 1. The town of Kinderhook, Columbia County, is hereby authorized and empowered, in its corporate capacity, to receive and hold in trust all the residuary estate and legacy, and all sums of money growing out of same, bequeathed by the will of Edward G. Miner, deceased, bearing date January six, eighteen hundred and seventy-two, and by any codicil thereof, for the uses and purposes mentioned in said will and codicil.

"SECTION 2. The supervisor and justices of the peace of said town are hereby authorized and empowered to appoint suitable persons, one or more, to receive such legacy from the executors of said will, and to collect the interest and income upon said legacy, and appropriate the same according to the terms and provisions of said will and codicil."

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"SECTION 3. The persons so appointed as provided in section two shall, before receiving any portion of said legacy, give a bond, with one or more sureties as security for the same, which said bond shall be approved as to its form and sufficiency by the supervisor of said town, and shall be filed in the town clerk's office."

The statute laws of the State of New York relating to trusts and to charitable uses, or to other matters bearing upon the questions at issue, found in the printed copies of the statute laws of that state, purporting to be published under its authority or certified by the proper officers, were by consent of parties referred to as facts and as part of this case, and the books of reports of cases adjudged in the courts of New York, as evidence of the unwritten or common law of that state.

C. L. Beale, (of New York,) for the town of Kinderhook.

M. Wilcox, (*J. Dewey, Jr.*, with him,) for the defendant Miner.

GRAY, C. J. This charitable bequest would apparently be held ineffectual and void by the courts of New York, if the testator had been domiciled and his estate had been settled there: not, however, because the purpose was unlawful, but because, by the later decisions of the Court of Appeals, the statutes of that state are held to have repealed the old law of charitable uses, and to have prohibited any corporation to take a charitable bequest of this description without express authority of the Legislature. *Sherwood* v. *American Bible Society*, 4 Abbott, (N. Y.) 227; *S. C.* 1 Keyes, 561. *Bascom* v. *Albertson*, 34 N. Y. 584. *Adams* v. *Perry*, 43 N. Y. 487. *Holmes* v. *Mead*, 52 N. Y. 332.

But the testator's domicil being in this Commonwealth, the question of the validity of his dispositions of his personal property, though to be executed elsewhere, is to be determined by the law of Massachusetts. *Fay* v. *Haven*, 3 Met. 109. *Phelps* v. *Pond*, 23 N. Y. 69. *Bascom* v. *Albertson*, 34 N. Y. 584. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424. By our law, this bequest is valid, whether the beneficiaries are in this or in any other state or country. *Bartlet* v. *King*, 12 Mass. 536. *Washburn* v. *Sewall*, 9 Met. 280. *Webb* v. *Neal*, 5 Allen, 575. *Odell* v. *Odell*, 10 Allen, 1. *Saltonstall* v. *Sanders*, 11 Allen, 446. And the fact that a charitable bequest, otherwise valid, cannot take effect immediately, for want of proper objects or trustees, or of enabling

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ts of the Legislature or of the Executive, will not defeat it. anderson v. *White*, 18 Pick. 328, 336. *Odell* v. *Odell*, 10 Al- n, 1, 8. *Baker* v. *Clarke Institution*, 110 Mass. 88, 91.

The court will not allow a valid charitable trust to fail for want of a trustee; and if the trust is to be executed out of the Commonwealth, the court may appoint a trustee here to receive the bequest, or may order the fund, or the income thereof from time to time, to be paid to a trustee in the place where the trust is to be executed — as may be consistent with its own jurisdiction and practice, and best carry out the intention of the testator. *Washburn* v. *Sewall*, 9 Met. 280. *Attorney General* v. *London*, 3 Bro. Ch. 171; *S. C.* 1 Ves. Jr. 243. *Mayor of Lyons* v. *East India Co.* 1 Moore P. C. 175, 295–297, and cases cited. *Attorney General* v. *Sturge*, 19 Beav. 597. *Chamberlain* v. *Chamberlain*, 43 N. Y. 424.

This bequest is "to the town of Kinderhook, New York, in its corporate capacity," in trust for the charitable uses and purposes declared in the will. The St. of New York of 1875, *c.* 200, § 1, expressly authorizes that town in its corporate capacity to receive and hold in trust all the property bequeathed to it by this will, for the uses and purposes therein mentioned. The bequest being valid by the law of this state, the town named in the will as trustee being now enabled, by a special act of the Legislature of the state in which it is situated, to take the bequest, and the trust being directed by the will to be executed in that state and for the benefit of the inhabitants of that town, the court might properly direct the fund to be paid over to the town, if it were clear that the trust could thereupon be lawfully administered according to the will of the testator.

But here a new difficulty arises. The testator directs that the interest and income of the fund shall be collected and distributed by persons appointed by the town annually for that purpose. The statute of New York, already referred to, § 2, authorizes such persons to be appointed by the supervisor and justices of the peace of the town. The collection and distribution of the income by persons appointed by certain municipal officers would not be according to the will of the testator, which directs those persons to be appointed by the town itself. It does not therefore as yet appear that, if the fund should be ordered to be paid

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to the town of Kinderhook, it could be administered according to the will of the testator. The court is not at liberty to alter the scheme of the testator, either as to the objects of the charity or the agents by whom it is to be administered, unless it appears to be impossible to carry out his scheme according to its terms. *Baker* v. *Smith*, 13 Met. 34, 41. *Trustees of Smith Charities* v. *Northampton*, 10 Allen, 498, 501, 502. *Harvard College* v. *Society for Theological Education*, 3 Gray, 280. *Jackson* v. *Phillips*, 14 Allen, 539, 591, 592.

The result is, that the bequest must be adjudged valid, and the cause must stand for further directions. If the Legislature of New York shall see fit to provide by supplemental statute for the administration of the trust according to the will, the fund may then be ordered to be paid to the town of Kinderhook. If there shall be no such legislation within a reasonable time, it will become necessary to consider whether the court should appoint another trustee, or whether the bequest must fail.

Decree accordingly.

The Legislature of New York, by the St. of 1876, *c*, 241, passed May 13, 1876, provided for the election by the town of Kinderhook of persons to administer the trust according to the will; and by the final decree in the cause, at September term 1876, the fund, after payment of the defendants' costs, taxed as between solicitor and client, was ordered to be paid to the town.

HULDAH M. PECK *vs.* JAMES E. CONWAY & another.

Berkshire. Sept. 15, 1875. — March 9, 1876. AMES, DEVENS & LORD, JJ., absent.

A reservation in a deed of land, that no building is to be erected by the grantee, his heirs or assigns, upon the land conveyed, creates an easement, or a servitude in the nature of an easement, upon the land; and the situation of the land relatively to other land of the grantor may be considered in determining whether such easement or servitude is a personal right of the grantor or is appurtenant to his other land.

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deriving title under a recorded deed have constructive notice of its provisions; It is immaterial that they have no actual knowledge thereof.

owner of a large lot of land, conveyed a portion of it to B., with the reserva- in the deed "that no building is to be erected by the said B., his heirs or as- , upon the land herein conveyed." A. retained the rest of the lot as his estead, and owned no other land in the vicinity; and afterwards sold the home- lot to C. by a deed describing the land by metes and bounds, but making no ion of the reservation in the deed to B., or of privileges and appurtenances terwards sold to D. by a deed making no reference to the reservation, and D. o knowledge thereof. All the deeds were duly recorded. *Held*, that it was inferred that A. and B. intended to create an easement on the granted land e benefit of A.'s adjoining estate; that this easement passed as appurtenant e land by the conveyance to C.; and that he could maintain a bill in equity event D. from building on his land, although a proposed building would do preciable injury to C.'s land.

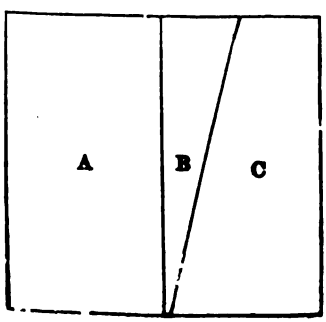
L IN EQUITY, by the owner of lot A. shown on the plan d in the margin,* to restrain the defendants, the owners of and C, from building on lot B.

e case was reserved by *Colt*, J., upon the pleadings and the of a master, for the consideration of the full court, and follows:

hard Ensign, on February 14, 1848, being the owner of and B, and occupying lot A as a homestead, conveyed in fee simple, with general covenants of warranty, to Jo- B. Huggins, who was then the owner of lot C. The deed bed the land by metes and bounds, and following the de- ion was this clause: "with this express reservation, that ilding is to be erected by the said Joseph B., his heirs or s, upon the land herein conveyed."

e defendants purchased lots B and C in 1874. Of the in the chain of title from Huggins, which were all duly

*



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recorded before the defendants purchased, some mentioned or referred to the reservation in Ensign's deed, but the deed to the defendants, which contained full covenants of warranty, made no mention of it or reference to former deeds. The defendants made no examination of the records before their purchase, and had no actual knowledge of the reservation.

The plaintiff purchased lot A of Richard Ensign by deed dated April 13, and recorded April 14, 1848. This deed made no mention of privileges or appurtenances, or of the reservation in the deed to Huggins. The defendants purchased their land, paying therefor its full market value, free of incumbrances, for the purpose of building thereon. The plaintiff notified them of the restriction before they commenced building, and forbade them so to do, and, upon their proceeding to build upon the land, brought this bill.

The master found that the greater part of the proposed building would stand upon lot B; that it would not obstruct the view from the front rooms in the plaintiff's house, and only partially obstruct the view from the rooms in the rear part of the house; and that its erection would be no appreciable damage or injury to the plaintiff's premises.

A. J. Waterman, for the plaintiff.

J. Dewey, Jr., for the defendants.

MORTON, J. Both parties derive title from Richard Ensign. The deed of said Ensign, under which, through various mesne conveyances, the defendants derive their title, conveys to Joseph B. Huggins a triangular piece of land adjoining the lot now owned by the plaintiff, "with this express reservation, that no building is to be erected by the said Joseph B., his heirs or assigns, upon the land herein conveyed." Ensign, being owner of the fee, had the right to sell his land subject to such reservations or restrictions as to its future use and enjoyment as he saw fit to impose, provided they were not contrary to public policy. The restriction in this deed, that no building should be erected upon the land conveyed, was one which he had a right to make, and there is no room for doubt, that, if a building was erected in violation of this restriction, Ensign, as long as he lived and remained the owner of the adjoining land, would be entitled to relief in equity to enforce the restriction. *Parker* v. *Nightin-*

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6 Allen, 341. *Whitney* v. *Union Railway*, 11 Gray, 359. ger v. *Boardman*, 16 Gray, 559.

he only question in the case is whether the plaintiff, who is grantee of said Ensign, is entitled to the same remedy.

The reservation creates an easement, or servitude in the nat- of an easement, upon the land conveyed. If this easement s created for the benefit of the adjoining lot, of which the antor in the deed remained the owner, and not for the per- nal convenience of the grantor, and was intended to be an- xed to such lot, it would be appurtenant thereto, and would ass to a grantee thereof.

The question whether such an easement is a personal right, or to be construed to be appurtenant to some other estate, must e determined by the fair interpretation of the grant or reser- ation creating the easement, aided, if necessary, by the situa- on of the property and the surrounding circumstances.

In this case, the triangular piece of land affected by the ease- ent was a part of a large lot owned by Ensign. He retained e remainder of the large lot for his homestead. There is no ggestion that he had other land in the vicinity, which could be nefited by the restriction. It is difficult to see how he would ve any interest in restricting the use of the land sold, except owner of the house lot which he retained. The nature of restriction also implies that it was intended for the benefit this lot. A prohibition against building on the land sold uld be obviously useful and beneficial to this lot, giving it the nefit of better light and air and prospect; this is its apparent rpose, while it would be of no appreciable advantage for any ner purpose. The fair inference is that the parties intended create this easement or servitude for the benefit of the ad- ning estate. We are therefore of opinion that it was not a ere personal right in Ensign, but was an easement appurtenant the estate which he conveyed to the plaintiff. *Dennis* v. *Wil-* n, 107 Mass. 591. *Stearns* v. *Mullen*, 4 Gray, 151. It follows at the plaintiff is entitled to the relief which she seeks.

The fact that the defendants, when they took their deed, had t actual knowledge of this reservation is immaterial. They rive their title under the deed which contains it, and have con- ructive notice of the provisions of the deed. *Whitney* v. *Union*

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Railway, *ubi supra*. Nor can the fact found by the master, that the erection of the building contemplated by the defendants "would be no appreciable damage or injury to the plaintiff's premises," affect the rights of the parties. Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived, because in the judgment of others it is of little or no damage. *Decree for the plaintiff.*

JUSTIN L. WORTHY, guardian, *vs.* COLLINS B. WARNER & others.

Berkshire. Sept. 14, 1875. — March 27, 1876. AMES, DEVENS & LORD, JJ., absent.

On a bill in equity, filed January 8, 1874, to redeem a mortgage, it appeared that on a writ of entry to foreclose the mortgage, an execution for possession issued dated May 6, 1869, upon a conditional judgment; that the officer's return and the acknowledgment of possession were dated May 3, 1869; and that the execution was recorded June 10, 1869. *Held*, that the date of the officer's return was not conclusive as to the actual date of the possession; and it appearing from the whole record, without resort to other evidence, that possession was actually taken on some day after the execution was issued and before June 10, that this was enough to commence the foreclosure as of the latter date.

The assignee of a judgment and execution for the foreclosure of a mortgage, under which possession had been taken, advanced to one of the owners of the equity, who was the guardian of the other owners, who were minors, a further sum, taking his note with sureties for the amount of the mortgage debt and the additional sum, and giving him a written agreement to cancel and assign to him the judgment, if he should pay the note with interest at its maturity, but not otherwise. The note was paid before its maturity by the sureties, and the judgment was assigned to them after the lapse of three years from the time possession was taken. *Held*, on a bill in equity to redeem, that there had been no payment of the mortgage debt or waiver of the foreclosure.

BILL IN EQUITY, filed January 8, 1874, by Justin L. Worthy, guardian of Susan A. Luce and Frederick W. Luce, against Collins B. Warner, Sidney A. Luce, personally and as administrator of Pluma A. Luce, Edwin L. Humphrey, Daniel Sprague, Phineas L. Sprague and the Berkshire Life Insurance Company, to redeem a parcel of land in Pittsfield from a mortgage executed on January 9, 1867, by Pluma Ann Luce, the mother of

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the plaintiff's wards, in which her husband, Sidney A. Luce, joined, to secure the payment of a note for $630 and interest to the defendant Sprague. Hearing before *Colt*, J., who reported the case, for the consideration of the full court, in substance as follows:

On June 10, 1867, Sprague brought his writ, in the Superior Court, to foreclose the mortgage. Pluma Ann Luce died intestate August 23, 1867, pending said suit, and leaving the wards her only heirs at law, and leaving no property other than the equity of redemption in said mortgage. On October 14, 1868, Sidney A. Luce was appointed administrator of the estate of Pluma Ann Luce, and guardian of the two minor children; and at February term 1869 of the Superior Court, after notice to the minors and their appearance by their guardian, conditional judgment was rendered in favor of Sprague, against Sidney A. Luce and the minor heirs, for $711.58, and $24.99 costs of suit.

On May 6, 1869, an execution of *habere facias* issued upon said udgment, and seisin and possession thereon was delivered to E. M. Wood, attorney for Sprague, June 3, 1869. The return on he execution, and the acknowledgment of the delivery of seisin nd possession on the back of said execution, were both dated Iay 3, 1869. The execution and the proceedings thereon were corded in the registry of deeds June 10, 1869, as appeared by e certificate of the register of deeds.

The defendants contended that the date of the officer's return, d of Mr. Wood's receipt, was a manifest error, and should ve been June 3 instead of May 3. The plaintiff objected to e introduction of any evidence to vary, contradict or control e record, and contended that the defendants could not in any y be allowed to show that possession was not had on May 3, 69, and that all the legal and equitable rights of the parties ust be decided and governed by the dates as recorded.

On June 7, 1869, Sidney A. Luce, desiring to pay Sprague d to obtain an additional loan of money, gave his negotiable omissory note to the Berkshire Life Insurance Company for ne thousand dollars payable in three years from its date, with nterest, with the defendants Page and Humphrey as sureties. The insurance company then took an assignment of the judg-

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ue; and gave Luce a written instru
ent to them of the judgment, the fur
ote, and concluding as follows: "Nov
ll and truly pay said note and intere
e said Berkshire Life Insurance C
e to cancel and assign said judgmen
otherwise."
me, and as part of the same transacti
reties, on the same paper with the las
the same date, the following writte

on of the above named E. L. Humph
; the above described note as my su
mphrey and Page pay the said note,
sign to them all my right, title and in
ve described, and I do in case of such p
nd request said Berkshire Life Insuran
and transfer all their right, title and
dgment unto them, the said Humph
nd assigns forever."
2, before its maturity, the note of Luce
pany was paid by the sureties, who obt
a note with Page as maker and Humphr
days, for $1200, and which was paid by a
Warner, indorsed by Page and Humphrey,
, 1872.
nce company, after the lapse of three y
session was taken for foreclosure, execute
eir request an assignment of said judgm
guarded form, and referred to the execu
t of Sprague to said company, for descrip
This assignment the defendants at the he
st. It was never of record, but was in ex
ossession of Page and Humphrey on July 27,
n examined by the defendant Warner.
72, the life insurance company executed and
and Humphrey a quitclaim deed of that date,
tle and interest in the land described in the

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On July 16, 1872, the resignation of Sidney A. Luce as guar
n of the minors was duly accepted in the probate court, and
the same day L. H. Gamwell was appointed and qualified as
eir guardian.

On July 27, 1872, Page and Humphrey, with the knowledge,
nsent and coöperation of Gamwell, then guardian of the mi-
ors, but without any authority or license from the probate
ourt, and claiming to be sole owners of the land described in
he Sprague mortgage, sold to the defendant Warner, who had
een one of the bondsmen of Sidney A. Luce as guardian and
administrator, and who had full knowledge and notice, both
nstructive and actual, at the time of the sale, of the title of
e premises, the premises described in said Sprague mortgage,
a public auction, after public notice thereof by handbills and
publication, for the sum of $1700. The actual cash value of
property was a few hundred dollars in excess of this price.
ir deed to Warner, which was of quitclaim, was of the same
. On September 26, 1872, Sprague conveyed to Warner all
ght, title and interest in the premises for a nominal con-
tion. Gamwell resigned his guardianship on December 2,
and the plaintiff was appointed guardian in his stead.
bringing the bill, the plaintiff demanded of the defend-
account of the rents and profits and of the amount due
mortgage; which they did not render, alleging that the
e was foreclosed and that the plaintiff had no right to

plaintiff was entitled to redeem, such decree was to be
would enable him to do so; otherwise the bill to be dis-
ith costs.

Pingree & Waterman, *J. M. Barker*, for the plaintiff.
E. M. Wood with him,) for the defendant

. The defendant Warner denies that the plaintiff has
ight to redeem the premises in dispute, and contends
mortgage from Mrs. Luce to Sprague, by which he de-
, has been legally foreclosed.
it upon this mortgage, conditional judgment was recov-
Sprague, and an execution for possession was issued
ay 6, 1869. The officer's return of the delivery of seisin

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and possession, and the acknowledgment thereof by the attorney of Sprague upon the back of the execution, are both dated May 3, instead of June 3, 1869, which without doubt was the true date. The execution and the officer's return with the attorney's acknowledgment was, however, left for record in the registry of deeds, June 10, 1869, within the time required by law, as appears from the register's certificate upon it.

It is contended by the plaintiff that the return must be taken as it stands, without amendment; and that Sprague's possession, therefore, does not appear to have been obtained in a way which is effectual under the statute to foreclose the mortgage, and cannot so operate, however long continued. The statute provides that possession recovered by a real action in which conditional judgment is rendered, and continued peaceably for three years, shall foreclose forever the right of redemption. Gen. Sts. *c.* 140, § 1. It is apparent from the date of the execution, and the time of its registration, that the date of the return is an error. The papers as they stand indicate that June 3 was the date intended; but whether so or not, it is certain from the whole record alone, without resort to other evidence, that possession was actually taken by Sprague's attorney under and by virtue of the judgment and execution, on some day after the process was issued, and before June 10, 1869, when it was left for registration. This was enough to commence the foreclosure, and, counting only from the latter date, there is time for three years' possession by the mortgagee, or those claiming under him, before this bill to redeem was filed.

The plaintiff further contends, that, before the defendant Warner acquired title, the mortgage had been paid by Sidney A. Luce, after he became owner of a legal interest in the equity of redemption; or, at least, that there had been a waiver and abandonment of the foreclosure by the holder of the mortgage.

It appears that Sprague's conditional judgment was recovered against Luce as tenant by the curtesy, and also against the two minor heirs of Mrs. Luce, who were all made parties after her death. The point relied on depends upon the effect to be given to the transaction between Sprague, Luce and his sureties, and the insurance company, after judgment had been recovered for foreclosure. The case shows that Luce, desiring to pay Sprague

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ıd obtain a small loan in addition, gave to the company a note ated June 7, 1869, with sureties, payable in three years, for the whole amount, and the company at the same time took an assignment from Sprague, under seal, of his judgment, with all the lands that might be recovered thereon, and agreed, under seal, to assign the same to Luce on payment of the note. The latter agreement recited that the company had satisfied Sprague for the assignment, and had lent Luce a further sum sufficient to make up the amount of the note. At the same time, and as part of the same transaction, Luce gave to his sureties on the note a conveyance under seal of all his interest in the judgment, requesting the company to transfer the same to them in case they the sureties, should pay the note. The note was, in fact, paid by the sureties shortly before its maturity; and, after the time for foreclosure had expired, the judgment was assigned and the lands described in the execution quitclaimed by the company to the sureties. The sureties, claiming to be absolute owners, shortly after sold and conveyed the premises to the defendant Warner, who had full knowledge at the time of the facts above stated relating to the title. Sprague also about the same time quitclaimed all title in the land to the defendant Warner.

In view of the legal and equitable rights of all parties under the several deeds and assignments, it is plain that the payment of the note by the sureties cannot be construed as a payment of the Sprague mortgage, or as manifesting an intention to waive and abandon its foreclosure; on the contrary the purpose and effect of all the proceedings was to transfer to the insurance company in the first instance, and then to the sureties, the security of the mortgage with the benefit of the judgment for foreclosure and the possession had under it. The amount due from Sprague by the insurance company and the judgment assigned by him to them directly; they became, if not the legal, the equitable, owners of the mortgage. This title passed to the sureties, was conveyed to Warner, and was confirmed by Sprague's deed conveying whatever legal title may have remained in him.

The mortgage thus held by the insurance company did not change character because Luce had given his note with sureties before the amount paid Sprague. If Luce had himself paid

that amount, in accordance with his purpose and intention, and the judgment had been transferred to him, the case would have been different, upon the question whether it should be treated as a discharge of the mortgage. It was not paid by him, but by his sureties, to whom it was agreed, both by him and the company, that the security should be transferred to be held by them and applied as indemnity against their liability. They held it after foreclosure by an absolute title, liable to account only for its faithful application. There is no claim that it was not fairly and honestly sold and the proceeds applied by the sureties. No charge of fraud on the part of the defendant is open upon this report. *Bill dismissed, with costs.*

JOTHAM G. CHASE *vs.* BOARD OF ALDERMEN OF SPRINGFIELD.

Hampden. Sept. 29, 1875. — March 1, 1876. AMES, DEVENS & LORD, JJ., absent.

On a petition for a writ of certiorari to bring up and quash the proceedings of an inferior tribunal, an answer of the tribunal containing allegations and denials of fact, and signed by counsel, is irregular.

It is no ground for a writ of certiorari to quash the proceedings of a tribunal, authorised to assess betterments for the laying out of a highway, that the records of the tribunal do not show that a grade line was established.

The erection of railings or barriers, required for the safety of public travel, is not essential to the completion of a public way under the St. of 1871, c. 382, § 1; and the want thereof does not prevent the assessment of betterments under that section.

The record of the board of city or town officers of their proceedings in the laying out or altering of a way and the assessment of betterments therefor, under the St. of 1871, c. 382, should show the amount of the expense of the laying out or altering, as well as of the assessment.

A petition for a writ of certiorari to quash the proceedings of a tribunal of a city assessing a betterment tax on an estate for the laying out of a highway, under the St. of 1871, c. 382, alleged that the proceedings were void because it did not appear that the amount assessed was a proportional part of the expense of laying out and grading the street. The answer alleged that it sufficiently appeared by the records that the expense of laying out and grading the street was largely in excess of the amount assessed by the tribunal, and that the amount so assessed was a proportional part of said expense. The answer also alleged that, in fact, said expense was largely in excess of the amount assessed, and said amount was a proportional part of said expense. The record annexed to the petition showed

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an adjudication that the whole amount of benefit and advantage received by any real estate from the laying out of the street, beyond the general advantage to all real estate in the city, was $31,050, one half of which, viz.: $15,525, should be assessed upon the lots of land specially benefited, in proportion to the benefit and advantage received by each. By consent of the parties, the case was reserved for this court upon the petition and answer and a report of a single justice, which stated that the records did not show the actual expense of laying out and constructing the road, or that the amount assessed upon the lands benefited was a proportional part of said expense; but that, if it could be shown in this way, it could be proved by the books of public record of the city, and by parol, that the actual expense of laying out and constructing the road was between $21,000 and $22,000, and that the assessment of betterments was a proportional part of about two thirds of that sum. *Held*, that, although the record was defective in not showing the amount of the expense, yet that defect could be cured by an amendment of the record, and, upon the allegations in the answer, the agreement of the parties as to the effect thereof, and the facts found at the hearing, afforded no ground for a writ of certiorari to issue.

An order of the proper tribunal of a city, laying a betterment tax under the St. of 1871, c. 382, directed the tax collector to collect said assessment, with interest at twelve per cent. per annum. *Held*, on a petition for a writ of certiorari, which did not assign the order to collect interest as one of the errors, that the validity of the order laying the assessment was not affected thereby.

PETITION for a writ of certiorari to the board of aldermen of the city of Springfield. The petition alleged that on December 5, 1871, the city council of Springfield, by an order of that date, laid out and established a street from a point near the foot of Blake's Hill, in Springfield, to the X road, so called, with a uniform width of one hundred feet, and to be called Fort Pleasant Avenue; that the petitioner is, and at the time of the proceedings hereinafter set forth was, the owner in fee of two tracts of land lying and abutting on said avenue; and that on October 19, 1874, the board of aldermen of Springfield passed an order assessing upon said lands of the petitioner the sum of $600 for benefits alleged to have been received by his said lands from the laying out and grading of said Fort Pleasant Avenue. The petition then alleged that said proceeding of the board of aldermen was irregular, illegal and void, for the following reasons:

"Because no grade line has been established to which said avenue is to be graded and worked.

"Because the work of laying out and grading said avenue had not been completed at the time when said assessment was made, and is not now completed.

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"Because the records of said board of aldermen do not show what was the actual expense of laying out and grading said avenue.

"Because the records of said board of aldermen do not show in a legal and proper form the actual expense of laying out and grading said avenue.

"Because it does not appear that the amount assessed is a proportional part of the expense of laying out and grading said avenue.

"Because, so far as the records show, the aggregate amount of assessments upon real estate on account of said avenue may greatly exceed the actual expense of laying out and grading the same.

"Because said assessment was made by the board of aldermen, and not by the board of mayor and aldermen."

Annexed to the petition was the report of the board of public works of the city of Springfield, dated October 12, 1874, and the order of the board of aldermen accepting the same, dated October 19, 1874.

The report, after reciting the reference to said board, upon the order of the mayor and aldermen, of the matter of assessing betterments under the St. of 1871, *c.* 382, upon lands specially benefited by reason of the laying out and grading of Fort Pleasant Avenue, notice given to all parties interested, and a hearing had, set forth that the board "adjudge and determine that the whole amount of benefit and advantage received by any real estate from said laying out and grading of Fort Pleasant Avenue, beyond the general advantage to all real estate in said city of Springfield, to be $31,050, one half of said adjudged benefit and advantage, viz.: the sum of $15,525, they are of opinion should be assessed upon the lots of land specially benefited, in proportion to the benefit and advantage received by each, as follows." Then followed a list of the assessments on various parcels of land, including two parcels belonging to the petitioner, upon which were assessed the sums of $3400 and $200 respectively. The report concluded as follows: "And they recommend that assessments be made of special benefits received by said real estate from the laying out and grading of said Fort Pleasant Avenue, upon the several lots of land and in the sev-

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t assessed, and said amount was a proportional part of
pense.

nd except as hereinbefore admitted, all the alle
itioner as to illegalities and irregularities in the
said assessment are denied by the respondents.

dents further allege that if any of the alleged i
e found to exist, they are mere matters of form n
the validity of the proceedings, and that in all i
s said proceedings are correct, and that substanti
en done, and that therefore the prayer of the p
not to be granted."

ring before *Colt*, J., who, by the consent of the
d the case for the full court upon the petition and
report, which, after stating that the copies of the
d to the petition, were made part of the case, pr
ows:

following record was introduced in evidence:
field, in Board of Aldermen, June 8, 1874. Order
atter of assessing betterments under and in acc
he provisions of chapter 382 of the Acts of 187
specially benefited by reason of the laying out and
t Pleasant Avenue, be referred to the board of
and that they be requested to make report thereon
ppeared in evidence, by the testimony of the cit
o grade line had ever been established by the city
ich said Fort Pleasant Avenue should be grade
d. The avenue, as wrought, varied in width fr
ed feet (the width named in the order of location
street) to forty-five feet. It is constructed acro
s, rendering embankments necessary; one of them
feet high, and the other twenty-five feet high. No
other barrier has been erected at these points on the s
avenue. Before the commencement of proceedings
sessment of betterments, the road had been properly c
and graded for public travel, unless the lack of raili
er barriers at the points above named, and the failure
y council to establish a grade, would prevent a finding
fect. The land of the petitioner abuts on said road
undred and forty feet in one part, and five hundred f
ther part.

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The records of the assessment of betterments by the respondents do not show the actual expense of laying out and constructing said avenue, or that the amount assessed upon owners of real estate supposed to be benefited is a proportional part of said expense. If it is competent to be shown in this way, it can be proved by accounts kept upon the books of public record of the respondents by its treasurer, and also by parol, that the actual expense of laying out and constructing the road is between twenty-one and twenty-two thousand dollars, and the assessment betterments upon owners of real estate was a proportional part of about two thirds of that sum.

It can also be proved by parol evidence, if competent, that the mayor of said city was present at the meeting of the board of aldermen at which said order of assessment was made, and acted as presiding officer of the board.

H. Morris & W. L. Smith, for the petitioner. 1. No grade has been legally established. Until that is done, the street cannot be said to be graded. The grading of the street, as the term is used in the St. of 1871, *c.* 382, § 1, means the bringing of the surface to a definite line — either a level, or a defined and established slope or slopes. Such is the sense in which the term is used in the Gen. Sts. *c.* 43, §§ 85, 86. St. 1853, *c.* 315, § 2. When the court say, in *Reed* v. *Scituate*, 5 Allen, 120, 124, "the commissioners have exclusive authority to determine what the grade shall be," they evidently mean a definite grade capable of being described and recorded. It is obviously for the public interest that streets should be made upon a proper grade when first opened. A change of grade after expensive buildings have been erected by the abutters involves great expense to the public. *Morse* v. *Stocker*, 1 Allen, 150.

2. The street was laid and ordered to be constructed one hundred feet wide. If at the points where it crosses ravines the width of the surface is necessarily reduced, there should at least be an equivalent at such points by the erection of suitable railings or barriers. Until these are erected, the street is not safe for the use of the abutters or the public, and is not "completed." St. 1871, *c.* 382, § 1.

3. The authority to assess under the St. of 1871, *c.* 382, is limited to a proportional share of the expense of laying out and

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The amount of that expense ought to be a m
which the person assessed may refer for the pu
g whether the assessment is proportional or v
sive. He should not be required to rely up
of employees of the city. He has a right to be in-
record of the various items of expense. The persons
ave a right to know, from the record of the tribunal
assessment, the precise amount of expense which they
to pay. The respondents offer to supply their defect-
by means of their books of account and by parol, but
t offer to show in any manner what was the actual ex-
aying out and constructing the street.

respondents fix the total amount of benefits received
estates benefited at $31,050, and they assess o
nt. Their order is merely to assess a prop
he benefits. It does not pretend to assess a
re of expense of laying out and construction.
t of the expenses the order is silent. It is not
e respondents to introduce evidence to contradi
d. *Wilbraham* v. *Hampden*, 11 Pick. 322.
Commissioners, 20 Pick. 71. *Gleason* v. *Slo*
Mendon v. *County Commissioners*, 5 Allen, 1
order of the board of aldermen which directs the col
axes to collect the assessment with interest is without
of law.

Knowlton, for the respondents.

C. J. The answer to this petition, containing allega
denials of matters of fact, and signed by counsel, is
Tewksbury v. *County Commissioners*, 117 Mass. 563.
& Nashua Railroad v. *Railroad Commissioners*, 118
But by consent of the parties the case has been sub-
h the same effect as if the facts stated in the report
y a proper return made officially by the respondents.
bjection "because no grade line has been established"
founded. The statutes do not require that such a
e formally established and defined upon the record of
dings, except so far as may be necessary to a proper
n of the manner in which the new highway or altera-
be made. Gen. Sts. *c.* 48, § 18. So far as the rights

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iabilities of abutters are affected by the grade of the street, depend on and are determined by the grade as actually con ıcted.

. The objection "that the work of laying out and grading avenue had not been completed" is not sustained in fact. mere want of railings or barriers for the protection and ty of public travel does not prevent the board from proceed- to assess the expenses. *Whiting* v. *Mayor & Aldermen of ton*, 106 Mass. 89.

The assessment, authorized by the St. of 1871, *c.* 382, § 1, tax, by which the expense of the laying out and construction ıe way is apportioned as a public burden upon the lands espe- y benefited by the public improvement. The benefit or ad- ıage to such lands is estimated only as a means of apportion- the tax and of providing a fixed limit of the amount to be ssed upon each estate. The fact of such benefit from the rovement furnishes a justification for the imposition of the upon a particular class of estates, instead of a levy in the ıeral way of ordinary taxation. But such benefit conferred ld not of itself alone warrant the exaction of money by way ompensation therefor. The estates are assessed, not for the fit conferred, but for the cost of the public improvement. essential point in the proceeding is the expenditure for a ic service, for which taxation in some form is required.

he record of the board of aldermen is defective in not show- what the amount of that expense was. But the defect may should be cured by an amendment of that record, and, upon allegations in the answer, the agreement of the parties as to effect thereof and the facts found at the hearing before a le justice, affords no reason why the court, in the exercise of liscretion, should order a writ of certiorari to issue. *Farm- on River Water Power Co.* v. *County Commissioners*, 112 ss. 206. *Noyes* v. *City Council of Springfield*, 116 Mass. 87. e order of the board of aldermen, taken in connection with facts thus alleged and admitted, shows that each estate has n assessed, in proportion to the benefit and advantage re- ved, a share of the expense of laying out and construction, exceeding the whole amount of that expense, nor half the ount of the benefit and advantage to all the estates.

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4. The objection that the record does not show that the mayor was present at the meeting of the board of aldermen was not insisted upon at the argument, and no objection was taken to the proceedings for want of the concurrence of the common council. See Sts. 1852, *c.* 94, §§ 8, 14; 1871, *c.* 382, § 1; *Day* v. *Aldermen of Springfield*, 102 Mass. 310; *Powers* v. *City Council of Springfield*, 116 Mass. 84.

5. The order to collect twelve per cent. interest is not one of the errors assigned in the petition, and does not affect the validity of the order laying the assessment. *Petition dismissed.*

AMELIA K. WHITFORD *vs.* INHABITANTS OF SOUTHBRIDGE.

Worcester. Oct. 7, 1875. — March 4, 1876. AMES & LORD, JJ., absent.

In an action against a town, for personal injuries caused by a defect in a highway, the defendant requested a ruling that the plaintiff could not recover unless she satisfied the jury that the injury was caused by the defect in the way without fault on her part. The instruction given was that "the plaintiff must satisfy the jury that she was in the exercise of due care at the time of the alleged injury, and if a want of due care on her part contributed in any degree to the injury she cannot recover, though it would not have occurred except for the omission of the town to perform its duty." *Held*, that the request did not call the attention of the presiding judge to the rule of law that it must appear that the injury was caused solely by a defect in the way, but only to the question of contributory negligence on the part of the plaintiff, and that the defendant had no ground of exception.

In an action against a town for personal injuries caused by a defect in a foot-path, by the side and within the location of a highway, instructions were requested that the jury could not find "merely" from certain specified circumstances that the town had recognized the path as a part of the highway that they were bound to keep in proper condition for travel. *Held*, that such instructions were properly refused; and that the recognition and adoption of the path by the town was a question of fact for the jury to determine, in view of all the evidence in the case.

A person, knowing the unsafe condition of a part of a foot-path by the side of a highway in a town, fell and was injured in the attempt to pass over it. In an action brought against the town for the injuries caused by the alleged defect, the defendant requested the judge to instruct the jury that the plaintiff's election, with such knowledge, to travel along the path instead of by the safe portion of the way might be considered by them as such want of due care upon her part as would prevent her recovering. The judge ruled that such knowledge would not be conclusive that the plaintiff did not exercise due care; but that if, with her knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way or in proceeding thereon after she had entered, she could not recover. *Held*, that this ruling properly left the jury to determine whether there was any want of due care in going upon the foot-path.

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ORT for personal injuries alleged to have been sustained by plaintiff in consequence of a defect in a highway in the de- lant town. Trial in the Superior Court, before *Dewey*, J., allowed a bill of exceptions in substance as follows:

The street had originally been laid out and constructed by the nilton Woollen Company, and in 1846 was laid out and ac- ed by the defendant.

he plaintiff offered evidence tending to show that she was a on seventy-two years old, residing with her son, who owned premises abutting on the highway at the place of the acci- ; that she came out of her son's house and went down a t of three steps, which led down from the bank on which son's house stood to the location of the highway, and pro- ed along a part of the location used as a sidewalk; that walk was ledgy, uneven and unsafe, and that while on this of the way, opposite her son's premises, and using due care, ell and was hurt. Her own testimony as to the occurrence e accident was as follows: "I came down the steps and ed three or four feet on the sidewalk, going north down the t, and I fell; my feet went against something, I do not what; and broke two bones right in my ankle joint. I going careful as I could. I was walking right on the side- . I don't know but I stepped on something, and I don't as I did." On cross-examination she testified: "It never been a safe place. I knew perfectly well its character. I dered it a bad place. I don't think it ever has been a safe . I always felt it was a bad sidewalk for any one to go on. s not thinking particularly about it at the time."

he plaintiff also offered testimony tending to show that she found lying on the sidewalk, with her leg broken, in the ion in which she described herself as lying, about two feet the north end of the steps. This was all the evidence as e mode of the occurrence of the injury.

he plaintiff further offered evidence of persons accustomed ss that way and living on the street, that at the time of the dent, and for many years before, the greater part of the foot e passed along said portion of the location. Evidence was introduced as to the situation and condition of said sidewalk nd prior to the time of the injury to the plaintiff; and that

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one Whitford, the adjacent owner, wheeled some material from his garden, which he spread over the ledgy part above described, and that afterwards a person, who was mending the road for the town, removed some material, using the gravel to crown up the middle of the street, and carrying off the stones which remained to a distant place. The plaintiff contended that this was to improve the walk. The defendant contended that it was not to improve the walk, and had no such effect, but was a mere taking of materials found within the location to improve the wrought part of the road.

The plaintiff also offered evidence tending to show that the town had laid out and constructed a sidewalk on that side of the street, northerly of the point in question, extending from Main Street to a point about forty or fifty feet from the place of the accident; that, from the point where the sidewalk so constructed terminated, a smooth foot-path extended to the uneven and ledgy place on which the accident happened; that said uneven and ledgy place extended about twenty feet, and southerly of said place a smooth, even path extended some distance further south; that between the carriage way and the side constructed by the defendant, a gutter had been made and by the defendant, and that a depression, of substantial same shape and size as the paved gutter, extended south from the paved gutter between the carriage way and the smooth path leading from said sidewalk to said uneven, ledgy place, and extending past the ledgy place and past the smooth path south of the ledgy place, and forming a continuous gutter or watercourse between the carriage way and the walk on the side of the road; that said sidewalk, so constructed by the town, and the smooth paths northerly and southerly of the said uneven and ledgy place, and the uneven and ledgy place itself, were substantially one continuous grade, and all on about the same grade relatively to the carriage way; that there was no method provided for the foot travel passing over the sidewalk constructed by the defendant to pass from the sidewalk to the carriage way at the point where said sidewalk terminated near the ledgy place, except by crossing the said gutter, without any bridge, flagging or other means of getting over.

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The defendant offered evidence tending to show that the high-
ay had a made way in the centre of the location wrought for
d sufficient for the public travel; that the town had never
id out or wrought the remainder of the location, including the
rt where the plaintiff was travelling, for the public use; that
was visibly unsafe and unfit for the purpose, and known to be
by the plaintiff, and that the greater portion of the foot
vel went over the wrought centre of the location, although
netimes persons passed over the part where the plaintiff was
velling.

Evidence was further offered by the defendant that the place
question was formerly, and after the construction of the road,
ank three or four feet above the level of the wrought portion,
l that an adjacent owner had many years before removed the
th from said bank, leaving the ledge bare, and put steps from
premises down to the walk, and had not levelled the walk or
ed it for travel.

The defendant requested the judge to instruct the jury as fol-
s:

'1. The evidence in the case is not sufficient to entitle the
intiff to recover.

'2. There is no evidence which tends to show that the injury
which the plaintiff complains was caused by any defect in the
hway.

'3. There is no evidence which warrants the jury in finding
t the portion of the way where the plaintiff claims to have
n injured was held out by the defendant as designed for
blic travel.

'4. There was no evidence upon which the jury would be war-
ted in finding that the plaintiff was in the exercise of due care.

'5. If the town had prepared within the limits of the loca-
n of the highway, a strip of twenty-five feet in width, being
easonable and proper width, and sufficient in all respects for
purposes of public travel, both as regards safety and con-
ience, they were not bound to prepare the entire width of
location of forty feet for such purpose.

'6. The town was not bound to prepare for the inhabitants
djoining estates the means of getting from their estates upon
location of the highway, or of crossing that portion of the

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highway not designed, wrought or appropriated for public travel, from their adjoining estates to the portion of the way so designed, appropriated or wrought, and if a person coming upon the highway from an adjoining estate in crossing to the part of the way so wrought, designed or appropriated, and before reaching the same, sustains an injury, the town is not liable.

"7. If the jury shall find that the town constructed and maintained within the location a safe and convenient way of sufficient width and suitable in all respects for all purposes of public travel, leaving a bank between such way and the limit of the location unfit and unsuitable for travel, and several feet higher in grade than the way so prepared, and the owner of the adjacent premises removed the earth from said bank, leaving between said wrought way and said limit a ledge of rocks, uneven, sharp and unfilled, and unsafe and inconvenient for such travel, and the town did no act, either to repair or work upon said ledge, or in any manner to adopt or recognize it as used, fitted or appropriated for public travel, the mere use of it by persons knowing or having reason to believe all these facts, but choosing to take whatever risk might attend walking over such ledge, would not render the town liable for failure to make the same safe and convenient, even if such acts had been so extensive or long continued or notorious that the town may be presumed to have knowledge of it.

"8. A town is not liable for defects and obstructions within the bounds of the way as laid out; but outside of the travelled path.

"9. To make the town liable for failure to render safe and convenient a portion of the way never wrought or designed by it for travel, there being a sufficient way so wrought and designed by it within the location by reason of the use of such portion by the public, there must be such a long continued public and notorious use and enjoyment by the public as to amount to a recognition of it as a wrought and completed part of the way.

"10. The town is not liable for a failure to make safe and convenient a portion of the location outside the travelled path merely because, with the knowledge of the town and without its objection, such portion is used for public travel, if such public

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vel is only by persons who know the elevation and condition the street, and have reason to know when they use it that the ne was not designed or appropriated by the town for such use.

' 11. If the plaintiff, knowing that the part of the way on ich she was travelling was unsafe and inconvenient, and had ver been adapted by the town for travel, elected to travel ng the same, instead of proceeding directly to the portion of way which was safe and convenient, the jury may consider h election as a want of due care on her part, which will pre- t her recovery.

' 12. If persons travelling on foot choose, for purposes of rtening their route, or of avoiding dirt or mud, to pass over a tion of the location which they have reason to know is not e and has not been designed or adapted by the town for such , there being a sufficient way provided, the jury cannot infer, n such use alone, a holding out of such portion of the way the town as intended or designed for travel.

' 13. The authorities of the town, and not travellers, are en- ed to determine what portion of the location, such portion ng always sufficient, reasonable and safe, shall be prepared public travel; and no portion of the public, by simply using part of the location, however unsafe or inconvenient, can ose upon the town the obligation or burden of blasting out ges, or otherwise repairing portions of the location not needed the reasonable use of the public.

' 14. It is not enough for the jury to be satisfied that the ntiff sustained an injury and that the highway was in some t unsafe or inconvenient. The plaintiff cannot recover un- she further satisfies the jury that the injury which she sus- ned was caused by the defect in the way, without fault on her t.

' 15. If the condition of the ledge was such as to advertise l inform all persons who were about to go over it that it was fit and unsafe, and never had been wrought, completed or de- ned by the town for public travel, the mere fact that a large mber of persons chose to go over it, instead of going over the rt actually prepared and fitted for travel, does not oblige the wn to make it safe and convenient as a part of the way de- gned or held out for public travel."

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The judge declined to give the instructions requested, and instructed the jury as follows:

"1. It is the duty of towns to keep ways safe and convenient for travellers on foot or in carriages, at all seasons of the year. These highways are of different width from two to six rods.

"2. A town is not bound to work and prepare for public travel the whole of the land within the limits of the way, but only such portions as are reasonably necessary for that purpose.

"3. A town is not necessarily chargeable with damage arising from every defect existing within the located limits of a highway. Nor would it be liable for obstructions or defects in portions of the highway not a part of the travelled path, and not so connected with it that they would affect the safety or convenience of those travelling on the highway and using the travelled path; nor would the town be legally liable when an injury was sustained by a party using the road for the purpose of passing from his own land, although it was caused by a defect within the limits of the highway, if it was outside the part of the road used for public travel.

"4. The town is not bound to prepare for abutters the means of passing from their estates to the adjoining highway, or of crossing from that part of the highway, not appropriated to travel, to that part which is so appropriated.

"5. It was the duty of the town to keep and maintain safe and convenient, for the public travel, those parts of the highway which were the travelled paths, and held out to the public as intended and designed by the defendant for that purpose, and were so used.

"6. The travelled path is that which, with the knowledge and acquiescence of the town, is used for public travel within the located limits of the highway.

"7. It is a question for the jury whether the foot-path, on which the plaintiff alleges she met with the injury, was so connected with the wrought part of the road, or with the carriage way, and so used for travel, as to make the town liable for its condition.

"8. From the length of time this path had been there in its then situation, and from the public notoriety of the fact, the jury may find whether this foot-path, by long continued public

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e, with the knowledge and acquiescence of the town, was cognized as a part of the wrought and finished track.

" 9. If the defendants had themselves constructed this side-lk, they would of course have been responsible to keep it in air. But if it had been constructed by others, there may be, the part of the town, such an adoption of the acts of those o constructed it, and such a long continued public and noto-us use and enjoyment of the sidewalk as to amount to a recog-ion of it as a wrought and completed part of the way, and this question of fact for the jury.

" 10. The plaintiff must satisfy the jury that she was in the rcise of due care at the time of the alleged injury; and if a nt of due care on her part contributed in any degree to the ury, she cannot recover, though it would not have occurred cept for the omission of the town to perform its duty. A owledge of the condition of the way and its alleged defects uld not be conclusive that the plaintiff did not exercise due e; but where a person had knowledge of defects, or reason to prehend any danger, a much greater degree of care and cir-nspection would properly be required of such person; and if, h her knowledge, the plaintiff did not exercise due care and dence, either in entering upon the way, or in her proceeding reon after she had entered, she cannot recover. And whether h her knowledge, and under all the circumstances, the plain-is in the exercise of due care, is a question for the jury to ermine."

The jury returned a verdict for the plaintiff for the sum of 50; and the defendant alleged exceptions.

G. F. Hoar & A. J. Bartholomew, for the defendant. 1. The ole evidence as to the cause of the injury to the plaintiff was, t she was walking carefully over an unsafe way; her foot nt against something; she does not know whether she stepped something; she fell and was hurt. Upon this evidence it was practical question, to which the attention of the jury should ve been distinctly called, whether the defect in the way caused e injury. The defendant requested the judge to instruct the ry: 1. That the evidence was not sufficient to entitle the aintiff to recover. 2. That there was no evidence tending to ow that the injury was caused by a defect in the way. 3. That

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"it is not enough for the jury to be satisfied that the plaintiff sustained an injury and that the highway was in some part unsafe or inconvenient. The plaintiff cannot recover unless she further satisfies the jury that the injury she sustained was caused by the defect in the way." The judge declined to give all these instructions; on the contrary, he stated the questions of fact upon which the jury were to pass, with such instructions as he deemed appropriate to each. If the jury followed the course indicated by the charge, they could have inquired: 1. Was the plaintiff hurt in the highway? 2. Was she hurt in a part appropriated to travel? 3. Was she using due care? And if they had found all these questions in the affirmative, they would have found for the plaintiff.

The instructions omitted all mention of that element of the well settled rule in this class of cases, requiring the jury to find the sole cause of the injury to be a defect in the way. *Babson* v. *Rockport*, 101 Mass. 93. The defendant insists that there was no evidence which warranted the jury in finding that the injury was caused by any defect in the highway.

2. The judge should have instructed the jury what was such a "use by the public with the knowledge and acquiescence of the town," as would bring the case within the rule laid down in *Weare* v. *Fitchburg*, 110 Mass. 334. In that case there was shown "a smooth level sidewalk, four feet wide, extending about a quarter of a mile, which the jury might have found was to all appearance as much a part of the highway as the carriage track was." The judge extracted from the opinion in *Weare* v. *Fitchburg* certain sentences, which were in that case not only a correct, but an ample and adequate statement of the law. But the defendant submits that a further instruction and explanation was properly asked, when the rule is to be applied to a case where a portion of the public, with full knowledge of its condition, elect to travel over a part of the way which it knew the town had never designed for that use. The instructions asked upon the evidence in the case were appropriate and necessary to constitute a sound rule, fixing the liability of towns in cases like this. The last instruction requested should have been given.

3. The judge erred in instructing the jury as matter of law that "a knowledge of the condition of the way and its alleged

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ects would not be conclusive that the plaintiff did not exer-
e due care." It was a fact for the jury to find, and it was for
em to determine whether these facts were conclusive or not.
ne judge should, therefore, have confined himself to stating
at such knowledge was not held to be conclusive as matter of
v. The instruction asked on this point was accurately stated,
d should have been given. The defendant prayed for the dis-
ct rule, that the jury were at liberty to find, that going upon
is dangerous way was an act alone, and taken by itself, show-
g a want of due care. But this instruction was refused in
rm and substance, and that actually given stated simply that
eater care was required when the defects were known. *Whit-
er* v. *West Boylston*, 97 Mass. 278. *Frost* v. *Waltham*, 12
len, 85.

F. P. Goulding, (*J. M. Cochran* with him,) for the plaintiff.

DEVENS, J. It is well settled that in an action of this nat-
e it is not sufficient for the plaintiff to show only that she
s injured while walking in the highway and using due care,
t that it must further appear that the injury was caused solely
a defect in the way. *Babson* v. *Rockport*, 101 Mass. 93.
mis v. *Arlington*, 114 Mass. 507. The instruction requested
the defendant, that "the plaintiff cannot recover unless she
ther satisfies the jury that the injury which she sustained was
used by a defect in the way without fault on her part," did
, however, call the attention of the presiding judge to this
iliar rule of law, but only to the question of contributory
gligence on the part of the plaintiff. As thus requested, it was
bstantially given by the ruling that if the want of due care
the part of the plaintiff "contributed in any degree to the
ury, she cannot recover, though it would not have occurred
cept for the omission of the town to perform its duty." The
cessary inference was that the plaintiff was to recover, if at
, on account of the occurrence of the injury from a defect in
e way existing by reason of the neglect of the town to perform
duty.

Both the instructions requested, and those given in reply to
em, relate mainly to the liability of the defendant for the
ndition of that part of the way where the injury occurred and
its responsibility for defects therein. This part of the way

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was a path within the limits of the highway, but outside of that portion wrought for carriage travel; and if the instructions were correct and there was no deficiency in them, the defendant has no ground of complaint. The evidence which tended to show that this path was unsafe and that the plaintiff was walking carefully, would warrant the jury in finding that while using due care the plaintiff was injured by reason of the defect in the way.

These instructions, which were largely in the language used in the opinion of this court in *Weare* v. *Fitchburg*, 110 Mass. 334, submitted as a question of fact whether there had been an adoption and recognition by the defendant of this path as a portion of the wrought and finished track so that the town would be liable for defects therein. The jury were to take into consideration the position and character of the path, its relation to the main wrought road, the length of time it had been in its then situation, the public notoriety of the facts, and were to determine whether by long continued public use, with the knowledge and acquiescence of the defendant, it had been thus adopted and recognized. From the nature of the case it would not have been possible to have given an exact rule as to the relation the path should have been shown to bear to the main wrought road, or the amount or character of its use, in order to render the town liable. The use which, in connection with other facts, was to furnish evidence of such recognition, was sufficiently defined as a "long continued public use."

Instructions were asked substantially to the effect that if the condition of the ledge (where the path was situated) was such as to inform all persons that it was unsafe, the mere fact that a large number chose to go over it would not oblige the town to make it safe; also, that if a large number of persons chose, for the purpose of shortening their route, to pass over a portion of the road not safe and not designed nor adapted for public travel, the jury could not infer from that use alone a holding out of such portion for travel; and further that if persons, who knew the character of the street and had reason to know that it had not been appropriated to public use, saw fit to use and did use it for public travel, the town would not be liable to make it safe and convenient, merely because this was done. These requests

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properly declined. So far as appears by the bill of excep-
, there was no evidence as to the motives or knowledge of
e who used this path, nor did the plaintiff rely on the mere
of any such use as was thus stated. The presiding judge
l not have been properly asked to rule that a portion of the
ence did not sustain the plaintiff's case. The almost neces-
effect of such instructions, if given, would have been to draw
ttention of the jury from the inquiry whether this was a
lled path within the limits of the highway held out by the
dant to the public as intended and designed for travel and
o used with the knowledge and acquiescence of the town.
he circumstances attending this use were proper to be con-
ed in connection with this question.

e defendant contends that the instruction requested, that
ry were at liberty to find that the act of going upon this
rous way was in itself an act showing a want of due care,
ot given, but in place thereof only a ruling that greater
was required where defects were known. This suggestion
wever, erroneous. The jury were told that "if, with her
ledge, the plaintiff did not exercise due care and prudence
in entering upon the way, or in her proceeding thereon
she had entered," she could not recover. This certainly
he jury to determine whether there was any want of due
in going upon the way. *Exceptions overruled.*

TY OF WORCESTER *vs.* FRANCIS H. KELLEY & others.

cester. Jan. 5. — March 7, 1876. AMES & DEVENS, JJ., absent.

was conveyed to a city in trust for the purpose of building a hospital thereon. he terms of the deed, the city was to make an appropriation of twenty-five sand dollars for the purpose, and to build a hospital, or part of a hospital, of rtain size, upon the land within three years, or, failing to do so, to pay the ntor, or his legal representative, the sum of two hundred dollars a month; and land was not to be sold for twenty-five years, and then only upon the opinion hree fourths of the board of trustees that it was unsuitable for a city hospital, upon the setting apart of a sum of money equal to the value of the land, as then rtained by three appraisers, as a permanent fund for the city hospital. The was duly authorized by the Legislature to erect and maintain a city hospital, accepted the grant of the said land. The grantor by his will, after devising

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all the residue of his estate to the city in trust, to be by it applied for the sole use and benefit of the city hospital, provided as follows: "While I would not wish to give any particular direction to the bequest, nor incur the risk of defeating the purpose I have in view in making it, by imposing any limitations or condition as to the manner of its use, still I should prefer to see it set apart as a separate fund, and the income thereof only applied to the support and maintenance of said hospital, if such course shall commend itself to the wisdom of those having it in charge." *Held*, that a bill in equity brought by the city after the death of the grantor and within three years after the grant, seeking to release the city from the obligation of building a hospital upon the land within three years from the date of the deed, and to enable the city to sell the land immediately for its own benefit, on the ground that the city had made other provisions for a suitable and convenient city hospital elsewhere, that it would be inexpedient and unnecessary to erect a hospital on the land, and that said land, on account of its situation, its northern exposure and nature of its soil, was not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons, could not be maintained.

BILL IN EQUITY, filed November 24, 1874, by the *city of* Worcester against the trustees of the Worcester City Hospital, the heirs and executors of George Jaques, and the Attorney General, alleging the following facts:

By the St. of 1871, *c.* 339, passed May 25, 1871, the city of Worcester was authorized "to erect, establish and maintain a hospital for the reception of persons who, by misfortune or poverty, may require relief during temporary sickness," and the city council of said city was empowered "to make such ordinances, rules and regulations as they may deem expedient, for the appointment of trustees and all other necessary officers, agents and servants for managing the said hospital."

On June 26, 1871, the city council passed an ordinance, which is now in force, establishing a hospital accordingly, and providing for the appointment of a board of trustees for the management of the hospital and of all funds and real and personal property received by the city by gift or bequest for the benefit of the hospital, and afterwards elected a board of trustees under the ordinance. The city established a city hospital for the reception of patients, and the city council made annual appropriations for its support and maintenance.

On March 12, 1872, George Jaques conveyed to the city a parcel of land in Worcester, to be held by the city, its successors and assigns, in trust nevertheless, and for certain charitable uses and purposes set forth in the deed as follows:

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"1. The said parcel of land shall be forever appropriated and
sed, except as hereinafter otherwise provided, as a site for a
ublic city hospital, to be erected, established and maintained
hereon by said city of Worcester in its municipal capacity, in
he manner authorized by law.

"2. The city council of said city shall, on or before the fif-
enth day of April next after the date hereof, make an appro-
riation of not less than twenty-five thousand dollars for the
ection on said parcel of land of a hospital building, or of a
art of a hospital building; and said building or some part
hereof shall, within three years after the date hereof, be so far
mpleted as to afford reasonably comfortable accommodations
r at least twenty-five patients of such classes as said city is
ow authorized by law to receive and care for in its city hospi-
l; and if said hospital building or some part thereof shall not
ithin said three years be so completed and furnished, then the
id city shall forfeit and pay to me or to my legal representa-
ve, at the expiration of said three years, the sum of two hundred
200) dollars a month from the date hereof, without interest,
nd shall thereafter continue to pay to me, or to my legal repre-
entative, the sum of two hundred (200) dollars a month, with-
ut interest, until such accommodations for twenty-five patients
hall be furnished as above provided. No hospital building, or
art of a hospital building, shall be placed or built on said parcel
f land, for twenty-five years from the date hereof, until the plan
f such building or part thereof shall have been approved by a
ote of said city council, and also by a vote of the board of trus-
ees of the city hospital of said city. And no hospital or building
rected upon said parcel of land shall ever, either before or after
he expiration of twenty-five years from the date hereof, with
he knowledge or consent of said board of trustees or by permis-
on of the city council of said city, be used for the reception of
ersons sick with diseases dangerous to the public health.

"3. The city council of said city shall, within two years from
he date hereof, by its decree, lay out and widen said Prince
treet as a public street, to a width of fifty feet, and lay out the
ame as near as may be in a straight line parallel with Chandler
treet, from King Street to Wellington Street, a distance of
bout two thousand feet; and said Prince Street shall be so

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made as to be in a reasonably good condition for carriages to pass over it from King Street to Wellington Street; ing of said Prince Street to fifty feet shall be made h side or wholly on its southerly side, as said city coun fit to lay out the same; and I hereby grant to said ci to lay out and maintain said Prince Street over an owned by me which shall be comprised within the lin street when so laid out and widened; and I hereby fu to said city the right to cut and fill any portion of said Prince Street for its entire length, from King Street to Wellington Street, as the city council of said city shall determine; and I request that the name of said Prince Street may be changed to Hospital Street.

"4. The city council of said city shall within two years from the date hereof, by its decree, lay out and widen said Wellington Street as a public street, to a width of fifty feet from the northwesterly line of Main Street to a point where the northerly line of said Prince Street, as above to be extended, shall intersect with the said Wellington Street, the said Wellington Street to be widened wholly on its southerly side, unless the said city council shall decide to widen it partly on its northerly side. The remaining portion of said Wellington Street shall not be widened on its southerly side without my consent, for a period of ten years from the date hereof, by any order of said city council; but I hereby grant to said city the right to lay out and widen said remaining portion of Wellington Street as a public street, to a width of fifty feet over any land now owned by me adjoining said street, after the expiration of said period of *ten* years from the date hereof.

"5. The board of trustees of said city hospital shall have *the* exclusive care and management of said parcel of land during all the time that said parcel of land shall be occupied for hospital purposes as herein provided; and my desire is that for the period of twenty-five years from the date hereof, no tree on said parcel of land shall be injured or taken down, except by the consent in writing of three fourths of the members of said board of trustees.

"6. At any time after the expiration of twenty-five years from the date hereof, if, in the opinion of three fourths of the

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nbers of said board of trustees, said parcel of land shall for reason be unsuitable for the purposes of a city hospital, then said city in its corporate capacity may occupy the whole or part of said parcel of land for school purposes or for other , or may sell the whole or any part thereof; provided ho w- , that before the occupation or use of said parcel of land for r purposes than for a city hospital, and before the selling of part of said parcel of land, the said trustees shall cause said el of land, apart from the buildings thereon, to be appraised hree competent men chosen by said trustees, one of said men e a resident of the city of Boston, in said Commonwealth, the other two to be residents of said city of Worcester, and eupon a sum of money equal to the amount of such appraisal l be immediately set apart and expressly established forever aid city of Worcester, as a permanent fund which shall not liminished, and the income of said fund shall be forever de- d to the institution now known by the name of the 'Worces- City Hospital,' according to an ordinance entitled 'An ordi- ce relating to the City Hospital,' passed by the city council aid city June 26, 1871."

he city accepted said deed, and agreed to carry into full effect its provisions, and to be bound thereby, and the city has in espects complied with the terms and conditions of said deed, has not erected, or begun to erect, a hospital building on land thereby conveyed.

eorge Jaques died August 24, 1872, leaving a last will dated 29, 1872, which had been duly proved and letters testa- tary issued to the executors named therein. The testator, nd by his said will, after providing for the payment of his s, funeral expenses and charges of administration, and di- ng the payment of certain pecuniary legacies, devised and eathed all the rest and residue of his property, real and per- l, to the city of Worcester, in trust for the use and benefit aid city hospital, said devise and bequest being contained in ighth and ninth clauses of his will, as follows:

8. I have been convinced for some time that the city of rcester, containing within it as it does so many elements of perity, thrift and rapid growth, has no greater want to be plied than that of a well endowed and properly managed gen

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eral hospital which can minister to the comforts of the sick unfortunate among the poorer classes of the city's popula by furnishing that care, nursing and medical skill which ot wise they never would receive.

"I have already given evidence of my conviction upon this point by the gift recently made to the city for that object at the same time I realize how little that alone can do t the proper and full accomplishment of the work, or even t a degree as to render it of any permanent and real value t for whose comfort and well being it is designed.

"In making disposition of the balance of my property ated as I am, with no relation likely to survive me neare cousins with whom I have never been on terms of intimac many of whom are comparative strangers to me, I have t I could not be the instrument of more good to my fello or serve a better purpose with said balance of my estate contributing still more to the object above named. Th

"9. All the rest, residue and remainder of my est personal or mixed, not herein otherwise disposed of, of may die seised and possessed, or to which I may in any entitled at the time of my decease, whatever the same wherever it may be or be situated, or however it may be known, designated or described, I give, devise and bequeath unto the city of Worcester, in trust, however, to be by the city applied to the sole and particular use and benefit of the institution recently established and known as the Worcester City and to no use or purpose other than that whatsoever. would not wish to give any particular direction to th nor incur the risk of defeating the purpose I have making it, by imposing any limitations or condition manner of its use, still I should prefer to see it set apart as a separate fund, and the income thereof only applied to the support and maintenance of said hospital, if such course shall commend itself to the wisdom of those having it in charge."

The bill further alleged that a large personal and real estate had vested in and was now held by the city under said will, for the charitable uses and purposes in said will declared; that the city had made other provisions for a suitable and convenient city hospital building; that it would be inexpedient and unnecessary

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o erect a hospital building on said land at the present time or vithin three years from the date of said deed; that said land, n account of its situation, its northern exposure and the nature f its soil, is not a suitable, convenient or wholesome place for he erection of a hospital for the reception and care of sick per- ons; that other land, more suitable and available for said pur- ose, can readily be obtained; that the city had already estab- ished a city hospital on land which was devised to the city under aid will of George Jaques, and which is better adapted to said purposes; that it is necessary and expedient that a sale and con- veyance of the land conveyed by said deed should be made, and the proceeds invested for the use and benefit of said hospital; that James Jaques, one of the defendants, had released to said executors all his interest in said estate, and the executors had conveyed the same to the city.

The prayer of the bill was that the city might be relieved from the obligation of building a hospital building on said land within three years from the date of said deed, and that a con- veyance of said land and the investment and application of the proceeds for the purposes of said hospital should be decreed, and for other relief.

The executors filed an answer disclaiming all interest in the matters set forth in the bill. The trustees of the city hospital filed an answer admitting the allegations of the bill, and con- senting that the prayer of the bill might be granted. The bill was taken for confessed against James Jaques. Sabra Carter, one of the heirs at law of George Jaques, appeared and filed a demurrer, assigning for cause that the plaintiff had not in the bill made or stated such a case as entitled it to any relief what- ever.

The case was heard and reserved by *Gray*, C. J., upon the bill and the demurrer, for the consideration and determination of the full court.

B. F. Thomas, for Sabra Carter.

T. L. Nelson, for the plaintiff.

GRAY, C. J. By the terms of the deed executed by George Jaques and accepted by the city, the city took the land for the purpose of building a hospital thereon; the city was to make an appropriation of twenty-five thousand dollars for the purpose,

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and was to build a hospital, or part of a hospital, of a certain size, upon the land, within three years, or, failing to do so, to pay to the grantor or his legal representative the sum of two hundred dollars a month; the land was not to be sold for twenty-five years, and then only upon the opinion of three fourths of the board of trustees that it was unsuitable for a city hospital, and upon the setting apart of a sum of money equal to the value of the land, as then ascertained by three appraisers, as a permanent fund for the benefit of the Worcester City Hospital.

The right to the monthly sum of two hundred dollars, payable by the terms of the deed to the grantor or his legal representative, vested, upon his death, in his executor or administrator. *Cox* v. *Curwen*, 118 Mass. 198. By virtue of the residuary clause in his will, it would pass to the city; yet not as absolute property, but in trust for the benefit of the Worcester City Hospital.

There is nothing in the will, which manifests any intention to vary the provisions of the deed, or to authorize a sale of the land except at the time and under the restrictions therein stated. The donor may well have considered that if a hospital should not be erected on the land granted, the land would increase in value so much during twenty-five years, that his charitable purpose would be best promoted by not selling the land before the expiration of that time. But whatever his reasons were, the terms of his grant, to which the city, by accepting it, assented, are plain. Even if, as the city now alleges, the land is an unsuitable place for a hospital, whatever weight that consideration may have upon the question whether a hospital shall be immediately built there, it has no tendency to show that the alternative undertaking of the city to pay two hundred dollars monthly cannot be carried out.

The object of the present bill is to release the city from the obligation of building a hospital upon the land, and of appropriating twenty-five thousand dollars for that purpose, or, failing so to build, of paying two hundred dollars monthly; and to enable the city to sell the land immediately, in violation of the terms of its contract with the donor, and thus to avail itself of the whole value of the gift, without performing its part of the contract, or paying any of the sums of money which it had bound itself to pay out of its own funds.

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The only reasons alleged are that the city has made other provisions for a suitable and convenient city hospital elsewhere, that it would be inexpedient and unnecessary to erect a hospital on this land; and that "said land, on account of its situation, its northern exposure and the nature of its soil, is not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons."

It does not appear that there are any facts which did not exist or were not known to the city at the time of accepting the deed of the donor, and no case is shown for inducing a court of equity to assist the city in violating its contract with him.

Bill dismissed.

STEPHEN HENRY & others *vs.* LUTHER THOMAS & another.

Plymouth. January 24. — March 4, 1876.

The words, "greater part of them in interest," in the Gen. Sts. *c.* 148, § 2, providing that the proprietors of meadow and swamp lands, "or the greater part of them in interest," may apply by petition to the Superior Court for the improvement of the lands, relate to the proprietors having the greatest interest in value, and not to those owning the largest territorial area.

PETITION, under the Gen. Sts. *c.* 148, to the Superior Court, by three proprietors of meadow lands in Marshfield, for the appointment of commissioners to prescribe the measures to be adopted for making certain improvements thereon. The other proprietors, two in number, were made respondents. Hearing before *Putnam*, J., who granted the petition, and allowed a bill of exceptions, so much of which, as is material to the point decided, appears in the opinion.

P. Simmons & B. W. Harris, (*P. E. Tucker* with them,) for the respondents.

C. G. Davis, for the petitioners.

DEVENS, J. Many objections have been made by the respondents to this proceeding which it is unnecessary to discuss, as we are of opinion that there is one which is necessarily fatal to it.

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In order to initiate the proceeding, it is pr
prietors, or "the greater part of them in in
to the Superior Court setting forth the propo
and the reasons therefor." Gen. Sts. c. 148,
the court ruled that by the words "greater
was meant those having the greater part in ex
area and not in value of interest. This ruling
the more obvious meaning, that such proprietor
greater interest in value, is fortified by the wh
the proceeding.* By it the proprietors of the me
are treated as owners of a common property wl
rights must be subjected to such modifications a
sioners may judge most practicable to secure the b
of all. *Coomes* v. *Burt*, 22 Pick. 422. *Lowell* v.
Mass. 454, 469. In questions concerning the ma
property of this character, it is but just that those
greater interest in value should be those to commen
ceedings and to propose the improvements to be m
improvements are not of a public character; *they affe*
estates of those who are owners of the property; and
which is to be taken relates only to that *in which* a
common interest, or in reference to which all are affe
common necessity. *Lowell* v. *Boston*, *ubi supra*.

This is analogous to the management of wharves *and*
fields by their proprietors, who are to vote in regard the
cording to the relative amount or value of *their interes*
known. Gen. Sts. c. 67, §§ 12, 24. Nor can it be fairl
tended that, because the words "amount" *and* "*value*" ar
in the statute last referred to in connection with the word
terest," and not in c. 148, a different construction is to be g
to the latter statute. The word "interest" is itself *sufficien*
include value. *Exceptions sustained.*

* By the St. of 1876, c. 228, passed April 28, 1876, § 2, of the Gen. Sts.
148, is amended by adding the words "either in value or area," after the wo
"interest."

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WILLIAM MASON *vs.* LEWIS E. FIELD.

tol. Oct. 28, 1875. — March 2, 1876. MORTON & LORD, JJ., absent.

wning a building abutting upon lands owned severally by B. and C., made sep-
ate contracts with them conveying to each a part of his wall, with permission to
ild upon it as high as their buildings should require. B.'s and C.'s buildings
re substantially one. B. agreed so to provide for carrying off the water from
roof of A.'s building where it abutted against his own, as to prevent any leak-
e in A.'s building. The contract with C. contained a similar stipulation on his
rt. *Held*, that B.'s agreement applied only to leakage in that part of A.'s roof
at abutted on B.'s building; and, that part being properly constructed, that he
s not liable for imperfection in the roof against C.'s part of the building.

nd B., owning contiguous land and buildings, made a contract with regard to a
ilding to be erected on B.'s land, wherein B. stipulated to remove the eaves and
of A.'s building, and make good the roof, after removing the same where his
ilding rose above A.'s wall, "in a thorough and workmanlike manner, without
jury to the appearance or utility of the rest of the building, and provide in the
ost effectual manner, by a gutter, valley, flashing or otherwise, to permanently
ceive and carry off the water from the roof of A.'s building." B. made a new
of to a part of A.'s building for the purpose. *Held*, that he was justified in so
ing under his contract, if that was the best method of carrying off the water, or
good as any other; and that this question was properly submitted to the jury.

nd B., owners of adjacent lands and buildings, made a contract whereby B.
reed to make certain alterations in the roof of A.'s building where it abutted
on B. In an action by A. for a breach of this contract, he joined counts in tort,
erring that they were for the same cause of action. *Held*, that under these
unts A. could not show acts of B. done in regard to portions of A.'s roof not
utting on B.

ONTRACT for breach of a written agreement, with counts in
, averred to be for the same cause of action. At the trial in
Superior Court, before *Aldrich*, J., the jury returned a ver-
for the defendant, and the plaintiff alleged exceptions, the
stance of which appears in the opinion of the court.

. *A. Reed*, for the plaintiff.

. *Marston*, for the defendant.

ENDICOTT, J. The plaintiff owned a building called Templar
ll, which was bounded on its eastern side fifty-three feet by
nd of Richmond, twenty feet by land of the defendant, and
gain twenty-five feet by land of Richmond; Richmond thus
wning the northern and southern end of the adjoining land,
nd the defendant the intervening twenty feet. The defend-
nt, intending to build on his twenty feet, entered into a con-

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tract with the plaintiff, which is the subject matter of this suit By this contract the plaintiff conveyed to the defendant one undivided half part of the eastern wall of Templar Hall, from the ground to the roof, abutting on the twenty feet owned by the defendant. The contract contemplated the erection of a building by the defendant higher than the eastern wall of Templar Hall, and authorizes the defendant to build the wall as much higher as necessary for the completion of his building. And it provides that the defendant shall "remove the eaves and jet of said Templar Hall Building, and make good the roof after removing the same, where his proposed building rises above the present wall, in a thorough and workmanlike manner, without injury to the appearance or utility of the rest of the building; and provide in the most effectual manner, by a gutter, valley, flashing or otherwise, to permanently receive and carry off the water from the roof of the Templar Hall Building, where it abuts against his said building, so as to prevent any leakage in said Templar Hall Building by reason of rain, accumulation of snow, ice or otherwise, during the work and afterwards."

The intent of the parties in making this provision was evidently to prevent leakage in that part of the roof of Templar Hall which would abut against the proposed building of the defendant, and this is confirmed by other facts which appear in the bill of exceptions. The plaintiff had an agreement with Richmond like the one made with the defendant; from which it is to be inferred that both of them intended to build substantially one building, under similar agreements in relation to the work to be done on the land of each where it abutted against Templar Hall. It also appears that Richmond and the defendant erected the building against Templar Hall, but it did not appear at the trial that the defendant had anything to do with the portion erected on Richmond's land, or that Richmond had anything to do with the portion erected on the defendant's land.

The building thus constructed by Richmond and the defendant respectively was about six feet higher than the eastern wall of Templar Hall, and the wall was raised to that extent by both the defendant and Richmond, under their contracts. To carry off the water that would fall on the space covered by that side of the roof of Templar Hall, the defendant constructed against

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wenty feet, and Richmond against the land owned by him, the original slate roof of Templar Hall, a tin roof which d from the ridge of the hall to the new building. It was nstructed that the water falling on the tin roof, together a portion of the water falling on both Richmond's and the dant's parts of the new building, should be carried into a ucting pipe, and from that into the defendant's building, to ed there.

e plaintiff contended that the pipe was insufficient for the ose, and that the water was discharged over the south end e new roof against Richmond's part of the new building, hrough imperfections in the south end of the new roof, be- n the old and new roof, there was a leakage into Templar . And he asked a witness, "How was the south end (which Richmond's part) of the addition in the roof of Templar Building closed up?" This question was properly ex- ed; and the presiding judge rightly ruled that if the defend- had properly constructed the new roof against his twenty he was not liable for improper construction in the roof nst Richmond's part. And, in connection with the claim of plaintiff that the capacity of the pipe was insufficient, he properly ruled that the defendant was bound to provide for discharge of all water falling on the new roof abreast of his , under all usual circumstances of the climate, but was not ound to provide for any extraordinary condition of things be expected in this climate.

or do we see any objections to the ruling of the presiding e that if the construction of the new roof over the old roof the best method of carrying off the water, the defendant justified in doing so under his contract. The contract pro- l for the erection of a new building higher than the eastern of Templar Hall, and the raising of the wall, and the de- ant stipulated that he would provide "in the most effectual ner, by a gutter, valley, flashing or otherwise, to perma- ly carry off the water from the roof of the hall, where it s against his new building."

Whether the defendant had properly constructed the new and whether that method of carrying off the water was the method, or as good as any other, was submitted to the jury

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under instructions to which no exception was taken; a
those questions the jury found for the defendant.

The plaintiff called a witness, an expert in the business
and tin roofing, and among other things asked him wha
be the effect of water or rain flooding up on the tin roof,
judge, on objection by the defendant, excluded the in
being matter of common knowledge, and not a subje
evidence of experts. It is not necessary to consider th
whether the effect of water or rain flooding on a tin
subject matter for the testimony of an expert. The
the tin roof which was affected by the flooding, and
mitted the water through imperfections in its constru
not against the defendant's part of the building; and no claim
is made that the roof leaked where it abutted on the defendant's
part. The testimony, therefore, of the expert becam
rial, as it related to the action of water on that part
abutting on Richmond's land, for the improper con
which the defendant was not responsible.

It was clearly incompetent for the plaintiff, under his counts in tort, to show acts of the defendant "in respect to the portion of the new roof abreast of the land of Richmond," as he asserted the right to do. He had averred that the counts in tort and contract were for one and the same cause of action; otherwise they could not be joined. Gen. Sts. *c.* 129, § 2, *cl.* 5. As the count in contract can only apply to acts done or omitted in regard to that portion of Templar Hall abutting on the plaintiff's land, the count in tort is also limited to the same portion. When the plaintiff attempts to prove a tort not within that limit, he shows another cause of action, different from that set up in the count in contract. *Exceptions overruled.*

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DAVID HEALY *vs.* MATTHIAS PFAU.

Bristol. Oct. 29, 1875. — March 4, 1876. MORTON & LORD, JJ., absent.

A bond for a deed of land recited that the obligor had agreed to sell and convey to the obligee certain land, the same to be conveyed by a good and sufficient warranty deed, and that the obligee agreed to pay therefor $1142, of which $100 was to be paid in cash "upon the delivery of this bond for a deed," and the remainder by six notes bearing even date therewith, the principal to be paid $200 each year and interest according to the tenor and effect of the notes; and provided that it should be void, if the obligor should, "upon tender by the obligee of the said cash and notes, and at any time when said amount is paid from this date, deliver unto the said obligee a good and sufficient deed as aforesaid." The bond and notes were all of the same date, the $100 was duly paid, and the notes given. *Held*, in an action upon the first note after its maturity, and to recover interest upon the other notes, that the defendant was only entitled to the deed on payment of the notes at or before their maturity, and that the action could be maintained without a previous tender of a deed of the land by the obligor.

CONTRACT upon a promissory note for $200, dated Fall River, June 12, 1873, made by the defendant, payable to the plaintiff one year from date, with interest at the rate of eight per cent., payable semi-annually, and to recover interest upon five other similar notes, payable respectively in two, three, four, five and six years from the same date. Writ dated November 21, 1874. The case was submitted to the Superior Court, and, after judgment for the plaintiff for $272.47, to this court on appeal, on an agreed statement of facts in substance as follows:

The plaintiff sold a parcel of real estate to the defendant, and gave to the defendant the following bond for a deed, signed by him and dated June 12, 1873:

"Know all men by these presents, that I, David Healy of Fall River, county of Bristol, and State of Massachusetts, am holden and stand firmly bound unto Matthias Pfau, of said Fall River, in the sum of twenty-five hundred dollars, to the payment of which to the said obligee or his executors, administrators or assigns, I hereby bind myself, my heirs, executors and administrators.

"The condition of this obligation is such that, whereas the said obligor has agreed to sell and convey unto the said obligee a certain parcel of real estate situated in Fall River aforesaid, and bounded as follows, namely. [Then followed a description

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of the land.] The same to be conv
warranty deed of the said obligor,
title to the same, free from all incun

"And whereas, for such deed a
that the said obligee shall pay the
forty-two dollars, of which one hund
cash upon the delivery of this bond
der by six notes of the said obligee, b
cent. per annum, payable semi-annua
herewith, whereby the said obligee ag
said sum and interest. The princip
dollars each year, and interest as a
tenor and effect of said notes.

"Now therefore, if the said obligor
said obligee of the aforesaid cash and
when said amount is paid from this d
obligee a good and sufficient deed as a
tion shall be void, otherwise it shall be
and virtue."

The defendant gave the plaintiff for
hundred dollars in money, and six pro
him, but the plaintiff never gave or tend
deed of the land. The notes mentioned i
upon which the action is brought. Th
made at the same time, and the $100 wa
time of making the notes and bond.

If the court finds said action to be bro
that a deed should have been tendered t
bringing said action, or that the considera
failed, then judgment is to be for the def
the plaintiff.

W. H. Peirce, for the plaintiff.

H. K. Braley, for the defendant.

AMES, J. The defendant insists that,
bond, the plaintiff had no right of action u
upon, without having first delivered or ten
ant a deed of the land which was the subjec
tween the parties. It is not easy to give a
to an instrument so illiterate and obscure as

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the parties have undertaken to set forth the terms of their contract. The bond given by one party, and the notes given and the payment made by the other, all were of the same date, and are agreed to have constituted one transaction. If the defendant is right in his claim that, upon the delivery of the notes and the payment of one hundred dollars, he was entitled to his deed, there was no occasion for a bond at all. In that view of the case, he had done all that he was required to do, in order to be entitled to the conveyance. He had bought the land on credit, and had given all the securities which he was required to give. Nothing remained for the plaintiff to do except to deliver the deed, and, having done so, to wait for the payment of the notes as they should come to maturity in regular succession. But the instrument is described on its face as a bond for a deed — a form of expression which imports that a deed is to be given at some future time, and that for some reason it is not to be delivered presently. We cannot give any sensible interpretation to the bond, or any rational explanation of the fact that it was given and accepted instead of a deed, except upon the assumption that the parties had it in contemplation that something remained to be done in the future, and that the delivery of the notes was not of itself to entitle the defendant to his deed. No deed was delivered by the plaintiff, and none was demanded or apparently expected by the defendant at that stage of their dealings; and there is no apparent reason why he should have taken a bond for a deed, if he had in fact fulfilled the conditions upon which he was to have a present and immediate right to the deed.

Our conclusion therefore is, that the true meaning of the instrument, however awkwardly and imperfectly expressed, must be that the defendant was to have a bond for a deed, until he should have paid the notes; and that whenever they were paid, whether at or before their maturity, it would be the duty of the plaintiff to execute the conveyance. *Exceptions overruled.*

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LOUM SNOW, JR. *vs.* UNION MUTUA COMPANY.

Bristol. Oct. 27, 1875. — March 7, 1876. *Mo*

The right to recover for a constructive total loss, on a underwriters, depends upon the state of facts when the the abandonment, if justified by those facts, relates ba

If a vessel is once totally lost by a peril insured against, diligence, is unable to regain possession of her in such circumstances as to enable her to pursue the voyage for right to abandon and to recover for a constructive total gard to the question whether at some future time, over control, he might be able to regain possession of her on without regard to the proportion between the amount of th of the vessel.

In an action on a policy of marine insurance, there was evide sured, a whaling vessel, was jammed fast in the ice in the open water in sight, and drifting northwards with the curre and crew, finding it impossible to extricate her with the utmo nearly worn out with fatigue and want of sleep, in order to save in their boats, taking with them their guns and whaling gea through narrow strips of water and hauling the boats over the whaling fleet in safety, fifty miles south of where they left the days afterwards, the men, boats and guns being scattered in diffe some of them having gone home, the ice loosened, and the aban got out by the master and crew of another vessel, and held for sa master of the vessel insured was not able, by the exercise of reason obtain a sufficient crew or whaling craft, or to gain possession of the sue the voyage on which she was employed, and for which she was i the vessel was taken by the salvors to San Francisco, and before her was abandoned by her owners to the underwriters. *Held*, that it wa for the jury to find a verdict against the underwriters for a constructive

Under a declaration on a policy of marine insurance for a total loss, a co total loss may be recovered.

It is not necessary, in a declaration on a policy of marine insurance, to a abandonment of the vessel to the underwriters, or the facts necessary to c the total loss relied on.

CONTRACT on a policy of insurance on the *ship Helen S* and outfits, "wherever she may go on a whaling voyage," f October 14, 1871, to October 14, 1875. The vessel was valu at $10,000, and the outfits at $20,000.

The declaration was as follows: "And the plaintiff says th defendant made to him a policy of insurance, a copy of which is hereto annexed, for the sum of eighteen hundred and seventy

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dollars, on bark Helen Snow, against the perils of the seas other perils therein mentioned, on a whaling voyage during time in said policy set forth; and while engaged upon said ling voyage, the said bark was encompassed in heavy masses e in the Arctic Ocean, and so rendered unnavigable and at mercy of the currents and the masses of ice around her, and anger of immediate destruction by being crushed or set nd, with all her outfits, cargo and stores, so that the officers crew for the safety of their lives were compelled to leave abandon her, and seek safety in finding their way on the some other ships or to the land, and so the said whaling e was utterly broken up and lost, and said ship and her , cargo and stores were totally lost by the perils of the seas erils insured against in said policy; and the defendant had otice thereof, and became bound to pay the sum insured in olicy to the plaintiff, as provided in said policy, before the f the writ in this case. And the defendant owes the plain- herefor said sum of eighteen hundred and seventy-five dol- nd interest thereon, as for a total loss under said policy."

the trial in this court, before *Wells*, J., it appeared that essel was left by the master and crew in the Arctic Ocean ugust 21, 1872; that the vessel was abandoned to the un- riters on October 14, 1872, and on November 1, 1872, the l arrived at San Francisco in the possession of salvors. plaintiff also put in evidence on which the judge directed the following questions of fact should be submitted to the : "1. Whether the master, officers and crew of the Helen v were warranted, by necessity resulting from a peril insured nst, in leaving the ship, as they did, on August 21, 1872. Whether, up to the time of the written abandonments, the ntiffs had an opportunity to resume possession of the ship, the purpose of pursuing the voyage for which she was in- d, of which they did not avail themselves."

he defendant contended that the evidence would not war- the jury in answering these questions in favor of the plain- and declined to go to the jury thereon, agreeing that if the would be waranted in finding these issues in favor of the ntiff, the case should stand as if these issues had been so d. The plaintiff then asked the judge to rule that, upon

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these findings, he was entitled to recover a total loss. The judge declined so to rule.

The defendant objected that, under the declaration, no evidence of a constructive total loss would be admissible. The objection was overruled, and the case was reported for the consideration of the full court. If the findings for the plaintiff, upon the two issues submitted to the jury, would entitle him to a verdict for a total loss, then judgment was to be entered for the plaintiff for a total loss, if the court should also find that there was any evidence on which the jury might properly have found upon these issues for the plaintiff; otherwise, for the defendant, or the case to stand for trial, for proof of a partial or constructive total loss, if the action could be maintained under the declaration. Annexed to the report was a copy of the evidence in the case, the nature of which appears in the opinion.

G. Marston & C. W. Clifford, for the plaintiff.

T. M. Stetson, for the defendant, cited *Falkner* v. *Ritchie*, 2 M. & S. 290; *Parsons* v. *Scott*, 2 Taunt. 363; *Naylor* v. *Taylor*, 9 B. & C. 718; *Bainbridge* v. *Neilson*, 10 East, 329; *Thornely* v. *Hebson*, 2 B. & Ald. 513; *Underwood* v. *Robertson*, 4 Camp. 138; *Anderson* v. *Wallis*, 2 M. & S. 240; *Pole* v. *Fitzgerald*, Willes, 641; *Brotherston* v. *Barber*, 5 M. & S. 418; *Everth* v. *Smith*, 2 M. & S. 278; *Hunt* v. *Royal Exchange Assurance*, 5 M. & S. 47; *Wood* v. *Lincoln Ins. Co.* 6 Mass. 479; *Greene* v *Pacific Ins. Co.* 9 Allen, 217.

GRAY, C. J. The evidence introduced at the trial would warrant the jury in finding that the Helen Snow, being jammed fast in the ice in the Arctic Ocean, with no open water in sight, and drifting northwards with the current, her officers and crew, finding it impossible to extricate her with the utmost efforts, and nearly worn out with fatigue and want of sleep, in order to save their lives, left her and took to the boats, bringing away the guns and whaling gear, and by passing through narrow strips of water, and hauling the boats over the ice for two or three days, reached the whaling fleet, fifty or sixty miles south of where they left the vessel; that the officers and crew, with the boats, guns and whaling gear, being scattered in other vessels, and some of them having gone homewards, ten days afterwards, by a change of the wind and currents, the ice loosened

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nd the Helen Snow was brought out by the master and crew
f another vessel, and held by them for salvage; and that the
aster of the Helen Snow, although he made reasonable efforts
to do, was not able to obtain a sufficient crew or whaling
aft, or to regain possession of the vessel so as to pursue the
yage on which she was employed and for which she was in-
red, and she was brought by the salvors to San Francisco,
d, before her arrival at that port, abandoned by her owners to
underwriters.

By our law, the right to recover for a constructive total loss,
abandonment to the underwriters, depends upon the state of
ts when the abandonment is made; and the abandonment, if
tified by those facts, relates back to the time of the loss. It
rue that a loss of the voyage is not necessarily a loss of the
p, within the meaning of a policy of insurance upon her.
t if the ship herself is once totally lost by a peril insured
ainst, and the master, using due diligence, is unable to regain
ssession of her in such a condition and under such circum-
nces as to enable her to pursue the voyage for which she was
sured, the right to abandon and to recover for a constructive
tal loss still remains, without regard to the question whether
some future time, over which the master has no control, he
ght be able to regain possession of her on payment of salvage,
d without regard to the proportion between the amount of the
vage and the value of the vessel.

In the present case, the leaving of the vessel in the ice, made
cessary by a peril insured against, was a constructive total
s, and would clearly have warranted an abandonment to the
derwriters at any time before she was rescued. Her subse-
ent rescue by salvors, her master never having been able to
ume possession of her so as to prosecute her voyage, did not
t down this total loss to a partial one, but there was still a con-
uctive total loss of the vessel at the time of the abandonment
the underwriters.

The case is within the principle of *Greene* v. *Pacific Ins. Co.*
Allen, 217. See also *Peele* v. *Merchants' Ins. Co.* 3 Mason,
in which the principal English cases relied on by the defend-
t are fully considered and distinguished.

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The declaration alleges a total loss substantially in the form allowed by the practice act, as well as by the rules previously established by this court. Gen. Sts. p. 665. 24 Pick. 406. The allegation of a total loss, like the corresponding words in a policy of insurance, covers a constructive as well as an actual total loss. *Hvebner* v. *Eagle Ins. Co.* 10 Gray, 181. It is not necessary, under our practice, to allege the abandonment or other facts necessary to constitute the total loss relied on.

The evidence at the trial being sufficient to prove a constructive total loss by the cause alleged in the declaration, it follows that, according to the terms of the report, there must be

Judgment for the plaintiff for a total loss.

BRIDGET HAWKINS *vs.* PROVIDENCE AND WORCESTER RAILROAD COMPANY.

Bristol. Oct. 28, 1875. — March 27, 1876. MORTON & LORD, JJ., absent.

Personal apparel furnished by a husband to his wife, or purchased by the wife, with the consent of her husband, with money given her by him from a fund formed by their joint earnings, remains the property of the husband, and the wife cannot maintain an action against a carrier for the loss thereof.

CONTRACT, with a count in tort, for the loss of certain articles of personal property, delivered to the defendant corporation for transportation from Worcester to Providence, the plaintiff being a passenger at the time.

At the trial in the Superior Court, before *Pitman*, it appeared in evidence, on the part of the plaintiff, that at the bringing of this suit, she and her husband lived to husband and wife; that she and her husband had wo mill, and that he had delivered to her from time to earnings, and that she had mingled with them her o ings; that the articles mentioned in the declaration, scribed therein as clothing suitable for her, were by chased and used for her personal apparel, by consent husband, with money given her by him from the fund

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their joint earnings. The defendant asked the judge to direct verdict for the defendant; the judge refused so to do, and the fendant excepted.

The defendant asked the judge to instruct the jury as follows: 'If the plaintiff purchased the goods with her husband's per- ssion, and with his money, she cannot recover. If the plain- was earning money, and mixed it as earned and received h her husband's earnings, and from their joint earnings she, h his consent, purchased the property, she cannot recover.

'If a married woman, not having filed a certificate under the utes, mingles her earnings with those of her husband, cloth- purchased by her from the joint fund would be property of husband."

The judge refused so to rule, and instructed the jury as fol- s: "If the wife purchased the articles with the husband's ney, given her by him, or with her own money, or with money m a fund created by mingling the earnings of wife and hus- nd, she would have such a title to these articles of her per- al apparel as would enable her to recover their value in this ion."

The jury returned a verdict for the plaintiff; and the defend- alleged exceptions to the refusal to rule as requested, and to rulings given.

J. Hopkins, for the defendant.

B. K. Lovatt, for the plaintiff.

AMES, J. The statutes which from time to time have been cted in this Commonwealth, for the purpose of enlarging the hts and privileges of married women, have not in terms made specific regulations in regard to the ownership of their wear- apparel. Except in cases where the wife herself purchases ith her own separate money or earnings, that matter remains ctly as it stood at common law. At common law, the hus- d is bound to maintain the wife, and to provide her with suit- clothing appropriate to their degree and his own circum- ces and social position. If the articles of clothing and onal ornament appropriate for her are purchased with his ey or upon his credit, the fact that they are selected and hased by her, and are intended for her personal and exclu- use, does not render them any the less his property. In

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this respect, the clothing of the wife comes under the same general rule as the clothing of the minor children in the same family. The provision of the Gen. Sts. *c.* 96, § 4, that "the articles of apparel and ornament of the widow and minor children of a deceased person shall belong to them respectively," furnishes a strong implication that, without such a provision, they would constitute a part of the assets of the deceased person's estate, and would be liable as such to be sold for the payment of his debts. It was to prevent the distress and inconvenience in this respect, which would result from the common law rule as to such property, that this statute regulation was found to be necessary. The provision of the Gen. Sts. *c.* 133, § 32, among the "articles of the debtor" exempt from attachment for his debts, includes the "necessary wearing apparel of himself and of his wife and children;" a provision which would be wholly unnecessary if these articles were not his property.

The property sued for in this action consists mainly of the plaintiff's personal clothing; and if it had been purchased by her with her own money, that is to say, with money which was literally her own, and belonged to herself separately and exclusively, the action in her name might well be maintained. But we find nothing in the facts reported to support that view of the case. On the contrary, we find that the relation in which she and her husband stood to each other was exactly the ordinary relation of husband and wife as it stood at common law, unaffected by any of the recent legislation upon that subject. It does not appear that she had any separate property of her own, or that she was following any trade or business of her own, requiring a certificate to be filed in pursuance of the St. of 1862, *c.* 198. She and her husband worked in the same mill, and under the St. of 1874, *c.* 184, § 1, the work and labor of a married woman shall be presumed to be on her separate account. Under that statute, therefore, she could have kept her earnings separate, if she saw fit to do so. But this is a privilege which she might waive, and her allowing them to be mingled with those of her husband would be *primâ facie* evidence that she had done so. *Kelly* v. *Drew*, 12 Allen, 107. The money with which she purchased the clothing described in the declaration appears from the bill of exceptions to have been given to her by her husband from

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nd made up of her and his earnings. We see no ground on ch we can say that this joint fund, or any part of it, was her rate property. She was the custodian, but did not thereby me exclusively the owner of it. And, as we must assume this fund was used in paying the necessary expenses of the ly, the presumption referred to in the statute last quoted is tually rebutted. The husband was legally responsible for e expenses, and the fund was his property. The case does resemble, as it is suggested by the plaintiff's counsel, the of a wilful confusion of goods. The money given to her that fund was her husband's money and not hers, intrusted r as his agent, and, in pursuance of his legal obligation to ort and clothe her, to be used in payment of articles which as bound to supply, and which might properly be charged m. There can be no valid gift of money or property by the and to the wife. Gen. Sts. *c.* 108, § 10. *Thomson* v. *O'Sul-*, 6 Allen, 303. *Baxter* v. *Knowles*, 12 Allen, 114. It would in his property notwithstanding such gift.

this view of the case, the instructions requested by the de-ant should have been given, and those actually given were rect and inappropriate. *Exceptions sustained.*

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SUPPLEME

THE Honorable THERON METCALF, the twenty-fifth day of February, 18 of August, 1865, died at his residenc teenth day of November, 1875. A me the bar of the Commonwealth was held teenth, at which a resolution was passed the full court on the twenty-seventh t Before presenting it the Attorney Gen as follows:

May it please your Honors, — With yo present a resolution, unanimously adopt members of the bar of the Commonwealt their appreciation of the life, character an able Theron Metcalf, late an associate just

In the performance of this duty I can sa known to the court, nor can I improve upo tion, just criticism and honest appreciation lution.

Born in Franklin, in the county of Norf day of October, 1784, we know but little youth, save what was gained by an occasi from his own lips.

In 1801 we find him a member of the Fres University, then Rhode Island College, from with honor. For his Alma Mater, Judge M ished a filial respect and love. Among his t bered the accomplished and eloquent Maxey the college; David Howell, one of the ablest yers in the Continental Congress; Calvin Park tinguished Professor Park of Andover; and J

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recollection a member of Congress and Lieutenant Governor Massachusetts; and among his fellow students, Dr. Adoni- Judson, the distinguished Baptist missionary to Birmah Benedict, the historian of the Baptists; Willard Preston, the President of the University of Vermont; Governor Morton ur own state; Senator Allen; Judge Randall of Rhode Isl- ; and John Whipple, since the leader of the Rhode Island always distinguished for its learning and ability; and Henry eaton, Envoy Extraordinary and Minister Plenipotentiary to ssia, and the author of "Elements of International Law." er such influences Mr. Metcalf developed the qualities which rwards led to his distinction in his profession; and his efforts success as a scholar are treasured with pride in the traditions University which has contributed its full share to the dis- uished men of the Republic.

eaving college, he at once entered upon his legal studies, and 808 he was admitted to the bar of the Court of Common as. Three years afterwards, according to the rule then ex- g, he was admitted to the bar of this court.

n 1809 he established himself in Dedham, where he remained ty years, devoting himself with untiring zeal and patient r to the studies and duties of the profession, which he loved itself rather than for those rewards to which its constant vo- es are entitled. He held the office of County Attorney for lve years, and until the office was abolished and that of Dis- Attorney established. He was a member of the House of resentatives in the years 1831, 1833 and 1834, and of the ate in 1835. In each of those years he was chairman of the mittee on the judiciary. In 1839 he was appointed Reporter he decisions of this court, which position he filled until he was pinted to the bench in February, 1848, where he remained l his resignation August 31, 1865.

mid the labors and duties of his professional life he found to assist the profession and contribute to the science of the and his editions of Yelverton's Reports, of Starkie on Evi- ce, Russell on Crimes, and Maule and Selwyn's Reports, be- numerous contributions to the leading legal and literary re- s and periodicals of the country, attest his accurate learning ripe scholarship. As one of the commissioners in 1835 to

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supervise the publication of the Revised Statutes, the index to which was his own and a model of its kind; in his share in the preparation of the first volume of the United States Digest; in his Digest of a part of the Massachusetts Reports, and his Supplements to the Revised Statutes from 1836 to 1844, he made the profession and the Commonwealth largely his debtors. In 1867 he published a work entitled "Principles of the Law of Contracts, with examples of their application," which consists of ten articles originally contributed to the American Jurist, commencing in October, 1838. These articles attracted great attention in the legal profession and were unanimously commended.

I have thus hastily sketched his life and labors, that the record may show how he had compacted his life with usefulness, and how absorbingly he gave himself up to purely professional labors.

Born directly after the adoption of the Constitution, he seems to me perhaps the last of the men of eminence who connected us personally with the founders of the state. He had lived and walked and talked with Parsons and Sewall and Parker and Fisher Ames, and, like them, was fully imbued with the spirit of the common law, had made himself familiar with all its sources and master of its principles. It has been said of him, by one competent to give the opinion, that he was one of the greatest masters of the learning of the English common law which the American Bar has produced. Modest and self-depreciating to a fault, he was ever just to parties, able, patient and courteous to counsel, and, if not as distinguished as others have been as a nisi prius judge, his learning, his industry and his patience rendered him of the utmost value to his associates in bank and in the consultation room.

His life to us is a lesson of industry, energy and self denial; its results will reach far down the tides of time, long after the memory of him and his labors shall have passed away from the traditions of men; but he will be remembered by us and our contemporaries, in the language of Chief Justice Redfield, from whom I have already quoted, as "the model reporter, the learned, able and pure-minded judge, the unexceptionable law-writer, the accomplished scholar, the good citizen, the faithful friend, the earnest and devout and courteous Christian gentleman."

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The Attorney General then presented the following resolution:

The members of the bar of the Commonwealth, called together by the death of the most aged of our number who has held judicial office, desire not so much to express a sense of immediate loss, for we know that he had passed beyond the time for useful labor, as to bear our testimony to the great services which Theron Metcalf rendered the science of jurisprudence, to the simplicity of his character, the courtesy and kindness of his manners, the fidelity with which he discharged every public duty, and his almost unique devotion of a long life to the profession of his choice. While the traditions of his courtesy, geniality and quaint humor, his patience, indefatigable labor, tenacious memory and deep affection for all that concerned the learning or administration of jurisprudence, may not survive so long as we could wish, we are confident that he has established, by his labors as an author and judge, in his treatises, annotations and judicial opinions, a reputation that will not pass away. We believe that other generations of lawyers will recognize and admire, as we have, the rectitude of his judgment, the clearness and directness of his intellectual processes, the unusual terseness and purity of his style, and the entire trustworthiness of his statements.

We hope that younger men whose professional courses, mental habits and modes of expression are yet to be formed, will respect the wisdom which selected a profession to which his talents and faculties were well adapted; the fidelity which gave to it the single-minded labor of a lifetime; the conscientiousness which, aiming no public reward, received promotion only from the general sense of his fitness for the posts assigned him; keep before them his clearness, conciseness and purity of expression; and duly honor a life which has made jurisprudence its debtor.

We request the Attorney General to present this resolution to the Justices of the Supreme Judicial Court for the Commonwealth, at its present session, and to ask them to enter upon its records this tribute of respect to their late associate.

Chief Justice GRAY responded as follows:

Gentlemen of the Bar: The court heartily joins in your tribute of respect to one who was in so many ways a teacher of the present bench and bar of the Commonwealth in the rules and principles of the common law.

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Judge Metcalf was an excellent common lawyer. I doubt whether those who hear me have ever known a better. His deep and accurate knowledge was the result of the training of a clear intellect by years of unwearying study and much thought. Early in his professional life, he collected a nearly complete library of the old reports and commentaries, and, as he once admitted to me, read them all; and his notes and references in the volumes themselves mark how careful and thorough his reading was. His acquaintance with the sages of the law was so familiar and intimate, that he had imbued himself, not only with their wisdom and learning, but with their spirit, and almost seemed one of them, in mastery of legal principles and rules of pleading, in pith and compactness of phrase, and in quaint humor. Even in personal aspect, as we remember him, he recalled the frontispiece of a folio of Croke or Hobart.

The evidence of his legal knowledge and attainments, as well as of his sense of the duty which every man owes to his profession, is patent to all — in the records of his arguments at the bar, beginning more than a hundred volumes back in the series of our reports; his annotations of Yelverton, published in 1820, of which forty years afterwards he would say in private that he was not ashamed, but which he shrank from hearing cited by his own name; his editions of English text books, of which it is sufficient to mention Starkie on Evidence, in which he doubled the number of authorities referred to; his Essay on Contracts in the American Jurist; the first volume of the United States Digest, which, if he had completed the five volumes, might well have taken the same place in our law as that of Chief Baron Comyns in the law of England; his reports of decisions of this court, which have been the model and the despair of his successors; and his judicial opinions during the seventeen years that he held a seat upon this bench, which are unsurpassed for purity of style and clearness and exactness of expression.

Of his knowledge of those branches of jurisprudence, to which, judged by his own standard, he had not paid special attention, his modesty sometimes led him to speak so slightingly, as to mislead those who received his words literally, while, to those who knew him better, it seemed to border on affectation. His learned argument in the leading case in this Commonwealth on the sub-

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of foreign laws, reported in the ninth volume of Pickering, ws that it was from the civilians that he obtained his favorite im, *Juris ignorantia est si* JUS NOSTRUM *ignoramus*.

Outside of the law, his reading was confined to the classics and best old English authors. His kindly temper and manner, shrewd observation, his wonderful memory, his dry wit and l of unrecorded anecdote, made him a most entertaining com- ion to those of every age. But he was peculiarly accessible cordial to his juniors in the profession. For myself, I gladly this occasion to testify that, from the time I was a student aw, to that of meeting him in the consultation room of the es, I was constantly indebted to him for friendly advice and able instruction.

We do not mourn for him as for one stricken down in the midst is usefulness; for we knew that his means of communicating earthly friends were failing, and that he was at the end of pilgrimage, on the very bank of the river, waiting, in Chris- faith and hope, for the summons from the Celestial City.

s a sign that the memory and the example of Theron Met- are duly honored in the profession to which he devoted his it is ordered, in accordance with the request of the bar, that resolution, together with a memorandum of these proceed- be entered upon the records of the court.

he court then adjourned.

The Honorable JOHN WELLS, a justice of this court from the nty-second day of September, 1866, died at Salem on the nty-third day of November, 1875. A meeting of the mem- of the bar of the Commonwealth was held in Boston on the wing day, and an adjourned meeting on the fourth day of ember, 1875, at which resolutions were passed, which were ented to the full court the same day, by the Attorney General. ore presenting them the Attorney General addressed the court ollows:

May it please your Honors, — I am, in behalf of my associates, present to you this morning their tribute of honor and respect

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to the memory of his Honor John Wells, so recently your associate upon the bench of this court.

I perform this duty with a heart bowed down by no common sorrow, as we all are painfully conscious that we have suffered no common loss, and I wish, as briefly as I may, to add my tribute of esteem and love to those already heaped on his newly made grave.

I will not speak of him in terms of elaborate criticism or analysis, for that is far better done in the resolutions than I can do it, nor in terms of eulogy even, but in the language of friendship and affection.

I have no respect for those who indulge in censorious criticism of a public man when living, and indiscriminate eulogy when dead. I have often thought, when I have heard elaborate praise accorded to such a man after death, how a tithe of this language, in the living ears of the departed, would have encouraged him in the performance of duty, have cheered and prolonged his life, and have been to him a reward, added to that which follows the self-consciousness of faithful service.

Judge Wells was one of those rare men, who needed neither the spur of ill tempered criticism, nor of indulgent compliment, to keep him steady in the performance of duty. His mental and moral organization was so evenly balanced and well perfected, that censure did not retard, nor compliment hasten, the pulsations of his heart. He realized, at the outset of his life, that he had responsibilities to bear, and a purpose to fulfil, and he marched steadily on to its fulfilment.

I first knew him thirty-four years ago, in the Law School of the University, where, under the guidance of Story and Greenleaf, he laid the foundations of the superstructure which he subsequently raised. From that time to his death, I was honored by his friendship, and have watched his progress from young manhood to middle age, and the only change noticeable in him, as he advanced through the years, was a continual ripening, day by day. He was the same John Wells through all those years, thoughtful, conscientious, patient of labor, making all that could be made out of his opportunities, apparently ambitious only to discharge faithfully his duty in that station of life to which God had called him, and thus preserve the approval of his own con-

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nce, which he never intrusted to the keeping of another. ther then, nor since, am I aware of his ever saying, or doing illiant thing, and never, to my knowledge, was he guilty of a sh act, or silly utterance, but he moved right on, with that dy, self-poised and well-determined action, which attracts no ntion, until its results are accomplished.

s a lawyer in the country village which he had selected for his e, you find in him no noisy or cunning pettifogger, seeking rofit in pocket or reputation by the disputes of the people; stirrer up of strifes, but one who remembered that the emakers are blessed. You find him the diligent student, the adviser, the kind neighbor, the efficient member of the par- the active and Christian citizen, rendering cheerfully to the munity every good influence and kind act.

few years later, he is in the General Court, exerting a com- ding influence, as a sound, safe and discreet legislator.

s Judge of the Probate Court, that most difficult office to fill, re the incumbent must be judge, counsel and sympathizing nd at one and the same time, as well as by his well earned utation as a lawyer, he demonstrated his mental, professional moral fitness for the duties and responsibilities of a judge of , the highest judicial tribunal of the state, to which he was ointed, I believe, upon the unanimous recommendation of the of Western Massachusetts. The wisdom of their recommen- on, upon his appointment to the bench, was conceded at once n acquaintance by the bar of the Commonwealth, and his ju- l career proved that he had no superior, where all should be ls.

e entered upon and performed his judicial duties in the pro- d conviction that there were no duties or responsibilities assing those of a Judge of the Supreme Judicial Court; that required, and the office demanded, the highest integrity in ls, and in professional culture, united with patient labor, le courtesy and unwearied attention, and, acting upon this, uitor ever left Judge Wells's court room, whether successful ot, with the impression that his case had not received, at the ls of the court, all the consideration to which it was entitled. n his court room, every one felt that he was in a place "ap- riated to justice, to security, to reason, to restraint; where

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there is no respect of persons; where there is no high nor low, no strong nor weak; where will is nothing, and person is nothing, and numbers are nothing, and all are equal, and all secure before the law."

Judge Wells was no judicial demagogue; he acted upon the sentiment of the German poet: "The human being may not be trusted to self-government. The clear and written law, the deep trod footmarks of ancient custom, are all necessary to keep him in the road of faith and duty."

He followed precedents, but only as his mind discovered and approved the principles on which they were founded, and his opinions, the result of patient study, prolonged thought and severe logic, had placed him at the close of his life — alas! for the Commonwealth too early — among the foremost of the men who have adorned the bench of this court, and guided and illustrated its jurisprudence. Had it been in the providence of God that so valuable a life should be prolonged, it is no injustice to his surviving associates to say that no judicial life in this Commonwealth ever gave a more promising assurance for the future.

The corner-stone upon which the reputation of Judge Wells rested as a man, a lawyer and a judge, was his Christian character, vindicated by his love to God and to his neighbor, consistent always, forgetful never. He realized that here in his high office, he was a ruler, as well as lawgiver, and he was never unmindful of the injunction of the prophet of the Lord, "He that ruleth over men must be just, ruling in the fear of God."

Mr. Chief Justice, our friend and your associate is dead, cut off by an inscrutable Providence in the midst of his ripening usefulness. The bar of Massachusetts can only tender to his heart stricken wife and family, and to the court, the assurance of their profound sympathy, and the hope, "that in the good providence of God, time, the healer, will come to them, as it comes to all, and that what is now a bitter anguish will come to be a chastened sorrow," and that his memory shall be unto all of us "as the light of the morning, when the sun riseth, even a morning without clouds; as the tender grass springing out of the earth by clear shining after rain."

May it please your Honors, in compliance with the wishes of the bar, I move that the resolutions now presented may be entered upon the records of the court.

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he Attorney General then presented the following resolutions:

esolved, That the death of Judge Wells, Senior Associate ice of the Supreme Judicial Court, in the meridian of life and full maturity of all his powers, is a calamity which will long elt by the bar and the people of this Commonwealth; that cute, philosophical intellect, his legal learning, adequate in nd preëminent in many departments of jurisprudence, his of thorough and minute investigation, his remarkable power otracted study and patient thought, his anxious conscien- ess and unfailing devotion to duty, his absolute intellectual noral independence and impartiality, made him a pillar of th in our judicial system; while his native modesty, the or- nt of a meek and quiet spirit, the gentleness and courtesy manners, his simplicity, innocence and purity of heart and ndeared him to all who came within the sphere of his in e.

olved, That we tender our respectful sympathy to the widow hildren of our deceased brother, congratulating them that in irreparable loss they have the precious consolation of the ory of a life and character in which there is nothing they wish to have changed.

solved, That the Attorney General be desired to present resolutions to the Supreme Judicial Court, with a request they be entered on its records, and that the secretary trans- copy thereof to the family of the deceased.

ief Justice GRAY responded as follows:

ntlemen of the Bar: The sense of the loss which we have ined in the death of Mr. Justice Wells is too fresh and too for elaborate eulogy of him.

was of that type of character to which New England owes From his youth up, trusting in the power and goodness od, obedient to conscience, faithful to every duty, self-con- d and self-forgetful, modest, fearless, patient, straightforward, ibly just, more interested in moral questions than in romance etry, grave and reserved in demeanor, but kind and courte- o all, and warmly attached to his household, his friends, his bors, his state and his country.

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He was a republican, in the truest and best sense; believing in popular government, as known to him through the traditions of Massachusetts and his own experience; and ever ready to accept an opportunity of serving his fellow-citizens, in the parish and Sunday school, in associations for purposes of charity or education, in town or county offices, in the Legislature of the Commonwealth, or in conventions of the people for political or religious objects.

Born in one of the hill towns of Franklin county, practising his profession in the valley of the Connecticut, early associations and his own peaceful nature made the busy hum of cities or the grandeur of the wilderness less attractive to him than a quiet homestead amid orchards and green fields. When the exigencies of his judicial office induced him to remove to this neighborhood, he for a time lived in Boston. But he cannot be said to have taken root here. He was happier after he had built himself a house on a site of his own choice in the adjoining town of Brookline, where he could sometimes, as of old, when the labors of the day were over, join his townsmen in town meeting.

At the time of his appointment to this bench (little more than nine years ago) some of us had had opportunities of observing his learning and acuteness in the argument of questions of law, and the weight that his character and open dealing gave him with juries. We knew that his uprightness and ability had placed him at the head of the bar of his county; that his wise and paternal administration of the office of Judge of Probate had endeared him to many; and that he had the confidence of the people of his section of the state to such a degree as would be a support of any court of which he was a member. But we hardly anticipated his breadth of view, or his capacity of grappling with new problems of jurisprudence. Nor did we then understand, as has since been made manifest, how truly he was one

> "Who, not content that former worth stand fast,
> Looks forward, persevering to the last,
> From well to better, daily self-surpast."

You have attested, brethren, the sagacity and firmness, the untiring patience, the simple dignity and courtesy, with which he presided at jury trials or hearings in chancery. Some of his

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ions upon questions of equity and real property, and of con-
itional law, have already taken their place with the great
yments of his predecessors. But his judicial qualities were
here more conspicuous than in the consultation room. His
ute and accurate observation of the facts, his thoughtful com-
on of the arguments, his careful weighing and scrutiny of
edents, his nice appreciation of legal distinctions, his grasp
ndamental principles, his strength in presenting his own
stions, and his candor in considering those of his associates
ided throughout by a love of justice, and tempered by com-
sense — made his presence a peculiar safeguard. In arriv-
t results that would affect the rights of his fellow-men, no
was so small as to be neglected, no field of investigation
ide to be explored. Very cautious in forming his conclu-
he was correspondingly tenacious of them when formed.
lways wished the opinions of the court to be placed upon
grounds as, not going beyond what the decision of each case
ired, should afford a firm foothold in determining future con-
ersies. Speaking for each of the judges as for myself, I can
say that every year of association with him brought a greater
nce upon his counsel and a closer friendship.

he impression made by his death is not confined to the pro-
on of which he was one of the most honored and beloved
bers. From every part of the Commonwealth — from the
ern counties, in which he was born and educated, and passed
arly manhood; from Suffolk, in which the greatest part of
udicial work was done; from Norfolk, in which was the home
is adoption, and Essex, in which he died — have gone up
s of mourning and of blessing for the wise and just judge,
seful citizen, the kind neighbor, the true friend.

we vainly strive to express our estimate of his worth, better
s echo in our ears and come to our lips: "He did justly, he
l mercy, he walked humbly with his God." "The path of
ust is as the shining light, that shineth more and more unto
erfect day."

ethren, the duties, which we hoped he would have shared
lightened, rest upon his survivors. It is not for us to mur-
because He who doeth all things well has called him to his

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reward; but, thankful for his companionship, inspirited by his example, to close up the ranks and move onward.

In accordance with the request of the bar, their resolution together with a memorandum of these proceedings, will be entered upon the records of the court.

The court then adjourned.

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INDEX.

ABANDONMENT.

See INSURANCE, 9–13.

ABATEMENT.

See COMPLAINT, 3.

ACTION.

action against a town for an injury sustained by a defect in a high-
he mere fact that the injury was sustained while the plaintiff was
pting to pass in his carriage another carriage travelling in the same
ion, in violation of a statute, does not as matter of law defeat the ac-
f his own fault or negligence did not contribute to the injury; but it
petent evidence of negligence on his part to be submitted to the jury.
n v. *Scituate*, 66.

action to recover for injuries caused by the collision of the plaintiff's
ge with that of the defendant, the fact that the plaintiff was at the
driving at a rate of speed prohibited by a city ordinance does not, as
r of law, defeat the action, if his own fault or negligence did not con-
e to the injury; but it is competent evidence of negligence on his part
submitted to the jury. *Hall* v. *Ripley*, 135.

ction of tort cannot be maintained against a town for the acts of its
ors and collectors in assessing and levying a poll tax upon a person not
abitant thereof, even if the assessors act with integrity and fidelity
re therefore by the Gen. Sts. *c.* 11, § 51, not themselves liable to an
n. *Alger* v. *Easton*, 77.

rty to a contract, who agrees for a specified price to convey a good and
title to a parcel of land, free from all incumbrances, except a mortgage
ree and three fourth cents per square foot, cannot maintain an action
v upon the contract for the refusal of the other party, who has agreed
y the land on these terms, to complete the purchase, if it appears that
nd is subject to a mortgage of four and one quarter cents per square
although he tenders with the deed the difference in money between the
abrance mentioned in the agreement and that existing. *Brigham* v.
ead, 287.

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5. After judgment for the conversion of certain chattels, an action cannot be maintained for the conversion of other chattels taken by the same act, but accidentally omitted in the former action. *Folsom* v. *Clemence*, 473.

See COVENANT, 2, 3; EXECUTOR AND ADMINISTRATOR; PLEADING, I. WAY, 10, 11, 14.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

1. There is sufficient privity of estate between a testator, a person to whom he has devised land for life and the remainderman under his will, to establish a title by adverse possession, if the possession by the testator and his devisees is continuous for twenty years. *Haynes* v. *Boardman*, 414.
2. The mere payment of rent or admission of title by a tenant, without the knowledge of his landlord, will not operate to interrupt an otherwise continuous adverse possession by the landlord. *Ib.*

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMICUS CURIÆ.

See EXCEPTIONS, 1, 2.

APPEAL.

1. The "attested copy" of the reasons of appeal filed in the probate office, which is required by the Gen. Sts. *c.* 117, § 10, to be served on the adverse party, must be attested by the register of probate; and the service of a copy, attested by the attorney of the appellant, is not a compliance with the statute. *Wait* v. *Demeritt*, 158.
2. An order of the Superior Court, setting aside the verdict of a sheriff's jury, is a final disposition of the case so far as that court is concerned, and any question of law involved in the order may be brought at once to this court by exceptions or appeal. *Rose* v. *Taunton*, 99.
3. Irregularity in the proceedings upon a complaint in a District or Municipal Court is no ground for dismissing the complaint on appeal. *Commonwealth* v. *Holmes*, 195. *Commonwealth* v. *Fredericks*, 199.
4. If a criminal case has been brought by appeal from a Municipal Court to the Superior Court, and the complaint is sufficient upon its face to authorize a verdict and judgment upon it in the Superior Court, a misrecital of the complaint in the record of the Municipal Court furnishes no ground for dismissing the complaint. *Commonwealth* v. *Malloy*, 347.

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At the trial, on appeal from a District Court, of a complaint for a sale of intoxicating liquors, in which the prosecution enters a *nolle prosequi* as to all the offences charged except one, and a conviction is had upon that one, the presumption, in the absence of evidence to the contrary, is that the conviction in the District Court was for the same offence. *Commonwealth* v. *Holmes*, 195.

At the trial, on appeal from a Police Court, of a complaint for a sale of intoxicating liquor to a person unknown, if the evidence corresponds with the allegation of the complaint, the jury may, in the absence of proof to the contrary, presume the offence proved to be the same as that of which the defendant was convicted in the Police Court. *Commonwealth* v. *Fields*, 105.

ARBITRAMENT AND AWARD.

The question of the position of the boundary line of adjacent parcels of land cannot be submitted to arbitration under the Gen. Sts. *c.* 147, § 1. *Torrey* v. *Munroe*, 490.

An award by arbitrators under the Gen. Sts. *c.* 147, determining a boundary line, cannot be enforced by judgment of the Superior Court under § 10 of that chapter. *Ib.*

An award under the Gen. Sts. *c.* 147, was properly inclosed and sealed up by the arbitrator and transmitted to the court by the hands of the counsel of the party in whose favor it was made, who deposited it unopened with the papers in an action of contract brought upon it. It appeared that the award was not opened by the clerk of the court, nor by either counsel, and it did not appear by whom it was opened. There was subsequently found among the papers in the suit one purporting to be an award by the same arbitrator between the same parties, opened, without envelope or wrapper, or aught to show when or by whom it had been opened or filed. The Superior Court held that the award had not been so returned, filed and opened, as to warrant its acceptance or recommitment; and that there was not any award before the court. *Held*, on a bill of exceptions setting forth the above facts, that there was nothing to show that the judge erred in holding that the Gen. Sts. *c.* 147, § 8, had not been complied with. *Curley* v. *Chadburne*, 489.

ARSON.

See EVIDENCE, 12; EXCEPTIONS, 18.

ASSAULT.

1. Where two persons go out to fight with their fists, by consent, and do fight with each other, each is guilty of an assault, although there is no anger or mutual ill will. *Commonwealth* v. *Collberg*, 350.

2. On the trial of an indictment for an assault with a dangerous weapon, to wit, with a knife, there was evidence that the assault was with a jack-knife. The judge ruled that a jack-knife, like that exhibited to the jury, was a dangerous weapon. *Held*, on a bill of exceptions, which did not

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more particularly describe the knife, that the court could not say as matter of law that the instruction was erroneous. *Commonwealth* v. *O'Brien*, 242.

See EXCEPTIONS, 17; MALICIOUS PROSECUTION, 1.

ASSENT.

See EVIDENCE, 19; LAW AND FACT, 2; MASTER AND SERVANT, 3.

ASSESSMENT.

See COVENANT, 1; INSURANCE, 3–5.

ASSIGNMENT.

See PLEADING, 1; TRUSTEE PROCESS, 5, 6.

ATTACHMENT.

1. Tobacco stored in barns, hanging on poles in process of curing and in such condition that it cannot be moved without great damage to it, is subject to attachment. *Cheshire National Bank* v. *Jewett*, 241.
2. Under the Gen. Sts. *c.* 123, § 57, providing that in the attachment of articles of personal estate, which "by reason of their bulk or other cause cannot be immediately removed," a certified copy of the writ and the return may be filed within three days in the office of the city or town clerk, it is sufficient if the property cannot be removed without great damage to it. *Ib.*
3. Tobacco in the process of curing, and in such condition that it could not be removed without great damage to it, was attached under the Gen. Sts. *c.* 123, § 57, and afterwards, at the time when it required to be stripped and packed, was stripped and packed by the defendant in boxes so that it could be transported without injury. No arrangement was made between the defendant and the attaching officer in regard to the stripping and packing, and the officer did not see the tobacco until after it was packed, when he locked up the boxes containing it in a building upon the defendant's premises. The defendant afterwards mortgaged it to a person who had no knowledge of the attachment. The key to the building was kept by the officer for several months, and then given to the defendant's assignee in bankruptcy to enable him to examine the property, and by him lent to the defendant for a special purpose, without the knowledge of the officer. The mortgagee afterwards took possession and placed a keeper in charge of the property, from whom and against whose protest it was taken by the officer. *Held*, that there was no such misconduct or neglect shown on the part of the plaintiff or the officer as would dissolve the attachment. *Ib.*

See BANKRUPT, 2; EVIDENCE, 21; MORTGAGE, 3; STATUTE, 2.

ATTORNEY.

See CERTIORARI, 1; EXCEPTIONS, 19.

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AWARD.

See ARBITRAMENT AND AWARD.

BAIL.

A commissioner to take bail in criminal cases may require a written statement under oath from the bail, although the case does not come within the provisions of the St. of 1862, *c.* 159. *Commonwealth* v. *Butland*, 317.

BANKRUPT.

1. The jurisdiction of a state court over an action by an assignee in bankruptcy against a person, to whom the bankrupt has made a fraudulent preference, is not excluded by the bankrupt act, U. S. St. of 1867, *c.* 176, or by the U. S. St. of 1874, *c.* 390, § 2. *Goodrich* v. *Wilson*, 429.

2. Under the bankrupt act, U. S. St. of 1867, *c.* 176, § 21; U. S. Rev. Sts. § 5106, a plaintiff having a valid attachment upon the property of a defendant, who, pending the action, but not within four months after the attachment was made, has instituted proceedings in bankruptcy, is not entitled to a special judgment, to be enforced only against the attached property, until the question of the debtor's discharge is determined, if there is no unreasonable delay on the part of the defendant in endeavoring to obtain his discharge. *Ray* v. *Wight*, 426.

3. In an action by an assignee in bankruptcy to recover the value of personal property upon the ground that it was transferred to the defendant in fraud of the bankrupt act, it appeared that, more than four months before the filing of the petition in bankruptcy, two of the creditors of the bankrupt brought suits against him and attached the property in question, which was placed by the officer in the charge of the defendant, who receipted therefor in the usual form. The bankrupt afterwards executed a bill of sale of the attached property to the defendant, who sold a part of it and applied the proceeds to the satisfaction of the executions in the suits of the attaching creditors. The jury were instructed that if the arrangement between the defendant and the bankrupt was to the effect that the property should be sold and the proceeds applied towards the payment of the debts of the attaching creditors, without regard to attachments, and without a demand perfected in execution, that would be a preference, and in that case the defendant could claim no protection under the attachments; but if the understanding and intent was that the proceeds of the property should be held by the defendant as security against his liability on his receipts and applied on the debts only upon demand duly made on execution, and the sales were in good faith and the proceeds in fact applied on the executions, the defendant could claim protection under the attachments, unless it appeared that the parties intended a preference, or a fraud to prevent the property from distribution under the bankrupt act. *Held*, that the instruction was sufficiently favorable to the plaintiff, and that he had no ground of exception. *Parsons* v *Topliff*, 245.

See EVIDENCE, 3, 25; EXCEPTIONS, 19; FRAUDULENT CONVEYANCE; STATUTE, 2.

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BASTARDY PROCESS.

1. A supplementary complaint filed in the Superior Court, in a bastardy proceeding, need not be sworn to. *Sabins* v. *Jones*, 167.

2. Evidence is not admissible, in a bastardy proceeding, that the complainant had criminal intercourse with men, other than the respondent, more than twelve months before the birth of her child. *Ib.*

3. A person charged under the bastardy act with being the father of a bastard child, executed a bond, payable to the plaintiff, conditioned that he should appear at the next term of the Superior Court, answer to the complaint, and abide the order of the court thereon. The defendant did not appear, answered, and was defaulted at the trial. *Held*, that there was a breach of the bond. *Tracy* v. *Howe*, 228.

4. If the sureties, on a bond given by the respondent on appeal from the bastardy act for his appearance in the Superior Court, surrender their principal in the execution of the court thereon, surrender their principal in the execution of the order of that court has no authority under the Gen. Sts. *c.* 72, §§ — respondent to be committed to abide the further order of the court, to order him to give a new bond and to stand committed with that order. *Hanlan's Case*, 59.

See DEPOSITION; DISTRICT COURT.

BETTERMENT.

See CERTIORARI, 2–4; WAY, 3, 6, 7.

BILL OF EXCHANGE.

A draft headed "New England Agency of the Pennsylvania — Company," having the words "Foster & Cole, General Agents — England States" printed in the margin, and appearing on — drawn upon said insurance company in payment of a claim against — draft of the company, and not of Foster & Cole, although it — them in their own names. *Chipman* v. *Foster*, 189.

BOND.

1. A bond purporting in its body to be executed by J. S., "as —— —— as sureties," and signed by the principal and A., is — A. as surety, if duly executed by the principal, and it does not — A., at the time of executing it, understood that it was to be — any other person as surety. *Danker* v. *Atwood*, 146.

2. The surety upon a bail bond is liable in *scire facias* thereon — upon which the principal was arrested is identified by a date, — full name of the plaintiff, and the surname of the defendant, — Christian name, as expressed in the bond, was not inserted in —

3. A bond for a deed of land recited that the obligor had agreed — convey to the obligee certain land, the same to be conveyed by — sufficient warranty deed, and that the obligee agreed to pay the —

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hich $100 was to be paid in cash "upon the delivery of this bond for
d," and the remainder by six notes bearing even date therewith, the
ipal to be paid $200 each year and interest according to the tenor and
of the notes; and provided that it should be void, if the obligor
d, "upon tender by the obligee of the said cash and notes, and at any
when said amount is paid from this date, deliver unto the said obligee
d and sufficient deed as aforesaid." The bond and notes were all of
ame date, the $100 was duly paid, and the notes given. *Held*, in an
n upon the first note after its maturity, and to recover interest upon
ther notes, that the defendant was only entitled to the deed on pay-
of the notes at or before their maturity, and that the action could be
tained without a previous tender of a deed of the land by the obligor
y v. *Pfau*, 589.

See BASTARDY PROCESS, 3, 4; STATUTE, 2.

BOND OF INDEMNITY.

See PROMISSORY NOTE, 4.

BOOK ACCOUNT.

See EVIDENCE, 30.

BOUNDARY.

See ARBITRAMENT AND AWARD, 1, 2; DEED, 10, 11.

BROKER.

See EXCEPTIONS, 20.

BURDEN OF PROOF.

IDENCE, 1, 2; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 1;
PROMISSORY NOTE, 2; WAY, 14.

BY-LAW.

See SALE.

CARRIER.

See HUSBAND AND WIFE.

CERTIORARI.

a petition for a writ of certiorari to bring up and quash the proceedings
n inferior tribunal, an answer of the tribunal containing allegations and
als of fact, and signed by counsel, is irregular. *Chase* v. *Aldermen of*
ngfield, 556.

s no ground for a writ of certiorari to quash the proceedings of a tri-
l, authorized to assess betterments for the laying out of a highway, that
ecords of the tribunal do not show that a grade line was established

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INDEX.

rit of certiorari to quash the proceedings
etterment tax on an estate for the laying
of 1871, c. 382, alleged that the proce
ppear that the amount assessed was a p
laying out and grading the street. The
appeared by the records that the expens
reet was largely in excess of the amount
the amount so assessed was a proportion
wer also alleged that, in fact, said expe
nount assessed, and said amount was a pr
The record annexed to the petition show
amount of benefit and advantage rece
ing out of the street, beyond the genera
ity, was $31,050, one half of which, viz.:
the lots of land specially benefited, in
tage received by each. By consent o
for this court upon the petition and ans
which stated that the records did not
out and constructing the road, or that the
efited was a proportional part of said ex
n in this way, it could be proved by the
and by parol, that the actual expense o
ad was between $21,000 and $22,000, an
ts was a proportional part of about tw
although the record was defective in
ense, yet that defect could be cured by a
on the allegations in the answer, the
fect thereof, and the facts found at the h
rit of certiorari to issue. *Chase* v. *Alde*

roper tribunal of a city, laying a better
382, directed the tax collector to collect
elve per cent. per annum. *Held*, on a p
n did not assign the order to collect inter
idity of the order laying the assessment

See ERROR, 2; GRAND JURY, 4.

CHARITY.

ction of a house for public worship, or fo
stitute a public charity, if there is no de
was intended, capable of receiving, holdi
nded. But when there is a body, or a de
d or ascertainable clearly pointed out by t
trol and enjoy its benefits, it is not a publi
exclusively the trust may be restricted t
Society v. *Crocker*, 1.

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1669, land was conveyed to certain persons named "and to such as they ll associate to themselves, their heirs and successors forever, for the erec- of a house for their assembling themselves together publicly to worship l, as also the erection of a dwelling-house for such minister or ministers hall be by them and their successors from time to time orderly and regu- y admitted, for the pastor or teacher to the said church or assembly, and the accommodation of the said dwelling-house for the use of the minister ministers as shall from time to time be chosen as aforesaid, and for the ommodation of the meeting-house, with convenient passages of ingress, ess and regress for the people, that shall there from time to time assem- as aforesaid, and for no other intent, use or purpose whatsoever." In 7, the same grantor, by a deed reciting the preceding conveyance and building of a meeting-house on the land by the grantees, conveyed an oining piece of land to the six survivors of the persons named in the pre- ing deed, "and to such as they shall have associated unto them in church owship, or shall be associated to them and to their heirs and successors ever, for the ends and purposes in the first above mentioned deed is fully amply declared," "with the house already erected thereon for the use their ministers or ministry orderly chosen by the said society, being the rd Church of Christ in Boston, from time to time and at all times for- r." Both of these deeds were for a voluntary consideration. Subse- ntly, the grantor by her will gave to the "Third Church of Christ in ston" her dwelling-house which adjoined the land before conveyed, "for use of the ministry in the said church successively forever." The deeds l other writings concerning said house were by the will bequeathed to two the persons named in the preceding deeds, as trustees for the said church, or the end and use before declared." In 1845, the proprietors of pews the church and their successors were made a corporation and authorized take and hold, to the use of the corporation and its successors and assigns fee simple, the property held by the church, "for the support of public rship, for parochial and charitable purposes in this Commonwealth, and paying the debts of said corporation." *Held*, that neither the deeds the will created a public charity. *Held*, *also*, that the declaration of s in the statute did not define a public charity, and that it was not the ention of the Legislature to so merge the interests of the trustees and cestuis *que trust* as to discharge the estate from the trusts. *Held*, *also*, at lands so held might be sold by authority of the Legislature or of this urt as a court of equity. *Held*, *also*, on a bill in equity praying for the le of the property, and the application of the proceeds to the same trusts another part of the city, that the vote of a majority of pewholders or embers of the society was not of itself a sufficient authority to enable the rporation to make a sale, nor a sufficient reason to justify this court in thorizing it to be made; and that it was incumbent upon those who sought make the change to satisfy the court that it was reasonably required for e accommodation of the society as a whole, and that the proposed change uld not subject the minority to an unreasonable sacrifice of interest or

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ay work injustice to them. *Old South*

rust, directing the town to appoint
ve and invest the fund, and annually
some suitable person or persons to
nually, at such time as the town shall
the aged and infirm native-born inhab
who are native-born inhabitants of
as shall be deemed by him or them
m as he or they shall think most jus
o part of the said income shall be pai
ort as a pauper, is a valid charitable b
wealth. *Fellows* v. *Miner*, 541.
rust by a resident of this Commonweal
oid because the town, at the time th
the laws of that state, of taking the
o be paid over to the town upon its be
e Legislature of the other state, to a
. *Ib.*
Commonwealth, and having property
in trust for charitable uses, directing
nual town meeting some person or pe
own being then incapable under the
an act was passed by the Legislature
eceive and hold the property in trust,
ustices of the peace of the town to app
receive the property and administer
ation by persons appointed in the manne
according to the will of the testator;
ork should, within a reasonable time,
the administration of the trust accord
dered to be paid to the town. *Ib.*

CHARTER PARTY.

See Evidence, 2; Ship, 2.

CITY.

4; Flats; Trustee Process, 1; , 1; Way.

CODICIL.

Devise and Legacy, 2, 4.

SIONER TO TAKE BAIL.

See Bail.

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COMPLAINT.

complaint which alleges that the defendant "unlawfully did expose and
p for sale intoxicating liquors," with intent to sell the same in th's
nmonwealth, charges but one offence. *Commonwealth* v. *Curran*, 206.
complaint on the St. of 1875, *c.* 99, which charges the defendant with
awfully selling intoxicating liquor, "not being then and there authorized
ell the same in said Commonwealth under the provisions of" that chap-
, "or by any legal authority whatever," sufficiently negatives all au-
rity of the defendant to sell intoxicating liquors, whether derived from
statute or from any other source. *Commonwealth* v. *Fredericks*, 199.
e misnomer, in a complaint, of the defendant, which is not apparent on
record, cannot be availed of by motion to dismiss, but only by plea in
tement. *Ib.*
e record of the judgment of a Municipal Court, transmitted to the Supe-
Court on appeal, stated that A. was brought before the court on the
plaint of B. setting forth that A. was guilty of the crime of unlawfully
ing intoxicating liquors, ("as is more fully set forth in said complaint.")
nexed to the record of the judgment was a copy of the complaint, both
ers being signed by the name of the clerk of the Municipal Court, with
addition of the word "Clerk," and both being attested by him as true
ies. *Held*, that no error appeared upon the papers. *Ib.*
complaint under the Gen. Sts. *c.* 163, § 11, which alleges that the de-
dant at a time and place named "with force and arms did forcibly
cue and take out of the lawful custody of said complainant the body of
A., he the said A. being then and there a prisoner arrested by and
d in the lawful custody of said complainant, upon the charge of a certain
nce, to wit: the crime of drunkenness, and being a disturber of the
ce, he the said complainant being then and there a police officer of said
, and being then and there duly authorized to arrest and hold in custody
said A. upon the charge aforesaid," is sufficient without alleging that
defendant knew that A. was in custody. *Commonwealth* v. *Malloy*,
.

APPEAL, 3–6; BASTARDY PROCESS, 1; DISTRICT COURT; FISHERY, 1.

COMPOSITION.

e creditors of A. and B. by a composition deed agreed to accept from
and B. "ten per cent. of the amounts due us and each of us from said
and said A. and B. in full settlement and discharge of our debts against
em, said ten per cent. to be paid within thirty days." The plaintiff, one
A's creditors who joined in the deed, held a note and account against
n, which were then due. He also held another note, which would not
come due until after the expiration of said thirty days, on which A.'s
me appeared as indorser. *Held*, that this last note was not included in
composition deed. *Hamblen* v. *Ratigan*, 153.
., holding a promissory note of which B. was the maker and C. the
dorser, signed a composition deed whereby the creditors of B. released

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all claim against him, the deed to be
creditors, and wrote after his nam
release the indorser in any manner.'
creditor, who had signed the deed,
signers of the deed; but it was agree
lease the indorser, then all the credit
tion annexed by A. to his signature
rights against C., and did not prev
operating as a release of all his rights
bar to the action. *Richardson* v. *Pier*

8. In an action by the payee against the
was evidence that, before the making
take thirty-five per cent. of his debt an
he afterwards deposited his claim with
induced by fear of an attachment of hi
claim in cash, and the rest by the note
signed a composition deed, by which tl
five per cent. of their claims, which was
creditors, and was to be void unless the
days after the date of the deed. The pl
affixed after the expiration of the seven
those of a majority of the creditors who
structed the jury that if, after the plainti
tors of the defendant the deed of compo
threats of an attachment, collected of the
or larger than the sum agreed in the deed
tained the note declared on and delivered i
eration that he had thus received the full
signature to the deed, the jury would be w
was without consideration; that if there wa
tiff's signing the deed and the giving the n
dent contract for the payment of the def
irrespective of any promise to sign the same
note was for a good consideration. *Held*, t
jury in finding that the note was signed upo
deed should be signed. *Held*, *also*, that
Held, *also*, that the validity of the considera
object with which the contract was entered in
persons actually deceived by the plaintiff's sig

9. An agreement of creditors "to accept seventy
of indebtedness as set against our respective
cent. to be paid in two, four and six months, fr
tract to take effect "provided all merchandis
same settlement," is an agreement on the part
the debtor merchandise, to compromise the
name, and rests upon sufficient consideration

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. Creditors signed an agreement "to accept seventy-five per cent. of the amount of indebtedness as set against our respective names; said seventy-five per cent. to be paid in two, four and six months, from December 15,' the contract to take effect "provided all merchandise indebtedness accept the same settlement." A., one of the creditors, held three notes of the debtor, two of which he had previously sold, taken back under false representations by the purchaser, and at the time he signed the above agreement was, with the knowledge of the debtor, endeavoring to force the purchaser to take the notes back, which was done before December 15. *Held*, in an action by A. upon the note not sold, that A. not being in possession or having control of the two notes sold, the debtor was not obliged as to them to tender the settlement notes. *Held, also*, as to the note in suit, that the debtor was not obliged to tender a settlement note of seventy-five per cent. n that note after the transfer of the other two notes, which the debtor had aid to the purchaser. *Held, also*, that evidence of conversations, tending o show the understanding of parties as to the notes sold, prior to the execution of the agreement, was not admissible to vary the written contract. *Farrington* v. *Hodgdon*, 453.

COMPROMISE.

See MONEY PAID.

CONFESSION.

See EVIDENCE, 23.

CONFLICT OF LAWS.

See CHARITY, 4, 5.

CONSTABLE.

ervice of notice of intention to take the poor debtor's oath was made by a person who had been duly appointed and qualified as a constable of the city of Boston, and had held the office for several consecutive years, but the term of whose appointment had expired at the time of service. He was generally known as a constable, and at the time was notoriously acting as such, having an office in Boston, on the door of which was his name, with the addition "constable." The debtor delivered the notice to him, believing him to be a constable. *Held*, that he was an officer *de facto*, and that the validity of the service could not be collaterally called in question, in an action on the recognizance given by the poor debtor. *Petersilea* v. *Stone*, 465.

CONSTITUTIONAL LAW.

e St. of 1875, c. 99, authorizing the granting of licenses by the municipal uthorities to sell spirituous and intoxicating liquors, and requiring the payent of a fee or excise therefor, is constitutional. *Commonwealth* v. *Fredicks*, 199.

See DIVORCE, 1.

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CONT

I. *M*

1. A contract signed by several persons that if the other party to the contract dertake" to do a certain other thing, signers. *New Haven & Northampton*
2. In an action to recover the value of o plaintiff partly on his estate and partl may, in the absence of an express agre ant's part, infer a promise to pay, if tl the wall with the expectation that the the defendant had reason to know that expectation, and allowed him so to ac 513.

See COMPOSITION, 3; INSURANCE, 1; SERVANT, 3;

II. *Consider*

See COMPOSITION, 3;

III. *Validi*

See MARRIED W

IV. *Construct*

3. The acceptance by a grantee of a deed of that it is subject to a mortgage "which agrees to pay with the interest now due th the grantee not merely to indemnify the gr be the debt of the grantor. *Furnas* v. *Dur*
4. A promise to pay the debt of the promis promise to pay it when due, or forthwith if
5. A. and B., the owners of adjoining lands, seal, whereby either was to have the right t the land of each. The indenture also prov may at any time use as much of the wall as of any building, but before he or they may shall pay the other party an appraised value shall thus use." At the time the contract w ing, one story high, on his land, with three side of wood, resting, by permission, on A wooden side of his building, and A. built the spaces for the timbers of B.'s building, and these spaces, and so fitted his building and us otherwise use it. *Held*, in an action by A. a value of the wall so used, that B. had not use

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building, and that the action could not be maintained. *Shaw* v. *Hitch-*
254.
owning a building abutting upon lands owned severally by B. and C.,
e separate contracts with them conveying to each a part of his wall, with
ission to build upon it as high as their buildings should require. B. s
C.'s buildings were substantially one. B. agreed so to provide for car-
g off the water from the roof of A.'s building where it abutted against
own, as to prevent any leakage in A.'s building. The contract with
ontained a similar stipulation on his part. *Held*, that B.'s agreement
ied only to leakage in that part of A.'s roof that abutted on B.'s build-
and, that part being properly constructed, that he was not liable for
rfection in the roof against C.'s part of the building. *Mason* v. *Field*,

and B., owning contiguous land and buildings, made a contract with re-
to a building to be erected on B.'s land, wherein B. stipulated to remove
eaves and jet of A.'s building, and make good the roof, after removing
ame where his building rose above A.'s wall, "in a thorough and work-
ike manner, without injury to the appearance or utility of the rest of
building, and provide in the most effectual manner, by a gutter, valley,
ing or otherwise, to permanently receive and carry off the water from
roof of A.'s building." B. made a new roof to a part of A.'s building
he purpose. *Held*, that he was justified in so doing under his contract,
at was the best method of carrying off the water, or as good as any
r; and that this question was properly submitted to the jury. *Ib.*

See ACTION, 4; BOND, 3.

V. *Performance and Breach.*

plaintiff bought certain stock of the defendant at a price named. The
ntiff and defendant entered into an agreement in writing, by which, in
ideration of the purchase, the defendant agreed to pay to the plaintiff,
e expiration of three years from the date of the agreement, all loss he
t sustain in consequence of the purchase, including ten per cent. inter-
n the price paid, and the plaintiff agreed to pay to a third person one
h of all profits he might receive from dividend or sale of the stock, de-
ing ten per cent. interest on the cost of the stock. *Held*, that there
l be no breach of the agreement until the expiration of the three years;
the defendant was liable to the plaintiff at the end of the three years
loss sustained by him in consequence of depreciation in the value of the
k up to that time; and that the plaintiff was not required to sell the
k to determine its value, which could be proved by other modes. *Bel-*
v. *Loveland*, 539.

and B., members of a firm, assigned a patent right to C. and D., and by
ntract, made the same day with C. alone, agreed that, if C. should be-
e dissatisfied with the purchase within a certain time, they would repur-
se of him the patent right and repay him the amount paid therefor, pro-
d he should give them notice thereof within a certain time. In an

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action on this contract by C. against
dissatisfied and gave the defendants
purchase. The plaintiff testified that,
what he would do about the contract,
member of the firm to help the plaintif
was brought, the one, with whom the c
purchase. The plaintiff also testified t
stated in the contract, but before the a
tion with B., who said he could do noth
too poor to raise money. The judge ru
dence of a refusal to repurchase on t
in finding a waiver of a tender of a dee
ground of his poverty, did not bind A.
ported the case to this court, a new trial
correct. *Held*, that there was evidence s
ing that the defendants had refused to pe
was incorrect, and that a new trial must

See EVIDENCE, 4, 6; LAW AND FACT,

CORPORATI

Under the Gen. Sts. *c.* 68, § 35, authorizing
to "decree a dissolution of" a corporation
in number or interest of the members," it i
a telegraph company that it leased its line
than it might have obtained, fraudulently
the lease to the second company, in which
stockholders of the first company were also
the petition for dissolution, the lease is canc
both companies. *In re Franklin Telegraph*

See CHARITY, 5; EVIDENCE, 11; MASTER A
CESS, 3, 4.

COSTS.

1. The provision of the Gen. Sts. *c.* 156, § 27
"the plaintiff shall be allowed only one ter
faulted without having appeared," does not
defaulted on the main issue, and avails himse
by the Gen. Sts. *c.* 133, §§ 2, 3, of being h
damages, and of moving that such assessmen
gan v. *Clark*, 83.

2. A. brought an action against B. and attache
then sued by a creditor, and B. summoned as
returnable to and entered at the same term.
and paid on execution to A.'s creditor the fu
Afterwards, during the same term, judgment

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his costs, in the action of A. against B., and the clerk taxed the costs wn to the time of such judgment, including the fees for keeping the atched property after payment by the trustee. *Held*, under the Gen. Sts. 142, § 20, that the taxation of costs was correct. *United States Manuf.* v. *Clarke*, 163.

See WAY, 5.

COUNTY COMMISSIONERS.

See RAILROAD.

COVENANT.

Under the Gen. Sts. *c.* 48, § 5, providing that assessments for sewers and ains shall constitute a lien on the real estate assessed "for one year ter they are laid," an assessment by the mayor and aldermen of a city of e expenses of laying a sewer in a street of the city upon land abutting ereon and benefited thereby, is an incumbrance thereon from the time of e order for its construction, and is a breach of the covenant against inmbrances in a deed of the premises delivered after such order, but before e assessment was laid. *Carr* v. *Dooley*, 294.

n entry upon a mortgaged estate, upon breach of condition for foreclosure, without actual ouster, an eviction for which a warrantee can recover upon a covenant. *Furnas* v. *Durgin*, 500.

The certificate of an entry upon a mortgaged estate to foreclose the mortge under the Gen. Sts. *c.* 140, § 2, duly recorded, is sufficient evidence of viction to sustain an action for a breach of a covenant of warranty. *Ib.*

Upon an action for breach of covenant of warranty upon the eviction of e warrantee by an entry of the mortgagee for foreclosure, the measure of amages is the amount of the mortgage debt and interest, if that is less han the full value of the estate. *Ib.*

See DEED, 1, 7.

CUSTOM.

See EXCEPTIONS, 20; SHIP, 2.

DAMAGES.

Upon an action upon a promise to pay a debt of the promisee, brought after it is due, but before any payment by the promisee, the measure of the damages is the amount of the debt and interest. *Furnas* v. *Durgin*, 500.

On the trial of a petition under the St. of 1871, *c.* 382, § 7, by the lessee of a part of a building, for the assessment of damages occasioned by the taking of the land on which the building stood, by a city to widen a street, the jury were instructed in substance that the value of the lease was its market value; that market value meant the fair value of the property as between one who wanted to buy and one who wanted to sell, irrespectively of peculiar circumstances rendering the lease of greater value to the lessee

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or of a desire on his part to retain the
taken to this instruction, but the petitic
that in determining the value of the les
other things, the amounts which person
willing to give therefor, not excluding
himself would give. The judge stated
this instruction with the modification,
for the lease." *Held*, that the petitioner
refusal of the judge to give the instructi
also, that the petitioner had no ground
judge to instruct the jury, as requested b
persons whose property was taken for p
the value thereof, that the term "market
ute, and that the lessee was entitled to co
erty might have other than a market value

See CONTRACT, 8; COVENANT, 4; DEED, 1;
3; WAY, 2–4,

DEED.

1. Upon an action of contract against a gran
of warranty in a deed which contained a re
dower and homestead, there was evidence t
wife before the description of the land or an
in the deed, and that she never saw it afte
after the description and the other parts had
did not invalidate the deed as against the gr

2 On the trial of a writ of entry, the demand
question as part of a lot conveyed by A. to I
At the time of each of these conveyances, the
from the rest of the land conveyed by a sub
the rear of the lot. The tenant's dwelling-h
was no fence between it and the tenant's adjo
whole was used as one house lot in the exclu
the tenant, which was adverse, under a claim
The title which A. had in the premises was ac
the tenant and by the foreclosure of a mortga
had been assigned to him. At the time of the
session of the premises to the tenant under an a
was soon given up, and possession was taken b
of land in dispute. The mortgage was foreclo
Held, assuming that the deeds included in th
question, that the grantors in those deeds were
passed by them. *Johnson* v. *Bean*, 271.

3. Land was conveyed by metes and bounds with
of a right of way over the granted premises, a
was given back to the grantor, in which the land

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metes and bounds as in the deed, and as "being the same premises conveyed thereby, this mortgage being a part of the same transaction." The land was sold by the mortgagee for breach of condition under the power of sale in the mortgage, and was described in the deed to the purchaser by the same metes and bounds, and as being the same described in the mortgage. No reservation was made or incumbrance mentioned in the mortgagee's published notice of sale. *Held*, that the last named deed did not convey the right reserved to the grantor in the original deed. *Walsh* v. *Macomber*, 73.

A reservation in a deed of land, that no building is to be erected by the grantee, his heirs or assigns, upon the land conveyed, creates an easement, or a servitude in the nature of an easement, upon the land; and the situation of the land relatively to other land of the grantor may be considered in determining whether such easement or servitude is a personal right of the grantor or is appurtenant to his other land. *Peck* v. *Conway*, 546.

Parties deriving title under a recorded deed have constructive notice of it provisions; and it is immaterial that they have no actual knowledge thereof. *Ib.*

A., the owner of a large lot of land, conveyed a portion of it to B., with the reservation in the deed "that no building is to be erected by the said B., his heirs or assigns, upon the land herein conveyed." A. retained the rest of the lot as his homestead, and owned no other land in the vicinity; and afterwards sold the homestead lot to C. by a deed describing the land by metes and bounds, but making no mention of the reservation in the deed to B., or of privileges and appurtenances. B. afterwards sold to D. by a deed making no reference to the reservation, and D. had no knowledge thereof. All the deeds were duly recorded. *Held*, that it was to be inferred that A. and B. intended to create an easement on the granted land for the benefit of A.'s adjoining estate; that this easement passed as appurtenant to the land by the conveyance to C.; and that he could maintain a bill in equity to prevent D. from building on his land, although a proposed building would do no appreciable injury to C.'s land. *Ib.*

The defendant owned a tract of land and conveyed it by a deed embracing its description the whole width of a road, called a town road, running along the east side of the premises, its east side being made the east side of the land conveyed. The deed contained a covenant that the premises described were free from all incumbrances, except the aforesaid road, so far as the same was not discontinued. The town had previously voted, while the defendant owned the land, to discontinue a portion of the road bounding on the land conveyed. *Held*, in an action for breach of the covenants of warranty and against incumbrances, contained in the deed, that the deed conveyed the fee of the town road subject to the public easement. *Held*, *also*, that whatever private right of way certain persons had in the portion of the land, subject to the public easement, was merged in the public way, and that, as such right did not appear to have been acquired before the way was laid out, it could not be revived on its abandonment. *Leonard* v. *Adams*, 466.

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8. Land was sold bounded on a priv
way was then laid out, though a c
piece of the land retained by him a
showing a way had been previously
the deed made no reference to the
trol, and that the location of the wa
which the conduct and declarations
of the fence and culvert, and the pu
competent evidence. *Crafts* v. *Judso*

9. The owner of a large tract of land f
an open space of irregular width, v
feet, bounded on the sides by trees,
the road back to other lands of the
these lands, conveyed one of them
clause following the description in the
self, my heirs and assigns, that a carria
shall forever hereafter be kept open an
to" the said road. In an action of to
obstruction of the way, the defendant
entitled, under this clause, to an unobstr
wide, but contended that no location of
it, and asked the judge to rule that if a
his occupation been always left open, he w
declined so to instruct the jury, and instruc
given, a carriage way defined by visible o
by the grantor, they might find that such
to the grantee, although it was forty-five f
tion gave the defendant good ground of e

10. A grant of land bounded by a way con
the way, unless a different intention appea
or by the character of the locality to whic
Motley v. *Sargent*, 231.

11. Land was conveyed bounded northerly on
easterly on another street, thirty-five feet
land of C., seventeen feet five inches; and
thirty-four feet ten inches, "or however oth
ings thereon standing, and the free use an
in common with myself, my heirs and assig
my heirs and assigns forever, a mutual privile
ing at the northwesterly corner of the abo
same deed the grantor conveyed his interest i
north end of the land above described, which
to widen the street. By a plan afterwards pr
was not questioned, the northerly line varied fr
southerly line of the lot was only fifteen feet
passage way, and the passage way at that poin
that the grantee took to the middle of the pass

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A deed, in which the land conveyed is bounded upon a private way, stops the grantor and those claiming under him to deny the existence of he way for its entire length, as then actually laid out, or clearly indicated nd prescribed. *Tobey* v. *Taunton*, 404.

At the time of a conveyance to A. of land in a city, bounded in the deed y a street, the grantor was the owner of the street. It was then used as a treet and its boundaries were marked out and defined by rows of trees and nces, which boundaries included a portion of the land afterwards conveyed y the same grantor to B., and situated at the corner of the street. On a etition by B. for the assessment of damages for the taking by the city of a ortion of the land conveyed to him, for laying out the street, the jury were nstructed, at the request of the city, that if the grantor was the owner of he street at the time of the conveyance to A., and at that time the street as fully defined and marked out by having fences and trees to indicate its idth, and that deed was duly recorded, neither the grantor nor any one laiming under him would have a right to obstruct any part of the street as dicated by the fences and trees as they were at the time of the conveyance, and the jury can find for such land only such damages as B. would entitled to for laying out a street over land over which A. had a right of ay. The petitioner requested an instruction to the jury that the declaration the deed to A. did not impair the right of the petitioner to full damages for the land embraced in his deed and included in the way laid out. This truction was also given, with the addition, "but it is for the jury to say at that right is." *Held*, that the instructions were conflicting, and that t given at the request of the petitioner was erroneous. *Held*, *also*, the d to A. being upon certain conditions subsequent, that it was for B. to w that that deed had been defeated by breach of condition and entry refor, and that if not so shown, it was proper for the jury to consider, n the question of value, that the land was subject to A.'s right of way.

See CHARITY, 2; CONTRACT, 3; EQUITY, 7; EVIDENCE, 4, 14.

DEFAULT.

See COSTS, 1.

DEPOSITION.

trial of a complaint under the bastardy act, the respondent put in evi- ce the deposition of a witness, who testified on direct examination to ving had intercourse with the complainant at a certain time. On rex- ination he testified to having seen the complainant having intercourse h other men at a time more than twelve months before the birth of her ld. After the signature of the witness was a memorandum of the mag- ate, who took the deposition, to the effect that after the counsel for the plainant had left, the witness wished to correct his statement as to the e mentioned in his direct examination, that the counsel for the complain- t was recalled and objected, and the magistrate declined to make the cor-

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rection. The respondent was found g
lowed, which stated that the judge
that the memorandum of the magistra
nation, and that the bill of exceptions
was excluded. *Sabins* v. *Jones*, 167.

DEVISE AND

1. A woman died seised of personal esta
she had bought prior to the date of tl
queathed to her by her brother. Her v
constituted A. her "residuary legatee,"
property bequeathed me by my brother,
tion from my sister, and any other prope
sion, I will, and ordain, and bequeath,"
to certain other persons. *Held*, that it
dispose of all her estate; and that A.
legatee," all the real estate not bequeath
Laing v. *Barbour*, 523.

2. A testator by his will bequeathed a certa
were directed to pay the income accruing
life. The will provided that the trust shc
the wife, when the trustees were directed t
sum of $3000; a certain sum to another leg
fund to the residuary legatees. A codicil
wife's niece I give the sum of $7000 in ad
will, making $10,000; and I ratify and c
particulars." *Held*, that the legacy given
the trust fund upon the same conditions as
Snow v. *Foley*, 102.

3. A testatrix by her will, after directing payı
as follows: "All my property both real and
or kind (except what shall be disposed of h
nance, support, and bringing up of my niece
of my brother E. C., as guardian during his
bring home his wife F. or marry with some c
brother D. C. is to have the management or g
and if the said J. F. should not live, then the
her, the improve only I give to my brother I
vided he marries not nor supports his present
to my brothers A. and D. C.," and then gave
sons. *Held*, that J. F. took an estate in fee.

4. A testator by his will provided that the residı
vided into equal shares, and that one portion s
surviving children, and that the shares to be p
should be paid to them free from the control of
daughters should alone have the right to use

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codicil to the will directed that the share of one of the daughters should ' be held in trust " by the executors, and provided that " they are hereby directed to pay over to her, my said daughter, from time to time, a sufficiency for her comfortable support and maintenance during the term of her natural life, excepting only, that in case she shall survive her said husband, all the remaining portion of her share of my estate shall then be paid over to her in full. My object in thus limiting the payment of my said daughter's share of my estate during the lifetime of her said husband, is to prevent his having any share or benefit of or from my estate." The daughter died after the testator, and in the lifetime of her husband, leaving a will by which she bequeathed her share of her father's estate. *Held*, that she had a vested interest in fee in her father's estate ; that the time of payment to her was only postponed by the codicil ; and that her executor was entitled to said share. *Holden* v. *Blaney*, 421.

A testator devised all his estate, real and personal, to a trustee in trust to pay of the net income thereof one third to the wife of the testator during her life ; and the remaining two thirds, and, after the death of the wife, the whole of said net income, to his daughters A., B. and C., during their lives, and, after the death of one or more of them, to pay over the proportion of said net income, to which said deceased would have been entitled if living, to the legal heirs of such deceased ; and, upon the death of the wife and all the daughters, to convey all the said real and personal property in fee to the legal heirs of the daughters, in equal proportions, by right of representation. The testator left a widow, two daughters by a former wife, one of whom was the daughter A. named in the will, and one daughter by his then wife, who was the daughter C. named in the will. After the death of the testator, and in the same year, A. died without issue, and C. afterwards died without issue. The wife of the testator seasonably waived the provisions of the will in her favor, under the St. of 1861, *c.* 164. *Held*, that after the widow had received the personal estate to which she was entitled, and one third of the income of the real estate, as dowress, the remaining two thirds of the income of the real estate, and the whole income of the remaining personal estate, were to be divided, upon the death of A., between the surviving sisters equally, and that upon the death of C. the survivor still surviving should receive three fourths of the whole income, the remaining one fourth to be added to the income afterwards to be distributed. *Upham* v. *Emerson*, 509.

See CHARITY, 2–5 ; EQUITY, 7 ; WIDOW.

DISORDERLY HOUSE.

On the trial of a complaint for keeping a disorderly house, the evidence tended to show that the defendant kept a dance hall, which was resorted to by men and women of bad repute, and the government was permitted, against the defendant's objection, to introduce evidence that women of bad repute, resorting to the hall, had frequently while there solicited men to leave the building and go away with them for the purposes of prostitution ; that the

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men went away with them, and that
hall. *Held*, it not appearing by the
evidence offered at the trial, that the
Commonwealth v. *Cardoza*, 210.

DISSE

See Adverse Possi

DISTRICT

1. A justice of a District Court may rece
act, and issue a warrant, when the cou
167.

2. A complaint under the bastardy act w
trict Court and his certificate to the jur
court," followed by his signature with h
issued on the complaint was signed by
Held, that the complaint sufficiently app
sworn to before him, and that he issued
presumed that he acted under his autho
was not in session. *Ib.*

DIVORC

1. The St. of 1873, *c.* 371, § 2, modifying th
c. 404, in proceedings for divorce for the c
no judicial decree had been rendered, is w
the Legislature. *Wales* v. *Wales*, 89.

2. Under the St. of 1870, *c.* 404, providing f
matrimony, for certain specified causes, in
lowed by an absolute decree in case the par
a decree of divorce *nisi* was rendered at N
upon a libel filed in May 1873, upon the de
tice, for the cause of utter desertion from
libel. The St. of 1873, *c.* 371, which took
the provision of the St. of 1870 authorizin
nisi, and provided that "no divorce shall
the desertion has continued for at least thre
to the filing of the libel for divorce. *Hel*
the decree, that the decree was unauthoriz
cated. *Ib.*

3. On the trial of a libel by a wife for divorce f
of cruelty, the husband was permitted, with
planation of his conduct that he had received
not permitted to put the contents of the lette
had no ground of exception. *Mayo* v. *Mayo*,

See Evidence, 26, 28; Exce

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DOWER.

he judge, before whom a writ of dower was tried without a jury, found as a fact that the land described in the writ was conveyed to the demandant's husband; that he, on the same day, mortgaged it to a third person to secure his note to such person for money procured of him to pay for the land; and that the demandant did not join in the mortgage deed. The judge ruled, on these facts, that the demandant was entitled to dower. *Held*, that the facts stated did not conclusively prove that the seisin of the husband was instantaneous only. *Smith* v. *McCarty*, 519.

DRAIN.

See COVENANT, 1.

EASEMENT.

See DEED, 4, 6, 7.

EMINENT DOMAIN.

der the St. of 1871, *c.* 218, authorizing the city of Lynn, for the purpose f supplying the city with pure water, to take, hold and convey into the city he waters of Breed's Pond and all water rights connected therewith, and o take and hold, by purchase or otherwise, such land on or around the argin of said pond, not exceeding five rods in width, as may be necessary r the preservation and purity of said waters; and requiring the mayor to le in the registry of deeds "a description thereof sufficiently accurate for entification," and the city to pay the damages caused by such taking; the y took certain land, and filed in the registry of deeds a certificate which scribed the land as "a lot commencing at the southwest corner of land rned by Charles H. Trask on Walnut Street," and running by four courses d distances, 1896 feet in all, by the northerly line of that street; thence by r successive courses and distances, each except the last terminating at a lar post, amounting in all to 1703 feet, "to a point on the Downing d (westerly line) at its intersection with Elm Street;" thence by three rses and distances on "westerly line of road," 2496 feet in all; thence nineteen courses and distances, each except the last terminating at a lar post, and amounting to 8985 feet in all, "to starting point." The nes of the owners of the land taken were not mentioned, nor the town or y in which the land was situated, and no plan was referred to in the deiption or filed with it. At the trial of an action of trespass, brought by owner of land so taken, against the city, no monuments were proved, ept along about two thirds of one side of the tract of land intended to be en; it appeared that a very small portion of it was within the city of n; a plan was introduced, subject to the plaintiff's objection, of the entract of land taken, and a surveyor testified that the lot could be traced d its limits made certain by the plan; but there was no evidence that the

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land could be identified by the descript
or of a surveyor; and it did not appear
by the description, or which, or how m
that the certificate was insufficient, and
Wilson v. *Lynn*, 174.

EQUIT

I. *Jurisdiction and Ge*

1. After receivers of an insurance compa
Commonwealth, have been appointed, a
Gen. Sts. *c.* 58, § 6, a petition in equity
of a creditor of the company to reach,
petitioner's claim, the funds belonging to
hands of the receivers. *Commonwealth* v
2. This court has no jurisdiction in equity
vention for an injunction against a per
plaintiff's patent infringes upon a pater
deterring others from purchasing the pl
Kitson, 484.
3. An executor, who has no title as such in
who does not allege that there is any perso
bution, cannot maintain a bill in equity to o
as to the construction of the will of the te
and the fact appears, "that there is and w
estate and lands." *Parker* v. *Parker*, 478.
4. If a debtor has mortgaged land, by the in
his wife, without consideration and in frau
never taken possession, and no mortgage d
mains in possession, a creditor to whom a p
off on execution against the debtor, and p
adequate and complete remedy at law by w
and cannot maintain a bill in equity to obta
her right in the land set off. *Swamscott Ma*
5. If a person forges a deed of land to himsel
sent of the owner, and fraudulently procures
by some other person, and then leases and
owner has a plain, adequate and complete re
tain a bill in equity against the person execu
the lessee, and the purchaser, to cancel the
Jackson, 161.
6. Where a town is annexed to a city by a sta
receive all uncollected taxes, and makes it l
ligations of the town, this court has no juris
city from selling land to pay a betterment tax
landowner having a plain, adequate and con
v. *Boston*, 194.

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. Land was conveyed to a city in trust for the purpose of building a hospital thereon. By the terms of the deed, the city was to make an appropriation of twenty-five thousand dollars for the purpose, and to build a hospital, or part of a hospital, of a certain size, upon the land within three years, or. failing to do so, to pay the grantor, or his legal representative, the sum of two hundred dollars a month; and the land was not to be sold for twenty-five years, and then only upon the opinion of three fourths of the board of trustees that it was unsuitable for a city hospital, and upon the setting apart of a sum of money equal to the value of the land, as then ascertained by three appraisers, as a permanent fund for the city hospital. The city was duly authorized by the legislature to erect and maintain a city hospital, and accepted the grant of the said land. The grantor by his will, after devising all the residue of his estate to the city in trust, to be by it applied for the sole use and benefit of the city hospital, provided as follows: "While I would not wish to give any particular direction to the bequest, nor incur the risk of defeating the purpose I have in view in making it, by imposing any limitations or condition as to the manner of its use, still I should prefer to see it set apart as a separate fund, and the income thereof only applied to the support and maintenance of said hospital, if such course shall commend itself to the wisdom of those having it in charge." *Held*, that a bill in equity brought by the city after the death of the grantor and within three years after the grant, seeking to release the city from the obligation of building a hospital upon the land within three years from the date of the deed, and to enable the city to sell the land immediately for its own benefit, on the ground that the city had made other provisions for a suitable and convenient city hospital elsewhere, that it would be inexpedient and unnecessary to erect a hospital on the land, and that said land, on account of its situation, its northern exposure and nature of its soil, was not a suitable, convenient or wholesome place for the erection of a hospital for the reception and care of sick persons, could not be maintained. *Worcester* v. *Kelley*, 575.

ee CHARITY, 2, 4; CORPORATION; DEED, 6; PARTNERSHIP, 3; PROBATE COURT; SPECIFIC PERFORMANCE; TRUST AND TRUSTEE.

II. *Pleading and Practice.*

See TRUST AND TRUSTEE.

ERROR.

. The time for pleading to a writ of error may be enlarged under the 29th rule of this court. *Tufts* v. *Newton*, 476.

. If on a writ of error to the Superior Court a record is sent to this court, which is afterwards amended on a writ of certiorari, the validity of the proceedings is to be determined by the amended record. *Crimm* v. *Commonwealth*, 326.

See GRAND JURY, 4; SUPREME JUDICIAL COURT.

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ESTATE

See DEVISE AN

ESTOP

See DEED, 12, 1.

EVICTI

See COVENA

EVIDEN

1. Under the St. of 1864, *c.* 121, § 1, if a
icating liquors for sale in violation of
sale, the burden of proving that he h
upon him. *Commonwealth* v. *Curran*, 2

2. In an action to recover the freight due
of which the plaintiff is to take a cargo
and proceed direct to the port of delive
the plaintiff performed all things in the
performed, and the cargo is delivered in
is whether the vessel unnecessarily delay
sailing and deviated upon the voyage, the
tiff to show that he had complied with th
part to be performed. *Funcheon* v. *Harv*

3. In an action by an assignee in bankruptcy
been fraudulently paid by the bankrupt t
the bankrupt said to the defendant, some
the money of him, as to what he wanted it
by the bankrupt as to his pecuniary cond
payment, has no bearing on the question
had reasonable cause to believe the bankru
repaid it. *Goodrich* v. *Wilson*, 429.

4. Upon an action of contract for a breach o
fendant to the plaintiff of land in W. R.,
gage debt of the plaintiff as stipulated in
defendant, of land in H. P., it appeared th
exchange the land in H. P., and land in
the land in W. R. belonging to the defend
change was disputed by the defendant.' T
to the defendant of the land in B., and was
ant's objection, to put in an agreement sign
two days after the latter deed, whereby the
the plaintiff the same land in B. *Held*, that
defendant, after the date when the plaintiff
delivered, had treated the land in B. as his
bargain had been carried out. *Furnas* v. *Du*

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In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness called by him that the testator had before that suit was brought agreed to pay for the expenses thereof, if it could not be settled for a certain amount. The defendant was permitted, against the plaintiff's objection, to testify for himself that, at an interview, during the pendency of that suit, at which the testator, the witness for the plaintiff and himself were present, the testator stated that the defendant was to look after his matters, that he wanted the defendant to understand that he never had any transactions with the corporation or any suit that was to be or had been brought against it, to which the witness made no reply, and that the testator further said that he had not long to live and wanted them to know about it. The jury were instructed that if the persons in whose presence the statements were made by the testator had no authority from the plaintiff to act in the matter to which the statements related, the jury were not to consider those statements as testified to by the defendant. *Held*, that the evidence was rightly admitted, as tending to contradict the plaintiff's witness, although the statements were made by the testator after the suit was brought. *Held*, *also*, that the instruction was sufficiently favorable to the plaintiff. *Hill* v. *Crompton*, 376.

In an action against an executor to recover for services and disbursements in a suit brought by the plaintiff against a corporation, for which it was contended the testator promised to pay, the plaintiff relied upon the testimony of a witness that in reply to a question of the plaintiff as to what they should do about the suit, the testator said, "If you can settle the matter by taking off $400 or $500, do so; if not, fight it, and I will pay the bill." Another witness gave substantially the same testimony, except that he did not refer to the matter of attempting a settlement as stated by the first witness. *Held*, that the jury were rightly instructed that the plaintiff could not recover without showing that he attempted to settle with the corporation by throwing off $400 or $500 before he brought the suit, although the answer contained only a general denial. *Ib.*

On the trial of an indictment for robbery, it appeared that the defendant was not arrested until the end of the third day after the robbery, and the evidence was conflicting whether he had been concealing himself during the whole or any part of that time. To show such concealment the government called as a witness a policeman, who assisted in the arrest, and asked him, How soon after the robbery did you commence looking for the defendant? *Held*, that the question was rightly permitted to be answered. *Commonwealth* v. *Tolliver*, 312.

On the trial of an indictment for robbery, the government introduced evidence that the defendant had concealed himself to avoid arrest. The defendant offered evidence tending to show that instead of concealing himself, he was publicly walking about the streets before his arrest. The government then offered to show that while walking about the streets for an hour or two

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previous to the arrest, the defendan
ner. The defendant had introduc
judge ruled that such testimony cc
timony had been given by him or
disguise adopted by him. *Held*, t
presiding judge to admit the evid
Commonwealth v. *Tolliver*, 312.

9. On the trial of an indictment for rc
she was robbed of a ten dollar bill,
bills, but she was unable to say whet
the defendant was arrested three da
have in his possession two five dolla
one of which was a bank bill, and th
testified that in the struggle with th
them so as to cause a wound, and wl
the corresponding finger of the defend
of the two dollar bills which the gove
but there was no evidence that it was
tion, and there was no evidence of t
this. The person robbed could not id
fendant as hers, or any of it, and the
she was robbed of. *Held*, that the qu
jury whether any of the bills found on
person robbed. *Ib.*

10. In an action against a street railway c
act of one of its conductors in wrongful
the plaintiff introduced evidence that h
expelled; that in consequence he was cc
months, and was afterwards obliged to
introduced evidence, in reply, that the
dooryard, and the streets, with little appa
within two or three days after the allege
time to time within the period named by
close of the defendant's evidence, offere
the witnesses had seen him in his house
helped him from his chair to his bed. I
related to the days and times testified
Held, that this evidence was part of th
within the discretion of the judge at the
rebuttal. *Wallace* v. *Taunton Street Rail*

11. The extent to which a witness may be
largely in the discretion of the judge pre
an action against a corporation, it appear
are members of another corporation havin
plaintiff's counsel, in cross-examining a w
if he is not an employee of the latter corp
ing bias, no exception lies to the exclusion

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On an indictment for the malicious burning of a building on September 0, 1875, it is competent for the government to show, on the question of the ntent with which the defendant burned the building on that day, that on ugust 24 and on September 6, 1875, the defendant set fire to a shed ten eet distant from the building, and connected therewith by a flight of steps. *Commonwealth* v. *McCarthy*, 354.

In a criminal case, the admission by the defendant that the act was done ith a malicious intent does not preclude the government from proving such ntent. *Ib.*

The recital in a deed of land of the consideration paid is not admissible in vidence to show the value of adjoining land, as between persons not parties o the deed. *Rose* v. *Taunton*, 99.

Upon the assessment of damages sustained by the taking of land for a high-ay, a witness who has testified without objection to the value of the land ken, may state the reasons of his opinion. *Hawkins* v. *Fall River*, 94.

On the issue of the value to the lessee of rooms in a building which had een taken by a city to widen a street, it is within the discretion of the judge residing at the trial to permit a witness who underlets rooms in a building the vicinity, and who, for this purpose, has informed himself generally of he rents of buildings, to give an opinion as to the value of the lessee's prem-es, although he has not examined, and is not familiar with, the building in uestion. *Lawrence* v. *Boston*, 126.

Upon the assessment of damages sustained by the taking of land for a rail-oad, it appeared that the estate out of which the land was taken was a farm, nd that the land taken was on the bank of a river. The bill of excep-ons stated that a farmer who had lived many years in the vicinity of the nd, and had known of sales of land in the neighborhood, and was allowed ithout objection to testify as to the value of the land taken, and of the in-nveniences resulting to a farmer from being deprived of access to the river, s asked what in his opinion was the damage to the remainder of the farm the loss of the river bank, which was excluded; that the petitioner also imed damages by reason of being excluded from the river bank for pur-es of fishing and from a fishing ground, but that it did not appear that witness had any special or superior knowledge on the subject of fishing of fishing grounds; and that other witnesses for the petitioner testified to value of the river bank as affording facilities for fishing. *Held*, that the l of exceptions disclosed no error in the exclusion of the farmer's testi-ny. *Boston & Maine Railroad* v. *Montgomery*, 114.

In an action by a savings bank upon a promissory note, against one sign-g as surety thereon, parol evidence that the defendant signed the note solely the request of the treasurer of the bank, because of a rule thereof as to the mber of the names required upon a loan, and upon the assurance that the nk would not look to him for payment, is inadmissible as contradicting the ritten contract. *Barnstable Savings Bank* v. *Ballou*, 487.

At the time of negotiations for the purchase of land, a sewer was in proc-s of construction in the street on which the land abutted; the party pro-

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posing to purchase called the owner who was to pay for the sewer, to wh that the other party should not b deed of the land was subsequently incumbrances, but no mention was m afterwards paid an assessment upo sewer. *Held*, in an action by him ag ise to pay any assessment which shou which the consideration was averre evidence of the conversation and of t to prove the promise. *Held, also*, tha not open to the objection that it varie and that the promise proved was not *Dooley*, 294.

20. On the trial of an indictment, char with the forgery of a bond to dissolv count with knowingly uttering the for upon the ground that the defendant fi chancery a bond to dissolve an attach and J. as sureties; that at the same tim accomplices, who falsely represented th fied to their sufficiency as sureties; an fictitious names signed or procured to government also offered evidence that n found. The defendant offered to show, and J. as witnesses in his behalf, that threatened to prosecute them for perju Commonwealth and had not returned, s cure their attendance as witnesses. *H* dence gave the defendant good ground o *tello*, 214.

21. The declarations of an occupant of l are admissible in evidence against one s upon the land as his property. *Pickering*

22. On the trial of a petition by the lessee assessment of damages occasioned by the the building stood, to widen a street, it estate surrendered the entire estate to the nanted to indemnify the city against all cl suance of this agreement he defended th by him as to the value of the lease, made and before his agreement with the city, except to contradict him. *Lawrence* v. *Ba*

23. At the trial of an indictment for burning dence tending to show that the house was s were facts and circumstances pointing to th

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did, as the probable incendiary. The government was permitted to introduce evidence that after her arrest, and while in custody, the defendant confessed to officers, when questioned by them, that she set the fire, and stated how she did it, but it did not appear that any threats or promises were made by the officers. The jury were instructed that they should give no weight to the confession if it was induced by threats or promises; but, if it was not so induced, that such weight should be given to it as they thought it entitled to; that threats and inducements might be by acts as well as words; and that mere fear on the part of the defendant did not render the confession incompetent unless induced by some improper conduct on the part of the officers. *Held*, that the evidence was rightly admitted. *Held*, *also*, that the instructions were correct. *Held*, *also*, that the confession, being supported by independent evidence, would warrant a conviction. *Commonwealth* v. *Smith*, 205.

On the trial of an indictment for robbery, the government offered to prove certain confessions by the defendant, which the judge excluded as having been obtained by promises and threats made to him by officers. The defendant afterwards took the stand and testified in his own behalf, and upon cross-examination was asked by the government what statements he had made in the interview in which the confessions were made. The judge ruled that having made himself a witness, the inquiry could be made whether he made statements inconsistent with his testimony on the stand, as affecting his credit. *Held*, that the instruction was sufficiently favorable to the defendant. *Commonwealth* v. *Tolliver*, 312.

In an action by an assignee in bankruptcy to recover money alleged to have been fraudulently paid by the bankrupt to the defendant, it appeared that the defendant had admitted that a statement made by the bankrupt, at his examination before the register, in regard to the money paid by him, was true. *Held*, that the plaintiff was rightly permitted to show what the statement was by any one who heard it, and the fact that it was made in the course of the bankrupt's examination before the register did not render it incompetent. *Goodrich* v. *Wilson*, 429.

On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the libellant contended that the husband had committed adultery with A., and put in evidence tending to show that he and A. were found together in the same room at a hotel in the night-time, under circumstances which justified the inference of adulterous intercourse. The husband contended and put in evidence, tending to show that he was at the hotel in his professional capacity as a dentist, and that the libellant, A. and a private detective, had formed a criminal conspiracy to entice him to the hotel and place him in an equivocal position with A. so as to furnish false evidence of adultery. The husband called A. and asked her if she was the woman spoken of as being in the hotel with him. She declined to answer on the ground that it would tend to criminate herself, and the judge instructed her that she was not obliged to do so. He then asked her a number of questions which she answered without objection, and which, so far

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as relevant, would furnish links in her either of adultery or criminal c further. The judge then instructed first, and inquired of her if she h that she had not. *Held*, that it wa judge to allow the witness then to cl dence already given to be struck out

27. If the testimony of a witness is str her misapprehension of her privileg cannot put in her declarations or adm of 1869, *c.* 425. *Ib.*

28. On the trial of a libel by a wife f ground of adultery, the woman with having had adulterous intercourse wa testified, and her testimony was after her misapprehension of her privilege a the libellee, "Whom she had met and tion since the adjournment of the cou ruled that the libellee might show an any agent of hers, but beyond this t there being no testimony of the witnes such conversations, that the ruling was

29. Where a person accused of a criminal to show that his general reputation is go ernment in reply to put in evidence of *O'Brien*, 342.

30. In an action to recover the price of issue was whether the delivery of the g party, was upon the defendant's order a show by entries in his books of account the defendant, and credit given alone to h dence for that purpose, and ruled that regarded as a memorandum made by the entitled to some weight in confirmation o the plaintiff," upon the issue. *Held*, th evidence was correct, and that the secon *Thompson*, 151.

See ACTION, 1, 2; APPEAL, 6; BASTARDY 5; CONTRACT, 9; COVENANT, 3; DEED, HOUSE; DIVORCE, 3; EXCEPTIONS, 5, 11– ULENT CONVEYANCE; GIFT; GUARANTY; ICATING LIQUORS, 1–4, 11; JUDGMENT, MAN; MASTER AND SERVANT, 3; MORTG 2–6; PRINCIPAL AND AGENT; PROMISSOR SHIP, 2; SLANDER, 1, 2; WAY, 3, 8, 14.

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EXCEPTIONS.

An *amicus curiæ* is heard only by the leave and for the assistance of the court, and upon a case already before it; he has no right to take the case up, by bill of exceptions or otherwise. *Martin* v. *Tapley*, 116.

After verdict for the plaintiff in an action of contract, the defendant died, and the plaintiff moved the court to strike from the record a plea of discharge in bankruptcy filed by the defendant since the verdict, and to enter judgment *nunc pro tunc* as of a term before his death. At the hearing on these motions, no executor or administrator of the defendant having been appointed, his heir, and the sureties on the bond given to dissolve the attachment on the writ, were allowed by the presiding judge to appear for the purpose of being heard on these motions, but not as parties to the suit; and the counsel of the deceased defendant was heard in their behalf, and as *amicus curiæ*. *Held*, that neither the heir, nor the sureties, nor the *amicus curiæ*, could allege exceptions to an order of the judge granting the motions. *Ib.*

Under the Gen. Sts. *c.* 115, § 7, if exceptions are not presented to the presiding judge, or application made to him for an extension of the time for presenting them, before the final adjournment of the court, they cannot be allowed without the consent of the adverse party, although they are filed within three days after the verdict. *Commonwealth* v. *Greenlaw*, 208.

Under the Gen. Sts. *c.* 115, § 7, a bill of exceptions must be presented to the judge, as well as filed with the clerk, within the time therein specified; and unless so filed the judge is not obliged to allow them. *Tufts* v. *Newton*, 476.

Whether a judge errs in disallowing a bill of exceptions is a matter of record, and cannot be affected by oral evidence of his reasons. *Ib.*

Exceptions which are certified by the judge, who presided at the trial, not to have been saved or taken at the trial are not open in this court. *Brown* v. *Abington Savings Bank*, 69.

Exceptions, alleged by the plaintiff in trustee process to a ruling in favor of an adverse claimant to the funds in the hands of the trustee, cannot be entered in this court before judgment has been rendered in the court below discharging the trustee for the amount allowed to the claimant. *Gifford* v. *Beckett*, 71.

Where a declaration contains two counts for different causes of action, and the jury are instructed to return a verdict upon both, but return a verdict upon one only, and the cause of action set forth in the other count is not determined by further trial, discontinuance or otherwise, the whole case is not finally disposed of, and exceptions to a ruling of the Superior Court cannot be entered in this court. *Harding* v. *Pratt*, 188.

Under the St. of 1871, *c.* 361, authorizing the city of Worcester to supply itself with pure water, and providing in § 3 for the payment of damages by the city to persons injured thereby, and for the appointment by the Superior Court of three commissioners to assess the damages, an order of the Superior Court appointing such commissioners is interlocutory merely, and exceptions thereto cannot be entered in this court until after a final disposition of the case in the court below. *Crompton Carpet Co.* v. *Worcester*, 375.

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10. Under the Gen. Sts. *c.* 43, § 40, aside the verdict of a sheriff's jury fo upon the proof of the irregular and i the jury in charge, the verdict shoul perior Court, is within the discretion ercise of that discretion no exception l 98.

11. At the trial for the assessment of land for a highway, under the Gen. S copies of four deeds of land in the nei the lots of land described therein. Ol all the deeds, but special grounds of sion of three of them only. All th *Held*, that all the deeds were duly obj evidence of the price or value of the l titled to insist upon this objection as a *Rose* v. *Taunton*, 99.

12. Upon the issue, on the trial of a writ father of the same name, under whom t in a deed of land to one of that name, the demandant introduced evidence te grantee, that the deed was delivered to deed he made declarations as to the pr the premises, which were excluded in evi mandant. The tenant introduced evide with his money, that his father gave him was commenced, and not before, and de ging the cellar that he bought the land f reply offered evidence of the declaratio when digging the cellar, and before the land was his. This evidence was exclu these declarations were part of the decla dence by the tenant. *Held*, that their ex gave the demandant no ground of exceptic

13. In an action against a city for injuries o one issue was whether the plaintiff's horse speed. A witness for the plaintiff testifi horse was short-gaited, and looked as if really did go. The defendant then ask speed ?" not for the purpose of showing the accident, but to show the horse's abil testimony of the plaintiff's witness in cro refusal to allow this question to be put affo exception. *Tuttle* v. *Lawrence*, 276.

14. In an action against a city for injuries occ a witness who saw the plaintiff driving in a

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dent, was asked if it was possible for the sleigh, at the angle it was crossing a railroad track, to have gone into an excavation, which was the alleged defect. *Held*, that the refusal to allow this question to be put afforded the defendant no ground of exception. *Tuttle* v. *Lawrence*, 276.

6. On the trial of a libel by a wife for divorce from her husband on the ground of adultery, the woman with whom the husband was charged with having had adulterous intercourse was called by the libellee as a witness, testified, and her testimony was afterwards stricken out because of her misapprehension of her privilege as a witness. The libellee argued to the jury, without any adverse ruling being made, that he had done all he could to get the woman as a witness and to make her testify as to the facts. The judge in his charge stated that the case must be considered as if the woman had never been put upon the stand. *Held*, that this expression in the charge gave the libellee no ground of exception. *Mayo* v. *Mayo*, 290.

7. On a bill of exceptions to the refusal of a judge to set aside a verdict and grant a new trial, asked for on the ground that the verdict was for a larger amount than was warranted by the instructions given, this court will not sustain the exceptions unless they present sufficient facts to enable the court to perceive that the judge erred in matter of law in holding that there had been no error in the computation to the injury of the excepting party. *Hill* v. *Crompton*, 376.

On the trial of an indictment for an assault with a knife, the government called a witness who testified that on the evening of the assault a man came into his shop and bought a knife of the same make and style as the knife, which the government contended was in the hands of the defendant when the assault was committed; that he was not sure that the defendant was the man who bought the knife. He was then permitted against the defendant's objection to state a conversation which he had at the time of the sale with the man who bought the knife. *Held*, on a bill of exceptions, which did not state what the conversation was, that the defendant had no ground of exception to the admission of this conversation. *Commonwealth* v. *O'Brien*, 432.

On the trial of an indictment for the malicious burning of a building, the government contended that the motive of the defendant in setting the fire was to destroy his stock of goods, which was insured for more than its value, which was about $500 on the day of the fire; that on that date the defendant had insurance on the stock to the amount of $2000. To meet this evidence the defendant put in office copies of two mortgages on the goods, dated about six months before the fire; one to secure payment of a note of $1000, and the other a note of $700, both signed by the defendant. No other evidence was introduced respecting the mortgages. *Held*, that the mortgages were immaterial, and that the correctness of instructions in regard to them need not be considered. *Commonwealth* v. *McCarthy*, 354.

In an action by an assignee in bankruptcy to recover $1500 alleged to have been fraudulently paid to the defendant by the bankrupt, the defendant asked the judge to instruct the jury that if the defendant made a contract

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with the bankrupt, before proceedings
render him personal services and pay f
to or for the bankrupt, the contract wo
not be entitled to recover the money pai
ant complied with the terms of that con
a preference, unless it was made in pur
between the bankrupt and the defenda
and instructed the jury that a person ha
him in the proper discharge of his dut
bankrupt act, but that if insolvent he cou
purpose; that if the amount was paid as
vent so much as was in excess of what
creditors, and the defendant knew that th
or had reasonable cause to know, that h
signee could recover the whole amount p
were sufficiently favorable to the defendan
exception. *Goodrich* v. *Wilson*, 429.

20. In an action to recover compensation for
plaintiff contended that the defendant agre
commissions, and put in evidence of what a
the custom. The judge ruled, against the
custom was a reasonable one, and instructed
according to the custom, if they found that th
but that, if they found that the services we
ment as to compensation, they should find th
jury returned a verdict for a less sum than t
the custom. *Held*, on the defendant's bill of
of the reasonableness of the custom need n
Paine, 439.

21. In an action against a town, for personal inj
highway, the defendant requested a ruling that
cover unless she satisfied the jury that the inju
in the way without fault on her part. The instr
plaintiff must satisfy the jury that she was in
the time of the alleged injury, and if a want of
tributed in any degree to the injury she cannot re
have occurred except for the omission of the t
Held, that the request did not call the attention
the rule of law that it must appear that the inj
defect in the way, but only to the question of cont
part of the plaintiff, and that the defendant had
Whitford v. *Southbridge*, 564.

22. Where a petition to establish the truth of excepti
missioner to hear the parties and report the facts, a
testimony, or controversy as to the inferences of fa
evidence, it is the r'ght of either party to have t

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court thereon, and a motion to recommit the report to the commissioner to report the evidence upon which his findings were based will be granted. *Ela* v. *Cockshott*, 416.

3. A bill of exceptions tendered stated that requests for instructions were presented to the judge by the petitioner's counsel before the arguments; that the judge refused to receive or read them; that he accompanied his refusal with the statement that if the counsel was not satisfied with his instructions to the jury, he could except to them; and that at the close of the charge the judge asked the counsel to state briefly the substance of his requests, and the counsel then read the requests. The evidence reported by the commissioner, to whom a petition to establish the truth of the exceptions was referred, showed that no requests for instructions were presented to the judge until after the arguments and just before the charge; that the judge did not refuse to receive the requests for instructions before the arguments; that when he refused to read the requests just before the charge, he informed the counsel that at the close of the charge he could call the judge's attention to any point not covered by it; that after the charge he again asked the counsel to call his attention to any point in the instructions to which he objected; and that the counsel, instead of doing so, insisted on reading in full his request for instructions. *Held*, that the exceptions were rightly disallowed. *Ib.*

APPEAL, 2; ARBITRAMENT AND AWARD, 3; ASSAULT, 2; BANKRUPT, 3; DAMAGES, 2; DEED, 9; DEPOSITION; DISORDERLY HOUSE; DIVORCE, 3; EVIDENCE, 8, 13, 16, 20; INTOXICATING LIQUORS, 3; MARRIED WOMAN, 2; PAYMENT, 2, 3; SUPREME JUDICIAL COURT; WAY, 15–18.

EXECUTOR AND ADMINISTRATOR.

, pending an action against several defendants sued on a joint contract, e of them dies, his executor or administrator cannot, under the statutes this Commonwealth, be summoned in to defend the action. *New Haven Northampton Co.* v. *Hayden*, 361.

n agreement made by a party to an action, as to the amount of the judgent to be rendered against him, does not affect the form of the remedy ainst his estate. *Ib.*

See EQUITY, 3; EVIDENCE, 5, 6.

FENCE.

See RAILROAD.

FISHERY.

A complaint under the St. of 1869, *c.* 384, § 19, which charges the defendant with fishing in a certain pond, "in which fishes are lawfully artificially cultivated or maintained, without the permission of B., the proprietor of the pond," is sufficient without further designating the nature of B.'s interest. *Commonwealth* v. *Tiffany*, 300.

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2. Under the St. of 1869, c. 384, § 9, au
fisheries to lease, in the name of th
ceeding twenty acres in area, for the
the commissioners have authority to
acres in extent in its natural condition,
yond that extent by a dam. *Commonw*
3. The provision of the St. of 1869, c. 3
pond or parts of a pond, created by art
control of the fisheries therein existing,
of their authority, under § 9 of the sta
twenty acres in area in its natural cond
increased in extent by artificial flowage.
4. A warrant for a town meeting containe
will sell the Herring Brook for three yea
proper, to the highest bidder." Under
sold to the defendant for three years, for
bidder. *Held*, in an action by the town
which it appeared that the defendant ha
sale by the town was in the nature of a le
estopped to deny the title of the town or it
he was evicted or interrupted by some one
that the questions how far the brook was und
it was navigable where the defendant took
ham v. *Anderson*, 526.
5. The St. of 1871, c. 281, § 2, providing that
gable tidal stream, where the same empties
fishes are lawfully cultivated or maintained, sh
stream within his own premises, and also beyo
said stream, so far as the tide may ebb, provid
eighty rods," applies only to cases where the w
ey the proprietor for the purpose of cultivating
6. The lessee from a town of the right of fishery
stipulated rent, if he has enjoyed the premises,
of frauds, although his promise is not in writing.

FLATS.

The provisions of the St. of 1866, c. 149, requiring
by authority of the Legislature to submit their
the board of harbor commissioners, and to make
water thus displaced, do not apply to work done
and aldermen of Cambridge and Somerville in fill
ance of the power conferred upon them by the St.
cording to the plan devised by the harbor comm
with the state board of health, under the St. of 187
eral v. *Cambridge*, 513.

FORGERY.

See EVIDENCE, 20.

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FRAUDS, STATUTE OF.

A. entered into a written contract with B., by which B. agreed to build a house and barn for A., and do all the carpenter's work, and furnish all the material for a gross sum. B. afterwards ordered of C. in his own name, the windows and doors necessary for the house and barn, and, after some of them were delivered and placed in the buildings, A. called at C.'s shop to get the rest of the windows, and was told by C. that he had doubts of B.'s solvency, and had concluded not to trust him for the goods, and for that reason had withheld the remaining windows, and A. thereupon directed the plaintiff to send the goods to B. and charge them to A., and promised to pay for them. C. afterwards gave no credit to B., but wholly to A., but did not inform B. of the conversation, and afterwards delivered the goods to B. as he called for them. *Held*, in an action by C. against A. that the jury were warranted in finding that the promise sued on was a promise to pay the defendant's own debt, and not a promise to answer for the debt of another within the statute of frauds. *Walker* v. *Hill*, 249.

See EVIDENCE, 19; FISHERY, 6.

FRAUDULENT CONVEYANCE.

an action by an assignee in bankruptcy to recover the value of personal property upon the ground of a fraudulent preference, the plaintiff requested the court to instruct the jury "that the transfer in any case by a debtor of a large portion of his property, while he is insolvent, to one creditor, without making provision for an equal distribution of its proceeds to all his creditors, necessarily operates as a preference to him, and must be taken as conclusive evidence that a preference was intended, unless the debtor can show that he was at the time ignorant of his insolvency, and that his affairs were such that he could reasonably expect to pay all his debts. The burden of proof is upon him, in such a case, and not on the assignee." This instruction was not given, and the jury were instructed that the burden of proof throughout was on the plaintiff, but that the intent of the parties might be inferred from their acts, and that, if the conveyance to the defendant was out of the usual and ordinary course of business, the statute made it *prima facie* evidence of the fraudulent intent of the parties. *Held*, that the instruction given was correct; and that the plaintiff had no ground of exception. *Parsons* v. *Topliff*, 245.

See BANKRUPT, 1, 3; EQUITY, 4.

FREIGHT.

See EVIDENCE, 2.

GAMING.

A complaint on the Gen. Sts. *c.* 170, § 2, as amended by the St. of 1869, c. 364, § 2, alleged belief that "gaming apparatus and implements are used, kept and provided to be used in unlawful gaming, in certain rooms resorted to for the purpose of unlawful gaming, in a certain building sit-

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mated and numbered thirteen and one
that is to say, in the rooms in the sec
building, and also that furniture, fixture
therein, and may be found therein at
found playing at some unlawful game,
some person whose name is to your com
issued on this complaint directed the offi
the complaint and search for and seize
ments, and also to search for and seize
sonal property found in the rooms descri
when any persons are there found playi
that the premises to be searched were suffi
v. *Gaming Implements*, 332.

2. Under the St. of 1869, *c.* 364, § 2, auth
ure "of all the furniture, fixtures and pers
ing-house, the officer is not limited in his
following the words of the statute, merely
condemnation. *Ib.*

3. An information, filed after the return of a
under the Gen. Sts. *c.* 170, § 2, as amended
after reciting the complaint and the warra
said warrant" the informant, on a day name
and then and there seized certain gaming a
scribing them,) "and your informant did als
furniture, fixtures and personal property, use
personal property of said rooms." *Held*, tha
the furniture, fixtures and personal property
warrant. *Ib.*

4. Upon the filing of an information after the ret
complaint under the Gen. Sts. *c.* 170, § 2, as a
c. 364, § 3, praying for the condemnation of ce
implements, the clerk issued an order "in acco
court," directing a service by copy of the info
persons in whose possession the articles were
copy of the order and information on the build
made, fourteen days before the hearing. The r
that after diligent search he could not find the p
usual places of abode were unknown to him, and
by posting a copy, as directed, on the building.
notice in the public papers was not required, and
sufficient. *Ib.*

See MUNICIPAL COURT OF THE CITY

GIFT.

In an action by the executor of A. for a bond lent b
for which A. took a receipt, there was evidence th

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sick in bed, made verbally a gift of it to the defendant, without any other delivery of the bond, and promised to return the receipt when he should be able to get it. The judge ruled that, upon the above evidence, as matter of law, there had been no sufficient delivery of the bond to constitute a valid gift, even if such was A.'s intention. *Held*, that this ruling was erroneous; and that the question whether there was such delivery was a matter of fact to be tried. *Hunt* v. *Hunt*, 474.

GOODS SOLD AND DELIVERED.

See EVIDENCE, 30.

GRAND JURY.

1. A grand jury in this Commonwealth may consist of not less than thirteen, nor more than twenty-three. *Crimm* v. *Commonwealth*, 326.

2. Under the Gen. Sts. *c.* 171, § 4, providing for the case of deficiency of grand jurors in any court, the court is authorized whenever the number of grand jurors in attendance is less than the full number of twenty-three, to cause so many additional grand jurors to be summoned as in its opinion, making due allowance for absences and excuses, may insure the filling up of the grand jury to that number; and the summoning of a greater number does not affect the validity of an indictment found by the legal number of jurors. *Ib.*

If grand jurors, after being sworn, are at once excused and never join the grand jury in their deliberations, they form no part of the grand jury by which an indictment is found. *Ib.*

On a writ of error to the Superior Court, it appeared by the record sent to this court, as amended on a writ of certiorari, that of the twenty-three rand jurors summoned, five were permanently excused; that a venire was hereupon ordered by the court to issue for seven additional grand jurors, r of whom appeared and were sworn, and two of them permanently ex- sed, leaving a grand jury of twenty-two; that these with the seventh ad- tional juror before summoned constituted the grand jury by which an dictment was found. *Held*, that the grand jury was properly constituted.

GUARANTY.

following instrument signed by the defendant was delivered to the plain- ff; "I guarantee the sum of five hundred dollars value in glass shades urchased by my son A. from B. Terms of purchase to be sixty days from late of invoice, and, if not paid within ninety days, draft to be drawn on ne for the amount." *Held*, that it was not a continuing guaranty. *Held*, also, that parol evidence of the previous dealings, or of the dealings contem- plated, between the creditor and the principal debtor; or that the guarantor had previously agreed to give the plaintiff a guaranty for future advances, and that the goods were sold relying on such guaranty; or that the relations of the principal parties were well known to the guarantor, was not admissible

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to show that the instrument was othe
tion. *Boston & Sandwich Glass Co.* v

HARBOR COM

See FL

HEIR

See WID

HORSE RAIL

See EVIDENC

HUSBAND AND

Personal apparel furnished by a husband to h
with the consent of her husband, with mon
formed by their joint earnings, remains th
the wife cannot maintain an action agains
Hastins v. *Providence & Worcester Railroa*

See DEED, 1; INTOXICATING LIQUORS

INCUMBRANCI

See COVENANT, 1; DE

INDICTMENT.

1. Where a count in an indictment *charges two*
fault is cured by the election of *the prosecutor*
only, and his entering a *nolle prosequi as to t*
Holmes, 195.
2. An indictment on the Gen. *Sts. c. 163, § 12, al*
enness of A., at a time and place *mentioned, by*
and that the defendant "did then *and there un*
said A. in then and there unlawfully *escaping fr*
of the said B.," is insufficient, although *it follow*
Commonwealth v. *Filburn*, 297.

See COMPLAINT; PERJURY, 1

INSANE PERSON.

See PAUPER.

INSOLVENCY.

See PARTNERSHIP, 2.

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INSURANCE.

I. *Life.*

In an action by the payee against the maker of a promissory note, it appeared that the plaintiff was an agent of a life insurance company. Evidence was admitted for the defence tending to show that the note was given for a policy of insurance in the company upon an agreement with the general agent of the company that the defendant should have sixty days to determine whether he would or would not be insured, and that, if within that time he should decide not to be insured, and should so notify the plaintiff, who was then present, the policy should be taken back and the note returned. *Held*, that this evidence was competent upon the issue whether there was a contract between the parties and a completed delivery of the policy and note under it. *Watkins* v. *Bowers*, 383.

In an action upon a promissory note given to the plaintiff as the agent of a life insurance company for a policy of insurance under an agreement that, if the defendant should within sixty days notify the plaintiff that he had decided not to be insured, the policy should be taken back and the note returned, evidence was put in by the defendant tending to show that during the sixty days he took the policy to the town where the plaintiff resided and endeavored to find him for the purpose of returning the policy to him. *Held*, that the testimony was competent to rebut any presumption of the defendant's acceptance of the policy arising from his inaction. *Ib.*

II. *Fire.*

A policy, issued by a mutual fire insurance company, insured the holder against loss or damage by fire under the conditions and limitations expressed in the rules of the company, and stated the undertaking of the company to be "to satisfy and make good, from the absolute and conditional funds of the company, unto the said assured, all the damage by fire which may happen to said real estate, within the term aforesaid, according to the true intent and meaning of said rules. Provided, nevertheless, that if the whole of the absolute and conditional funds of said company shall be insufficient to pay and satisfy all damages that may happen, in such case a just average shall be made to the sufferers, and the payment to be demanded in virtue of this policy shall be a dividend of said stock, in proportion to the sum insured and the rate of damage." One rule required notice of a loss to be given in a prescribed manner, and provided that "payment shall be made in thirty days after receiving notice of the loss as above." Another rule provided that "in case losses should happen so as to absorb the whole of the absolute fund, the president and directors shall, within twenty days, proceed to assess on each member a sum not exceeding double the amount by him paid in way of premium and deposit, and the same assessment publish in two or more newspapers in Boston. They shall then collect the said assessment without delay; and in thirty days after such notice shall have been given, they shall actually proceed in due form of law against each delinquent, and

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thereby be completely exonerated.
jected to the penalty expressed in the
lect to pay said assessment, such deli
and determine until payment is made,
for the delay as shall be satisfactory t
that after losses which absorbed the a
quired an assessment upon the contin
sured who had sustained losses were n
the surplus remaining from the assessm
Commonwealth v. *Massachusetts Ins. Co.*

4. A mutual fire insurance company is
after the appointment of receivers and
property; and where, upon the happeni
lute fund of the company and require a
liability of the members, the fund accruin
enough to pay for the losses, the receiver
of the surplus for the purpose of meeting

5. Where the losses upon policies issued by a
so large as to exhaust the absolute fund of
is made in accordance with the rules of th
liability of the members, which proves to b
amount required, the surplus is, in the ab
rules of the company that it shall be devote
the members by whom the assessment was p

6. A policy of insurance against fire which con
sured "shall have made or shall hereafter
said property without the knowledge or cons
then in such case this policy shall be void," i
a subsequent policy which is invalid by reaso
to obtain the assent of the company issuing it t
ance upon the property as required by the t
assured may set up the invalidity of the second
upon the first policy, although he has received
from the insurer. *Thomas* v. *Builders' Ins. Co.*

7. Where a building is insured against fire by a p
the assured shall vacate the property in whole
be void; this company will not insure unoccupie
ment is made upon the policy by which it is to b
damage to mortgagees of the insured property
may appear," and the property is afterwards des
cupied, the policy is void, both as to the origi
gagees. *Franklin Savings Institution* v. *Central I*

8 A policy of insurance against fire, which provide
any change took place in the title or possession of
sale, transfer or conveyance, legal process or judi
the owner of an equity of redemption, payable in c

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gagee, as his interest may appear." The mortgagor afterwards conveyed his interest in the premises by quitclaim deed to the mortgagee, and at the same time took back a bond for a reconveyance of the same to him, his heirs and assigns, upon the payment of a sum named, which was the amount then due on his mortgage. The bond was not acknowledged or recorded, and the insurer had no notice of the existence of either the deed or the bond until after the premises were destroyed by fire. After the delivery of the deed and bond, and until the fire, the mortgagor occupied a part of the building without payment of rent, paid taxes, made repairs, controlled the occupation of the other tenants, and until four months before the fire collected the rents and paid them over to the mortgagee. After that the mortgagee collected the rents, but had nothing else to do with the premises. The debt secured by the original mortgage had not been paid. The mortgagee brought an action to recover for the loss by fire. *Held*, the Gen. Sts. *c.* 89, § 15, providing that an absolute conveyance shall not be defeated or affected by an unrecorded defeasance "as against any person other than the maker of the defeasance or his heirs or devisees, or persons having actual notice thereof," that there was an alienation within the meaning of the policy. *Foote* v. *Hartford Ins. Co.* 259.

III. *Marine.*

The right to recover for a constructive total loss, on abandonment of a vessel to the underwriters, depends upon the state of facts when the abandonment is made; and the abandonment, if justified by those facts, relates back to the time of the loss. *Snow* v. *Union Ins. Co.* 592.

A vessel is once totally lost by a peril insured against, and the master, using due diligence, is unable to regain possession of her in such a condition that under such circumstances as to enable her to pursue the voyage for which she is insured, the right to abandon and to recover for a constructive total loss remains, without regard to the question whether at some future time over which the master has no control, he might be able to regain possession of her on payment of salvage, and without regard to the proportion between the amount of the salvage and the value of the vessel. *Ib.*

In an action on a policy of marine insurance, there was evidence that the vessel insured, a whaling vessel, was jammed fast in the ice in the Arctic ocean, with no open water in sight and drifting northwards with the current; that her officers and crew, finding it impossible to extricate her with their utmost efforts, and being nearly worn out with fatigue and want of sleep, in order to save their lives, left her in their boats, taking with them their provisions and whaling gear, and, by passing through narrow strips of water, and dragging the boats over the ice, reached the whaling fleet in safety, fifty miles from the place of where they left the vessel; that ten days afterwards, the men, boats and guns being scattered in different vessels, and some of them having gone home, the ice loosened, and the abandoned vessel was got out by the master and crew of another vessel, and held for salvage; that the master of the vessel insured was not able, by the exercise of reasonable efforts, to obtain

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a sufficient crew or whaling craft, or
sue the voyage on which she was em
that the vessel was taken by the sal
arrival there was abandoned by her o
it was competent for the jury to find
a constructive total loss. *Snow* v. *U*
12. Under a declaration on a policy of m
structive total loss may be recovered.
13. It is not necessary, in a declaration
allege the abandonment of the vessel to
sary to constitute the total loss relied o

INSURANCE C

See EQUIT

INTERES

See CERTIORARI, 4; DAMAGES, 1; INS

INTOXICATING L

1. At the trial of a complaint under the Ge
and maintaining on May 1, 1875, and on di
and September 27, 1875, a tenement for th
uors, a witness for the government testified
which was at October term 1875, the defend
the witness produced and upon which were
and address, and the words, "Dealer in
"Porter" and "Lager Beer," was her car
printed about a year before. *Held*, that the
to read the card for the purpose of showing
of the tenement on May 1, 1875. *Commonwe*
2. Under the St. of 1875, c. 99, § 12, authorizin
a city, by whom a license to sell intoxicating li
clare a license forfeited upon proof satisfactory
conditions, after notice to the licensee and rea
to be heard by them, a licensee cannot be conv
liquors in violation of law upon the production o
aldermen, showing only that before the sale the
"revoked," and parol evidence that the licensee
of having sold intoxicating liquor on the Lord's
of revocation. *Commonwealth* v. *Moylan*, 109.
3. On the trial of a complaint under the St. of 18
fendant with unlawfully exposing and keeping
intent to sell the same in this Commonwealth, the
instruction to the jury that the burden of proof w
prove that the liquors exposed and kept for sale we

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he jury must acquit if the evidence left them in doubt as to that fact. The udge gave this instruction with the modification that if the liquors exposed vere ale, or distilled spirits, called whiskey, they must convict, if the same vere kept for sale. *Held*, that the modification was correct. *Commonwealth v. Curran*, 206.

At the trial of a complaint for the sale by the defendant of intoxicating iquors in violation of law, evidence that the defendant's son sold intoxicating liquors to the person named in the complaint in a public house kept by the defendant, and in which his son was clerk, is sufficient evidence to be submitted to the jury of a sale by the defendant, and to warrant a conviction. *Commonwealth* v. *Holmes*, 195.

If a married woman keeps intoxicating liquors for sale in violation of law n a house which she and her husband own jointly, the husband will be iable for such illegal keeping, if he has knowledge of the fact, and of her ntent, although he has no interest in the stock in trade or in the profits. *Commonwealth* v. *Kennedy*, 211.

Appeal, 6; Complaint, 1, 2, 4; Constitutional Law; Evidence, 1; Pleading, 7.

JOINT CONTRACT.

See Contract, 1.

JUDGMENT.

judgment of a court of general jurisdiction in another state may be ved by a duly certified copy of the "transcript of judgment," which sim- contains a copy of the summons to the defendant to answer in a plea of pass on the case in assumpsit; a return of the officer thereon, showing onal service on the defendant; a copy of the plaintiff's declaration and ment of his claim; a copy of the "continued docket entry," showing, r the names of the parties, the issuing of the summons, filing of the tiff's declaration and statement, and entry of judgment; and a copy of "judgment docket entry," showing, under the names of the parties, the of the judgment, the amount of the debt, and the amount of the costs. ward v. *Fowler*, 262.

n action on a judgment obtained in another state, in which the record s that the defendant was duly summoned to appear, evidence that the ndant did not owe the plaintiff anything is not competent on the issue ther service was made on the defendant, nor on the issue whether the m in the other state was fraudulent; and the evidence is not made ad- sible by the fact that the officer, who appeared by the record to have de the service, testified that when he made the service the defendant said claim was a just one. *Ib.*

See Bankrupt, 2; Exceptions, 2; Set-off; Statute, 2.

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JURISDIC

Under the St. of 1873, c. 261, providing made by petition to the Superior Court, by law that a sheriff's jury may be had, plication is duly made acquires exclusiv *Miller* v. *County Commissioners*, 485.

See BANKRUPT, 1; EQUITY, I.; SUPREM TRUSTEE; W

JURY.

See GRAND J

LANDLORD AND

See FISHERY, 4; LE

LARCENY.

On the trial of an indictment for larceny of r railroad corporation, the government introdu of tickets, containing one hundred each, bel tion, and numbered in regular succession fr hands of its ticket-agent; that soon after on tickets numbered from 200 to 300, was foun tickets identical in appearance and general de in the missing package, and numbered as t tained in that package, were found in the There was also evidence that the defendant s ets of the ticket-agent, who denied this. *H* jury were warranted in returning a verdict *Randall*, 107.

LAW AND FACT.

1. A. agreed in writing, for a round sum, to mo upon it, and "to finish said house ready for by A. on this contract, it was admitted that if build a water-closet, he had not completed the court could not say, as a matter of law, that the was a failure to perform the contract; and that i the jury to determine whether the building of a w necessary and proper to make the house ready for v. *Washburn*, 224.

2. In an action upon a contract under seal, by whi two owners of a house to move it, and "dig and st it is a question of fact for the jury whether the us ing the cellar wall, which were ordered by one ov ratified by the other. *Ib.*

See MECHANIC'S LIEN; NEGLIGENCE; P

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LEASE.

If land is taken under the St. of 1868, *c.* 277, which authorizes the city of Boston, to take lands in a certain district, for the purpose of abating a nuisance, and provides that "the title to all lands so taken shall vest in the city," the liability of a lessee of such land to pay rent to his lessor ceases on such taking, without any eviction by, or attornment to, the city. *O'Brien* v. *Ball*, 28.

Land in Boston was leased for a term of years, and, while the lease remained in force, the land was taken by the city to abate a nuisance, under the St. of 1868, *c.* 277, which provides that "the title to all lands so taken shall vest in the city;" the lessee continued in possession, and for some time paid rent to his lessor, both parties acting in the belief that the lease continued in force. Afterwards, the lessee being told that he was liable to be held to pay rent to the city, refused to pay rent under the lease. *Held*, in an action by the lessor, on the Gen. Sts. *c.* 137, § 5, to recover possession of the premises, that the judge, who tried the case on the above facts, was warranted in finding that no new tenancy, between the lessor and lessee, was created, and in rendering judgment for the defendant. *Held*, *also*, that the fact that after the action was begun the city reconveyed the land to the lessor did not affect the case. *Ib.*

A lease of a dwelling house for five years provided that the lessor might terminate the lease by notice, and that, if this was done during the first three years of the term, the lessee should be paid such sum as a compensation for the loss he may "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises, and expenses incurred in removing." In an action by the lessee to recover the expenses incurred by him in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that, at the time the lease was made, the building was in thorough repair; but the lessee had made some changes in it, and furnished it. *Held*, that the term "fitting up the premises" included not only the fitting up of the building and premises to the uses of the lessee, but the fitting of his furniture to the building, such as carpets, window curtains and the like. *Held*, *also*, that the measure of the lessee's damages was the loss sustained by reason of his having incurred such expenditures the full benefit of which he had lost by the abridgment of his lease, and not the entire cost of fitting up. *Pratt* v. *Jones*, 439.

Damages, 2; Evidence, 16, 22; Exceptions, 20; Fishery, 4; Pleading, 7; Promissory Note, 3.

LICENSE.

See Constitutional Law; Intoxicating Liquors, 2.

LIEN.

See Covenant, 1; Mechanic's Lien; Ship, 3–9.

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LUNAT

See PAU

MALICIOUS PRO

1. The declaration in an action for a mali for the abuse of the process of the court for an assault and battery in causing th present plaintiff under said writ. At t upon which the plaintiff was arrested wa court of competent jurisdiction, and that within the scope of his authority; that aft and before the entry of that action, it was in that action, and the writ was never retu cause of action, however stated in the de legal effect for malicious prosecution; and begun. *Hamilburgh* v. *Shepard*, 30.

2. In an action of tort by a husband and his of the wife, it appeared that the defendant a trial justice, accusing the wife of larceny, commanding the wife to the crime, and pra band; that the warrant was for the arrest of were brought from another state on a requisi Commonwealth, and were arrested and brougl wife was required to plead to the complaint, subsequent day, and to give surety for her app in default of bail was committed to jail, and was discharged, being found by the magistrate were instructed that the making of the compl the defendant liable for the subsequent arrest a but that if he intended and participated in h upon the complaint, the requisition or the warra her arrest and imprisonment were caused by s malice and without probable cause, liable in action. *Held*, that the action could be maintaine tion, and that the instructions were correct. *Gil*

MARRIED WOMAN.

1. Where a wife, whose husband has left the Com absent therefrom, is sued as a *feme sole*, upon a del by her, the burden of proof is on the plaintiff t *Kendall* v. *Jennison*, 251.

2. A husband left the Commonwealth, remained ab years after obtained a decree of divorce from his a court of competent jurisdiction in the state wher after due notice to her. The wife was afterwards

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debts contracted after the husband's departure, and for others contracted after the divorce, and the case was submitted to the court upon an agreed statement of facts, with a provision that the court might draw such inferences from the facts as a jury might draw. There was some evidence tending to show an intentional abandonment of the wife by the husband at the time of his departure, but the wife did not appear in the divorce suit against her, and it did not appear that she made any objection to it. *Held*, that this court could not say, as matter of law, that the court below was not justified in finding as a fact that, up to the time of the divorce, there had been no such abandonment by the husband as would entitle the wife to be treated as a *feme sole*, and that she was liable for all debts contracted after the divorce. *Kendall* v. *Jennison*, 251.

See INTOXICATING LIQUORS, 5.

MASTER AND SERVANT.

A servant, who by his contract of hiring agrees that if he intends to leave his master's employ, he will give notice of such intention, and work ten full working days thereafter, and, in default thereof, forfeit all money that may be due him, may recover from the master wages previously earned, if he is kept from his work by sickness, gives reasonable notice thereof to the master, and is absent only so long as he is so disabled. *Harrington* v. *Fall River Iron Works Co.* 82.

A laborer who has assented to a regulation of his employer providing that all persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms, and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with," cannot maintain an action to recover for labor if he has left his work without giving the required notice, although the defendant is not restrained from dismissing the plaintiff without notice. *Preston* v. *American Linen Co.* 400.

In an action by a laborer who worked under no express contract, and was engaged for no definite time, to recover for his services to his master, it appeared that the plaintiff had been in the defendant's employ fourteen months, and that he had regularly received his pay in an envelope on which was printed a regulation of the defendant, providing that "all persons intending to leave are required to give two weeks' notice of such intention to the overseers of their respective rooms; and no person will be considered honorably discharged or entitled to wages then due unless this regulation is complied with." It did not appear that the plaintiff knew of this regulation when he commenced the work, but he testified that he read it soon after, and knew of it "about all the time he was in the defendant's employ." *Held*, that it was rightly submitted to the jury as a question of fact whether the plaintiff assented to be bound by the regulation, and that they were rightly permitted to consider the fact that, after knowledge of it, he continued to work as before. *Ib.*

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4. A railroad corporation is not liable to a
injury sustained by him while riding in
down a bank by the breaking of a switch
dence that there was any negligence in
defect in the switch which could have bee
ful inspection, or that the switch was in
been expected, to hold the cars upon the
reasonable speed, or of other evidence of
tion would be liable. *Ladd* v. *New Bedfor*
5. A railroad corporation is not liable to an e
by him while riding in one of its cars, whi
the ground that the cars were imperfect by
was of the opinion that cars without che
knew that some of the defendant's cars
chains, and did not notice, until after the acc
he was riding had check-chains or not. *Ib.*
6. A brakeman in the employ of a railroad c
action against the corporation for personal i
up of a train of cars, with platforms of une
servants of the corporation, under the dir
masters. *Hodgkins* v. *Eastern Railroad*, 419.

MAXIM.

Qui tacet consentire videtur. See *Day*

MEADOW AND LOW L

The words, "greater part of them in interest,"
providing that the proprietors of meadow and sw
part of them in interest," may apply by petitio
the improvement of the lands, relate to the prop
interest in value, and not to those owning the larg
v. *Thomas*, 583.

MECHANIC'S LIEN.

1. Upon the trial of a petition to enforce a mec
whether the certificate required by the Gen. Sts.
thirty days after the work was completed or mate
contract, or whether work was done within the t
the purpose of reviving the lien, is a question of fa
ing of the judge, who tries the case without a j
Wentworth, 459.
2. On the trial of a petition to enforce a mechanic's li
labor was performed and materials furnished by the
three houses in a block under an entire contract,
tracts, is a question of fact, upon which the finding
the case without a j ry, is final. *Ib.*

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On the trial of a petition to enforce a mechanic's lien, the petitioner claimed a lien for furnaces and ranges furnished by him. The judge who tried the case without a jury found that the petitioner was entitled to the lien. *Held*, that the question was one of mixed fact and law: that if the transaction between the petitioner and the owner of the buildings was merely a sale of the furnaces and ranges as personal property, there would be no lien; but if by the contract the furnaces and ranges were to be furnished as parts of the houses, and they were in fact so applied, there would be a lien; and that, it not appearing that the judge erred in applying these principles of law, exceptions alleged to his finding could not be sustained. *Turner* v. *Wentworth*, 459.

See SHIP, 3–9.

MEMORANDA.

Death of Mr. Justice Metcalf, 600.
Death of Mr. Justice Wells, 167, 605.
Appointment of Mr. Justice Lord, 354.

MILL.

See WAY, 9.

MISNOMER.

See COMPLAINT, 8.

MISTAKE.

See MONEY PAID.

MONEY PAID.

If in a settlement of mutual accounts one party thereto allows, without being induced by fraud, a certain sum by way of compromise of a doubtful claim, he cannot recover it back; but if he pays it relying upon erroneous vouchers produced by the other party at the time of the settlement, he may, even if there was no fraud, recover it back as money paid by mistake. *Stuart* v. *Sears*, 143.

MORTGAGE.

I. *Of Real Estate.*

On a bill in equity, filed January 8, 1874, to redeem a mortgage, it appeared that on a writ of entry to foreclose the mortgage, an execution for possession issued dated May 6, 1869, upon a conditional judgment; that the officer's return and the acknowledgment of possession were dated May 8, 1869; and that the execution was recorded June 10, 1869. *Held*, that the date of the officer's return was not conclusive as to the actual date of the possession; and it appearing from the whole record, without resort to other evidence, that possession was actually taken on some day after the execution was issued and before June 10, that this was enough to commence the foreclosure as of the latter date. *Worthy* v. *Warner*, 550.

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2. The assignee of a judgment and execu
gage, under which possession had been
ers of the equity, who was the guardia
minors, a further sum, taking his note w
mortgage debt and the additional sum, a
to cancel and assign to him the judgme
interest at its maturity, but not otherwi
maturity by the sureties, and the judgme
lapse of three years from the time posses
equity to redeem, that there had been no
waiver of the foreclosure. *Worthy* v. *W*

See COVENANT, 2–4; DEED, 3; INSURAN

II. *Of Personal P*

3. Goods in the possession of a mortgagee we
mortgagor under the Gen. Sts. *c.* 123, § 67,
trustee. The goods were then sold by th
property under the Gen. Sts. *c.* 123, §§ 73–
after deducting the expenses thereof, were
gage, though the market value of the goo
was greater than the mortgage. After th
continued against the trustee. *Held*, in an
against the attaching officer, that the Gen.
an attachment of goods in the possession of
ment was void; that the attaching creditor
against the trustee turn the attachment into
§ 62; that the officer was a trespasser *ab ini*
the mortgage debt. *Porter* v. *Warren*, 535.

See SHIP, 1.

MOTION TO DISM

See COMPLAINT, 3

MUNICIPAL COURT OF THE CI

The Municipal Court of the city of Boston has ju
to be sold the furniture, fixtures or personal
house on a search warrant issued from and ret
Gen. Sts. *c.* 170, §§ 1–5, and the St. of 1869, *c*
were there found playing an unlawful game.
plements, 332.

MUTUAL FIRE INSURANCE

See INSURANCE, 3–5.

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NEGLIGENCE.

1 In an action to recover for injuries caused by the collision of the plaintiff's carriage with that of the defendant, it is a question of fact for the jury whether the plaintiff, in the exercise of ordinary care, could, by stopping or turning out, have avoided the collision, and whether his failure to do so contributed to the injury. *Hall* v. *Ripley*, 135.

2. In an action to recover for personal injuries sustained by a man by being struck by a wagon while crossing a street in a city, at eleven o'clock in the forenoon, it appeared that the street was sixteen feet wide, and that a person could see the whole length of the street. The plaintiff testified that his eyesight was good; that he looked and did not see the wagon, or hear it, until he was struck. A witness for the plaintiff testified that he was about twenty-five feet from the plaintiff, heard some one halloo and the rattle of a wagon, and turned and saw the wagon hit the plaintiff, who was then but a few steps in the crossing. The defendant testified that he saw the plaintiff and hallooed to him before he left the sidewalk, and when he was about fifteen feet from him; that the plaintiff turned and looked around, and undertook to run across. *Held*, that whether the plaintiff was in the exercise of due care was a question of fact for the jury. *Carland* v. *Young*, 150.

See ACTION, 1, 2; EXCEPTIONS, 21; MASTER AND SERVANT, 4–6; WAY, 14–16, 18.

NEW TRIAL.

Where, in an action against a city to recover for injuries occasioned by a defective highway, the issues are whether the defect had existed for twenty-four hours, and whether the city had notice of the defect, and the jury find specially that the defect had existed for twenty-four hours, and return a general verdict for the plaintiff, it is within the power of the judge to set the special finding aside, and to permit the general verdict to stand. *Monies* v. *Lynn*, 273.

See EXCEPTIONS, 10, 16.

NOLLE PROSEQUI.

See INDICTMENT, 1.

OFFICER.

See ATTACHMENT, 8.

OFFICER DE FACTO.

See CONSTABLE.

ORDINANCE.

See SALE; WAY, 14.

PARTIES TO ACTION.

See PLEADING, I.

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PARTNERS

1. A partnership is liable to the holder
member of the firm, in its name, if the
suspicion or cause of suspicion of any f
making of the note. *Blodgett* v. *Weed*, 2
2. If a promissory note, signed by one me
name, is given in payment of debts, some
another member came into the firm and t
thereon by the payee of the note is defen
the plaintiff, in the absence of evidence
knowledge when the party defending ent
to recover for such debts covered by the
became a member. *Guild* v. *Belcher*, 257.
3. Articles of copartnership between C., W
of a commission business, provided that
whole capital in unequal proportions; that
as he may be able to give;" that W., B.
their time to the business; that each partn
the net profits; and that C. and W. should
contributed by them. The partnership was
consent, the business of the firm closed by
Held, on a bill in equity by W. against the
constituted a debt of the partnership to whi
to contribute equally, and that, one of them
be borne equally by the other three. *Whitc*

PARTY WALL
See CONTRACT, 2,

PATENT.
See EQUITY, 2.

PAUPER.
In an action under the Gen. Sts. *c.* 73, § 25, by
the support of a lunatic committed to a stat
where he has a settlement, the plaintiff mus
pauper at the time the relief was furnished.

PAYMENT.
1. In an action upon a promissory note against
after the note matured, an arrangement was m
the same amount was given, signed by the indo
the issue was whether the new note was given
suit or as collateral security for it. One of the
law, and was called as a witness by the plainti

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peared that he had aided the plaintiff in the proceeding taken to en- e the note in suit against the defendant. *Held*, that the significance of witness's acts, as evidence of payment, was for the jury; and that the e rightly refused to rule, as requested by the plaintiff, that the fact that witness aided in collecting the note was no evidence of its payment. necticut *Trust Co.* v. *Melendy*, 449.

an action upon a promissory note against the maker, it appeared that, r the note matured, an arrangement was made by which a new note for same amount was given, signed by the indorsers of the note in suit, and e issue was whether the new note was given in payment of the note in it or as collateral security for it. The new note was given in anothe ate, by the law of which the giving of a promissory note was not presume be in payment of a preëxisting debt. *Held*, that it was a question of fact r the jury, upon the circumstances of the case, whether the fact that the ew note was credited upon the books of the holder was evidence of pay- ent. *Held*, *also*, the plaintiff having requested an instruction that the presumption of law is that the holder did not intend to accept the note in payment and to discharge the maker of the note in suit, and unless the jury find that a distinct agreement was made to accept the note in payment, they cannot find that it was accepted in payment, and, the instruction being given in substance, though not in the words requested, that the plaintiff had no ground of exception. *Ib.*

In an action upon a promissory note against the maker, it appeared that, after the note matured, an arrangement was made by the agent of the indorsers, by which a new note for the same amount was given, signed by the indorsers of the note in suit, and the issue was whether the new note was given in payment of the note in suit or as collateral security for it. The new note was given in another state, by the law of which the giving of a promissory note was not presumed to be in payment of a preëxisting debt. The plaintiff requested the judge to instruct the jury that, unless the indorsers intended to give their note in payment of the note in suit, it would not be a payment. The judge declined to give this instruction, and instructed the jury that the transaction at the time the new note was given is not only to be considered with regard to what the indorsers did and intended to do about it; if the plaintiff, who was the real creditor, chose to receive it and did receive it as payment and surrendered the note in suit, gave it up and received that in payment, then it was a payment. *Held*, the judge having previously instructed the jury that the defendant must prove an agreement between the parties that the new note was to be taken as payment of the old one, that the plaintiff had no ground of exception. *Ib.*

See Mortgage, 2; Principal and Agent, 1; Trustee Process, 6.

PERJURY.

An indictment against B. for perjury, alleged that on March 25, 1875, at Boston, in the county of Suffolk and Commonwealth of Massachusetts, C. " was brought before the Municipal Court of the City of Boston, holden at

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said Boston for the transaction of crin
due form of law," charging him with
tion of said complaint was continued ur
suing; and that on said sixth day of A
said Municipal Court, it was lawfully o
that C. recognize with sureties, and that
recognize, and that on the ninth day of
fore one A., a commissioner within and
authorized, and duly appointed and qual
in said county, B. offered himself as bai
for said C.; that B. was then and there
sioner — pursuant to the course and pra
— to make a written statement under oa
and property, the same being material to
ing whether he would and should take an
surety; that said B., being then and ther
aforesaid, did then and there, in pursuanc
statement, and did then and there, bein
wilfully, knowingly and corruptly say, de
written statement) as follows. The indict
signed by B., and entitled " Commonweal
Before A., a commissioner duly authorized
said county." *Held*, that if it was nece
186, § 1, to allege that the court had jurisd
was sufficiently alleged. *Held*, *also*, that th
whom the oath was administered to B. with
and place thereof. *Commonwealth* v. *Butlan*

3. The statements under oath, of a person off
value of his property, are material, and if
false, he is liable to conviction for perjury.

3. An indictment for perjury averred that th
that certain land was of the cash value of n
lars, whereas it was of trifling value, to wit,
there was some evidence that the land was of
dollars. The defendant asked the judge to
the allegation and proof was fatal. The jud
structed the jury that it was not necessary
that the true value of the property did not e
prove that its value was not what was stated
knowing its value was less than stated by h
value. *Held*, that the defendant had no grou

4. On the trial of an indictment for perjury, th
fendant had knowingly falsely sworn that he
worth $5000, the evidence on the part of the g
of one witness who put the value at $1800, an
defendant, made six months before, which st

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; and there were other issues to be submitted to the jury involving estion whether the defendant had sworn falsely. *Held*, that the tes- y of the witness was supported by corroborating circumstances suffi- o justify the submission of the issue to the jury. *Commonwealth* v. d, 317.

ne trial of an indictment for perjury, the issue being whether the de- nt had knowingly falsely sworn that he had personal property to the nt of $1285, consisting of stock in a grocery store in a certain town, witnesses testified that he had no such store in the town. Two other esses testified that the defendant made admissions to them to the same t. *Held*, that the issue was rightly submitted to the jury. *Ib.*

the trial of an indictment for perjury, the issue being whether the ndant had knowingly falsely sworn on December 11, 1874, that his lia- ies did not exceed $500, and that he was worth not less than $20,000 r and above all liabilities, there was evidence that the defendant went o bankruptcy in 1872, and that his schedules under oath showed debts to amount of $85,000; that he had not received a discharge, and no divi- nd had been paid. *Held*, that this evidence, unexplained and uncon- lled by evidence that the defendant had since paid the debts or acquired operty, was properly submitted to the jury. *Ib.*

n indictment alleging that the defendant committed perjury in an exam- nation touching the amount of his property, upon his offer to be bail for ne who had been committed to jail on a criminal charge, by falsely swear- ng that he had personal property at Gloucester, in the county of Essex and Commonwealth of Massachusetts, is supported by proof that he swore to a rritten statement that he had personal property at Gloucester, in the ounty of Essex, there being proof of facts to show that the statement ould apply, and was intended to apply to Gloucester, in the county of Essex and Commonwealth of Massachusetts, and that he had no property here. *Ib.*

On an indictment for perjury, the issue being whether the defendant had alsely sworn that he owned land in a certain town of the value of $5000, t appearing that the deed to him of the land was signed by A. and his wife n her right, A. was permitted to testify, against the defendant's objection, hat the defendant paid nothing to him for the land. *Held*, that the evi- ence was admissible. *Ib.*

See RECOGNIZANCE.

PILOT.

See SHIP, 2.

PLEADING.

I. *Parties to Action.*

The assignment by the payee of a promissory note of all his right therein, ithout any indorsement, does not prevent the maintenance of an action on the note in the name of the payee. *Tucker* v. *Tucker*, 79.

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2. Whe.e a person, answerable in cont
them so that that one has no longer an
it is a severance of the cause of actio
at law to the other alone. *Boston &*
Portsmouth Railroad, 498.

3. Where A., answerable in contract to
with B., by which B. agrees to pay, rel
to indemnify him against all demands,
interest of B. in the claim of B. and C
law alone against A. *Ib.*

See EXECUTOR AND ADMINISTRA

II. *Declar*

1. A. and B., owners of adjacent lands an
B. agreed to make certain alterations in
abutted upon B. In an action by A. for
counts in tort, averring that they were f
that under these counts A. could not sho
tions of A.'s roof not abutting on B. *A*

See INSURANCE, 12, 13; MALICIOUS PRO
VARIANC

III. *Demur*

See SLANDE

IV. *Motion to*

See COMPLAI

V. *Answer*

1. Under an answer denying each and ever
laration, the plaintiff is bound to make out
essary to be proved by him for this pu
Crompton, 376.

2. The objection that a promissory note appe
tiable, is open at the trial of an action ther
the declaration sets out a copy of the not
payable to the payee or order, and indorse
and the answer denies all the allegations.

3. Under an answer to a declaration for rent
taining a general denial and alleging in avoi
ingly let the premises to be used for the
toxicating liquors, the defendant is not entit
plaintiff, after the letting, knowingly permit
the purpose of illegally selling intoxicating li
fact he permitted the defendant to use the
recover. *Rice* v. *Enwright*, 187.

See CERTIORARI, 1; ERROR, 1; EVIDENCE

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POOR DEBTOR.

der the Gen. Sts. *c.* 124, § 13, one who is arrested on an execution in favor f a creditor, who does not reside or have a place of business in the county here the arrest is made, and who has no agent or attorney therein, may ive notice of his intention to take the poor debtor's oath to the officer mak- ng the arrest; and the time for travel is to be determined by the distance etween the place of service on the officer and the place of examination; and ot by the distance at which the creditor or his attorney resides or does usiness therefrom. *Homer* v. *Sinnott*, 191.

See CONSTABLE.

PORT.

See SHIP, 7.

PRINCIPAL AND AGENT.

A. sent B. to do work for C., and A.'s bookkeeper, after the completion of he work, made out, in accordance with his duty, the bill therefor upon one f A.'s printed bill-heads, which he placed in the hands of B., who de- anded and received payment for the work from C. Upon the bill-head as printed in fine type, "All moneys to be paid to the treasurer and bills o be receipted by him." *Held*, in an action by A. against C. to recover or the work, that, in the absence of evidence that C. saw these words, here was evidence of payment to go to the jury. *Kinsman* v. *Kershaw*, 40.

n an action to recover for the conversion of a part of the furniture in a otel, it appeared that the defendant was the owner of the hotel, and that he plaintiff had succeeded to the title to the furniture, which C., who car- ed on business in the hotel, had. One witness testified that he bought all he property in the hotel; that he used it, and told C. that he could take way a certain portion of the furniture, but nothing else. It appeared that o obstacle was put by the defendant in the way of the removal of all the rniture in suit. *Held*, that in the absence of evidence that the witness ted as the agent of the defendant, or bought the property of him, the de- ndant was not liable. *Hewett* v. *Sessions*, 221.

BILL OF EXCHANGE; INTOXICATING LIQUORS, 4; LAW AND FACT, 2 SHIP, 2

PRINCIPAL AND SURETY.

See BOND, 1, 2.

PROBATE COURT.

jurisdiction of the Probate Court under the Gen. Sts. *c.* 117, § 5, to en- ce the specific performance of a written agreement for the conveyance of l estate, is concurrent with that of this court under the Gen. Sts. *c.* 113, , and is governed by the same rules. *Lynes* v. *Hayden*, 482.

See APPEAL, 1.

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PROMISSO

1. A promissory note containing a prov and a half years or sooner at the op with interest at the rate of seven pe and for such further time as said pr remain unpaid," is not negotiable, wl third person. *Stults* v. *Silva*, 137.

2. In an action upon a promissory note, the defendant made the note, and th alteration, proof of the defendant's si the whole body of the note written ov the burden of proof is on the plaintiff t the note of the defendant. *Simpson* v.

3. A lease of rooms in a building, which tion of the premises by fire the rent surrendered to and accepted by the l made by the lessee payable to the less notes were duly paid, and before the la destroyed by fire. *Held*, that the lesse last note when due. *Brooks* v. *Cutter*,

4. In an action by the payee against the m be dated July 1, 1869, for $1000 payab trial was that the plaintiff lent the de 1869, and at the same time received fro and could not be produced. There wa payable. *Held*, that the note might be p and that the evidence was sufficient, in other note of that amount was ever given to warrant the jury in returning a verdic rendering judgment in his favor, upon hi nity. *Tucker* v. *Tucker*, 79.

See COMPOSITION, 1–3, 5; EVIDENCE, 18 SHIP, 1, 2; PAYMENT; P

RAILROAI

A railroad corporation, desiring to take lanc filed its location over a lot of land whose o of the lot to the corporation. The county the petition of the corporation, ordered th included within the location. *Held*, under viding that railroad corporations shall not their railroad without the consent of the o sioners first prescribe the limits within whi the corporation acquired no right in the la the corporation was bound, under the Gen.

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ences between the land conveyed to it and the rest of the lot. *Derby* v. *Framingham & Lowel. Railroad*, 516.

See EVIDENCE, 10, 17; JURISDICTION; MASTER AND SERVANT, 4–6.

RECEIVER.

See EQUITY, 1; INSURANCE, 4.

RECOGNIZANCE.

an indictment for perjury for swearing falsely when being examined under oath as bail for a person, who had been arrested on a complaint to a Municipal Court for an assault and battery upon a police officer, it appeared that the person arrested was ordered to recognize to appear before the Superior Court, and that he entered into a recognizance "to answer to said complaint for the crime aforesaid." *Held*, that the recognizance was valid, and bound the principal to appear before the Superior Court to answer to any indictment which might be substituted for the complaint. *Commonwealth* v. *Butland*, 317.

See CONSTABLE; POOR DEBTOR.

RECORD.

See ERROR, 2; EXCEPTIONS, 5.

RELIGIOUS SOCIETY.

See CHARITY, 1, 2.

REMAINDER.

See DEVISE AND LEGACY, 4.

RENT.

See FISHERY, 6; LEASE, 1, 2; PLEADING, 7; PROMISSORY NOTE, 3.

REPORT.

Superior Court has no authority, under the St. of 1869, *c.* 438, to report case before verdict to this court, for its opinion upon the whole course of e trial and upon the admissibility of every piece of evidence offered, without any ruling of the court below upon its competency, or stating that evidence with sufficient precision to enable its competency to be determined. *Russell* v. *Lathrop*, 531.

RESCUE.

See COMPLAINT, 5; INDICTMENT, 2.

ROBBERY.

See EVIDENCE, 7–9, 24.

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SAL

The provision of the Gen. Sts. *c.* 49, § 15 establish such ordinances as they deem respecting the appointment of surveyors sory upon a city whose charter provid nances; and if such city fails to pass su under the Gen. Sts. *c.* 18, § 31, and *c.* 1 if, such ordinances not being passed, sur and lumber, is sold without being surve quired by the Gen. Sts. *c.* 49, § 143, the 285.

See STATUT

SAVINGS BA

In an action against a savings bank, on an amount of a deposit, the book of deposit i to show the amount of the plaintiff's n although the book contains printed cond *Brown* v. *Abington Savings Bank*, 69.

See EVIDENCE,

SEA SHORE

See FLATS.

SEARCH WARRA

See GAMING; MUNICIPAL COURT OF T

SEISIN.

See DOWER.

SERVICE.

See APPEAL, 1; TRUSTEE PRO

SET-OFF.

W. purchased of A. a claim against B., pending claim. B. had previously purchased a claim ag tice thereof to A. Suit was brought thereon by signor, in which W. appeared as adverse claiman B. summoned as trustee. At the time of his pur had no knowledge of the claim against A. *H* plaintiff in the second action could not be set off plaintiff in the first action. *Ames* v. *Bates*, 397.

SEWER.

See COVENANT, 1.

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SHIP.

mortgagee of a vessel, who is in possession, and to wl om supplies for e of the vessel have been furnished, under such circumstances that he le for them, is properly described as owner in the declaration in an ao- o recover for the supplies. *Luce* v. *Hadley*, 229.

owner of a vessel chartered it, retaining the necessary room for the to A. to bring a cargo to the port of B. or the port of G., the port to med before clearing. A. named B. as the port and the vessel sailed id voyage. Subsequently an agreement was made between the owner A. by which A. was to pay all extra charges incurred if he should elect ave the destination of the vessel changed from B. to G. Before the el arrived at G., a letter was sent by A. without the knowledge of the er of the vessel, to the office of the pilots in B., directed to the master he vessel, requesting him to go to G. This letter was delivered at sea he master by a pilot, and an agreement was made by which the pilot s to receive for taking the vessel to G. as much as he would have been itled to as pilotage, if he had taken the vessel to B. This was paid. he pilot then brought an action against the owner of the vessel to recover mpensation for taking the letter to the master, and at the trial put in evi- ence of a local usage in the port of B. for pilots to charge and receive a lotage fee for delivering such a letter to the master of a vessel. The dge instructed the jury that in order to charge the defendant they must nd that either the owner or master had knowledge of the usage, and that f they should find that either had such knowledge and should find the usage o be proven they must find for the plaintiff. *Held*, on exceptions taken by he defendant, that the contract relied on, if proved, was within the scope f the master's authority and would bind the owner; and that the contract etween the owner and the charterer in respect to paying for extra charges, n case of a change of port, did not affect the defendant's liability to the laintiff. *Held*, *also*, that knowledge of the usage, on the part of the mas- er, must be shown, and that it was not enough to show that the defendant ad knowledge of the usage. *Held*, *also*, on the issue whether an implied ontract was to be inferred from the act of the master in going to G., that he contract made between him and the pilot, about taking the vessel in, ight have a material bearing. *Fowler* v. *Pickering*, 33.

Under the St. of 1855, *c.* 231, no lien can be claimed for lumber furnished r the construction of a vessel, which has not been used in her construc- on, or fitted and prepared for that purpose. *Young* v. *The Orpheus*, 179.

Neither the fact that materials are furnished for the construction of a ves- l on credit, nor the fact that they are delivered primarily on the credit of e builder of the vessel, defeats a lien under the St. of 1855, *c.* 231, if no te or security is taken, and exclusive credit is not given to the builder. .

nder the St. of 1855, *c.* 231, § 2, a lien, for materials used in the con- uction of a vessel, is not dissolved by a clerical error, in the certificate d in the office of the town clerk, in adding up the items of the account,

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which themselves clearly show the amo
nally due. Nor is such lien dissolved
materials furnished for the vessel, but
not having been used in her constructio

6. Under the St. of 1855, c. 231, § 2, dec
be dissolved unless a certificate is filed
such ship or vessel shall depart from th
debt was contracted," the certificate ma
from the port. *Ib.*

7. The port of Boston is not limited to the
cludes the opposite shore of Chelsea; and
declaring that a lien on a vessel shall be d
"within four days from the time such sh
port at which she was when the debt wa
clerk of the city or town within which suc
the debt was contracted," a vessel does not
in an unfinished condition, the town of Cl
debt was contracted, and going to Boston;
more than four days after such leaving, an
seasonably filed. *Ib.*

8. A vessel sailed from Boston in March, 1856,
of this Commonwealth until July, 1871, whe
a lien for a debt contracted shortly before h
in the mean time been in different ports of
rival there was announced in the usual mann
that the petitioner had actual notice thereof.
c. 231, § 1, declaring that the lien "shall co
fied," that the petition was seasonably filed,
been changed. *Ib.*

9. On a petition to enforce a lien on a vessel und
interest is not due as part of the debt, but as d
puted from the filing of the petition, and not f
mand; and the fact that, before bringing the pet
in a court of the United States, which were disn
tion, makes no difference. *Ib.*

See EVIDENCE, 2.

SLANDER.

1. A declaration for slander which alleges, in the for
Sts. c. 129, that the defendant charged the plain
"by words spoken of the plaintiff substantially as
proof that the defendant spoke words substantial
like those set out in the declaration. *Chace* v. *Sha*

2. A declaration for slander alleged that the defenda
with burning his own mill, with the intent to defrau

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by words spoken of the plaintiff substantially as follows: He (meaning he plaintiff) burned it (meaning the said mill) because he was poor and wanted the money." At the trial there was evidence that the defendant charged the plaintiff with burning his own mill "to get his insurance." *Held*, that words were proved "substantially" as alleged, under the Gen. Sts. *c.* 129. *Held*, *also*, that the objection that the declaration did not show that the defendant charged the plaintiff with a crime, could be taken only by demurrer. *Chace* v. *Sherman*, 387.

A declaration for slander alleged that the defendant accused the plaintiff, by certain words, which were set forth, of burning his own building with intent to defraud the insurers thereof. The defendant's answer contained a general denial, and alleged that "there are no sufficient allegations in said plaintiff's writ and declaration of any matter or thing to constitute the substance of slander in form and manner." *Held*, that, if the answer contained a demurrer, it could not first be treated as such in this court. *Ib.*

SPECIFIC PERFORMANCE.

by an instrument in writing agreed to convey to B. "from 26,000 to 28,000 feet of land, situated on Walden Street and Vassal Lane, in Cambridge, when the bounds are fixed and the street laid out." The street last referred to was not laid out or the bounds fixed during A.'s lifetime. *Held*, that the agreement was too indefinite to be enforced under the Gen. Sts. *c.* 117, § 5, after A.'s death. *Lynes* v. *Hayden*, 482.

See PROBATE COURT.

STATUTE.

The St. of 1875, *c.* 153, applies only to sales of goods, wares and merchandise, by weights and measures, and not to sales of lumber. *Prescott* v. *Battersby*, 285.

The St. of 1875, *c.* 68, providing that "whenever any defendant in a civil action dissolves an attachment made in said suit, by giving bond as provided by the statutes of this Commonwealth, and has already been or afterwards is adjudged a bankrupt," the court may enter a special judgment applies only to cases where bonds to dissolve attachments are given after the statute went into operation. *Fickett* v. *Durham*, 159.

See CHARITY, 2; FISHERY, 5.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTES CITED, EXPOUNDED, ETC.

ENGLISH STATUTES.

43 Eliz. *c.* 4.	Charitable Trusts	16
9 Geo. II. *c.* 36.	Mortmain Act	18

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STATUTES OF THE U

1790, c. 11. Record
1804, c. 56. "
1850, c. 79, § 18. Port of
1867, c. 176. Bankru
—— —— §§ 1, 2. "
—— —— § 14. "
—— —— § 21. "
—— —— § 35. "
1874, c. 390, § 2. "

REVISED STATUTES OF THE

§ 629. Circuit C
§ 639. " "
§ 711. United St
§ 4972. Bankruptc
§ 4973. "
§ 5047. Bankruptcy
§ 5106. "
§ 5129. Fraudulent

STATUTES OF NEW

1875, c. 200, § 1. Town of Ki
—— —— § 2. "
1876, c. 241, "

STATUTES OF THE COMMO

1799, c. 57. Estate of Deceased Persons 365
1809, c. 91, § 4. Episcopal Donations 20
1815, c. 12. Trinity Church 20
1845, c. 229. Old South Church 11
1851, c. 343, § 2. Lien 184
1852, c. 94, §§ 8, 14. City of Springfield 564
—— c. 312, § 3. Declaration 364
1853, c. 70, § 15. City of Lawrence 286
—— c. 315, § 2. Grades of Streets 561
1855, c. 231. Lien 179
—— —— § 1. " 180
—— —— § 2. " 179
—— —— § 3. " 185
1860, c. 186, § 1. Indictment for Perjury 317

1861, c.
1862, c.
—— c. 1
1863, c.
1864, c.
1865, c. 1
1866, c. 14
—— c. 174
—— ——
1867, c. 32
1868, c. 27
—— c. 277.
—— c. 326.
1869, c. 78.
—— c. 111.

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9, c. 331. Probate Court 56
— c. 364. Gaming Houses 332
— —— § 2. " " 332
— —— § 3. " " 333
— c. 384, § 7. Cultivation of Fishes 300
— —— § 8. " 304
— —— § 9. " 300
— —— § 18. " 301
— —— § 19. " 300
— c. 425. Witness 290
— c. 432. Tide Waters 519
— c. 438. Report 531
— c. 447. South Bay 519
70 c. 404. Divorce 89
— —— §§ 2, 3. Divorce 90
71, c. 218. City of Lynn 174
— c. 273. Wharf in South Boston 519
— c. 281, § 2. Cultivation of Fishes 526
— c. 339. City of Worcester 576
— c. 361. " " 375
— —— § 3. " " 375
— c. 382, § 1. Betterment 556
— —— § 5. " 130
— —— § 7. " 126
72, c. 353. Abatement of Nuisance 518
— c. 368. Old South Society 12
73, c. 129. Wharf in Nahant 519
— c. 130. Bridge in Medford 519
1873, c. 136. Landing Places in Newburyport 519
—— c. 144. Mills 356
—— —— § 1. " 358
—— —— § 2. " 356
—— c. 261. Superior Court 485
—— c. 303, § 2. Town of Brighton 194
—— c. 304. Abatement of Nuisance 518
—— c. 371, § 2. Divorce 89
1874, c. 184, § 1. Married Woman 598
—— c. 187. Service of Writ 158
—— c. 270. Old South Society 8 n.
—— c. 283. Assessment 487
—— c. 293, §§ 1, 5. First District Court of Bristol 169
—— c. 297, § 1. Divorce 91
1875, c. 68. Bond to dissolve Attachment 159
—— c. 99. Intoxicating Liquors 199, 206
—— —— § 6. " 205
—— —— §§ 6, 12, 13. " 110
—— —— § 7 " 111
—— —— § 12. " 109
—— —— § 12, 13. " 205
—— —— § 18. " 206
—— c. 153. Sales by Unsealed Weights 285
1876, c. 228. Meadow Lands 584 n.

Revised Statutes.

36, § 27. Estate of Deceased Persons 365
38, §§ 1, 12, 13. Actions which survive 365
c. 107, §§ 1, 2. Mortgage 506
c. 116. Mill Act 357

General Statutes.

1, § 51. Tax 77
2 § 22. " 295
8, § 31. Town Officers 285
9, § 2. Powers of Cities 285
3. Way 99
— § 13 Way 562
c. 43, § 32. Way 496
—— §§ 33, 40, 42, 43. Way 101
—— § 40. " 98
—— § 61. " 490
—— § 73. " 95
—— §§ 85, 86. " 561

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TRESPASS.

See MORTGAGE, 3.

TROVER.

See ACTION, 5.

TRUST AND TRUSTEE.

Where a person, who has entered into a written contract for
'and, has paid or tendered the consideration, and by the ow
has entered upon the land and made improvements ther
charged with an implied trust in his favor; and a court of e
owner has never been a resident of this state, and no servi
him here, appoint a trustee, under the Gen. Sts. c. 100, § 1
same in such manner as it may require. *Felch* v. *Hooper*, 1

See CHARITY; DEVISE AND LEGACY, 2, 4, 5; EQU

TRUSTEE PROCESS.

1. Under the Gen. Sts. c. 142, § 5, providing that trustee pr
served on the defendant and each of the trustees in the ma
for the service of an original summons without an attachm
§ 22, providing that in any action brought against a city o
shall be served thirty days at least before the return day; a
summoned as trustee less than thirty days before the return
Doherty, 142.

2. Where an action is begun by trustee process and the wri
served upon the trustee, the plaintiff may, under the Gen. S
proceed with the suit against the principal defendant, if he l
served. *Ib.*

3. If a day laborer works for a corporation under an agreemen
amount to become due him monthly is paid in advance to
who is to account to the laborer for it at the end of each mo
ration is not liable in a trustee process to a creditor of the la
the third person to whom the money is paid is the treasurer
tion. *Callaghan* v. *Pocasset Manuf. Co.* 173.

4. A. delivered to B. a certificate of stock in a corporation as c
ity for a debt. B. thereupon surrendered the certificate to t
and took out a new certificate in his own name as trustee. A.
and B. delivered the certificate to A. and gave him a power
revocable in its terms, but not naming any attorney, to tran
After this, and before the stock was transferred on the books
tion, B. was summoned as trustee of A. in a process of foreig
Held, that he could not be charged. *Cooke* v. *Hallett*, 148.

5 A., by an instrument in writing and duly recorded, assigned
cember 13, 1873, "all claims and demands which I now have,
at any time between the date hereof and the first day of Feb

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may and shall have against C., for all sums of money due, and for all sums of money and demand, which at any time between the date hereof and the said first day of February, 1874, may and shall become due to me as laborer." *Held*, on a trustee process served after February, 1874, and before February, 1875, that the assignment was not void on its face, but applied to all wages until February 1, 1875. *Schofield* v. *McConnell*, 368.

6. A. being indebted to B. and other creditors, assigned to B., by an instrument duly recorded, his wages due and to become due from C., until a certain date, B. having at the time knowledge of the other debts. B. received the wages monthly, and applied part of them to his debt and part, at A.'s request, for necessaries for A.'s support, he having no other means of subsistence. At the time of a trustee process, brought by one who was a creditor of A. when the assignment was made, against A., in which C. was summoned as trustee, and B. appeared as claimant, it appeared that money was still due from A. to B., although B. had received money enough, had he so applied it to pay his own debt. It was found as matter of fact that the assignment and the subsequent arrangements between A. and B. were not made with any intent on their part to defraud the creditors of A. *Held*, on a bill of exceptions setting forth the above facts, that the court could not say as matter of law that the assignment was fraudulent. *Held*, *also*, the appropriations made by the parties being valid, that the law of appropriation of payments, applicable when no appropriations are made by the parties, did not apply. *Ib.*

See COSTS, 2; EXCEPTIONS, 7; MORTGAGE, 8.

USAGE.

See EXCEPTIONS, 20; SHIP, 2.

VARIANCE.

In an action for work and materials furnished by the plaintiff to the defendant, the judge who tried the case without a jury found as matters of fact that the plaintiff did not prove the contract declared on; and that, there being conflicting evidence upon the question whether the defendant promised to see him paid for work and materials which he originally agreed to furnish to another person, the liability of the original debtor was not extinguished, and ordered judgment for the defendant. *Held*, the findings of fact not being subject to revision in this court, that the judge rightly ruled as matter of law that such promise would not support the declaration. *Hogan* v. *Coleman*, 96.

See PERJURY, 3.

VERDICT.

See EXCEPTIONS, 8, 16; NEW TRIAL; WAY, 5.

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WAIVER.

See CONTRACT, 9; DEVISE AND LEGACY, 5; MORTGAGE

WATERWORKS.

See EMINENT DOMAIN; EXCEPTIONS, 9.

WAY.

1. The posting by the selectmen of a town of a notice of their out a town way, as required by the Gen. Sts. c. 43, § 61, is tice under that section to the owner of the land taken, thou the town, if such ownership be not known to the selectm *Newton*, 480.

2. If a city passes an order reducing generally the grade of afterwards passes another order for the construction of sic street, the owner of land adjoining the street, and injured of grade, may, upon a petition under the Gen. Sts. c. 44, § 1 one year from the time when the sidewalk in front of his brought to its final grade, recover for all damage done by grade. *Barker* v. *Taunton*, 392.

3. Where, at the trial for the assessment of damages sustained of grade in a street, the city introduces evidence that the c including the petitioner's own improvements, had increased t the value of the premises, it is competent for the petitione much he has expended in improvements upon the premises sir of grade. *Ib.*

4. It is no bar to a petition for the assessment of damages, sus change of grade in a street, that the petitioner was one of the tioners for the improvements. *Ib.*

5. Land was taken for the alteration of a highway by the may men of a city, who awarded the petitioner $2000 as damages. being dissatisfied with the award applied for a jury, who at t directed to add interest from the time of the taking of the l amount of damages found by them to have been thereby occa petitioner's estate, and to return the amount of damages and i sum. The jury returned a verdict, that "they estimate an amount of damages sustained by the petitioner at the sum of *Held*, that the jury must be presumed to have followed the them, and that the damages awarded by the mayor and alderm increased so as to entitle the petitioner to costs under the Ge § 73. *First Baptist Society* v. *Fall River*, 95.

6. The erection of railings or barriers, required for the safety of is not essential to the completion of a public way under the St 382, § 1; and the want thereof does not prevent the assessme ments under that section. *Chase* v. *Aldermen of Springfield*, 55

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7. The record of the board of city or town officers of their proceedings in the laying out or altering of a way and the assessment of betterments therefor, under the St. of 1871, c. 382, should show the amount of the expense of the laying out or altering, as well as of the assessment. *Chase* v. *Aldermen of Springfield*, 556.

8. At the trial upon a petition to the Superior Court, for a jury to assess the damages caused to the petitioner's estate by raising the grade of a highway it appeared that the petitioner, in anticipation of the change of grade, had built foundation walls to a height of about six feet above the old grade, and that the new grade was established two or three feet higher than the petitioner anticipated. The petitioner was then permitted, against the respondent's objection, to introduce evidence in relation to putting the property in the same position relatively as before, and the expense thereof. The judge admitted the evidence subject to instructions that that would be a mode of determining the damages, provided that would be the course which a prudent man would adopt in relation to property in that condition, provided such expenditures were the most economical way of diminishing the damages caused by the change of grade; that it was for the jury to decide what course a prudent man would adopt in relation to such property after the location and change of grade; and that the damages awarded the petitioner were in no event to exceed the amount of the diminution in the value of the petitioner's property owing to the laying out of the street and the change of the grade. *Held*, that the evidence was rightly admitted, and that the instructions were correct. *Buell* v. *County of Worcester*, 372.

9. A town, within the limits of which existing public ways have been changed by the county commissioners, for the accommodation of a milldam, under the St. of 1873, *c.* 144, and which has no ownership in the soil of such ways, does not come within the provisions of § 2, as a person or corporation that has sustained damages by reason of the alterations, changes of grade or repairs in such ways; and the objection that such damages cannot be assessed may be taken at the trial before a sheriff's jury summoned to assess the damages. *Cheshire* v. *Adams & Cheshire Reservoir Co.* 356.

10. One who, being upon a highway merely for play, meets with an injury occasioned by a defect therein, cannot maintain an action for damages therefor against the city or town bound to keep the highway in repair for travellers. *Tighe* v. *Lowell*, 472.

11. A child injured, while sitting upon the sidewalk of a public highway, by the falling upon her of a stone left there to be used as a curb-stone, is not a traveller upon the highway. *Lyons* v. *Brookline*, 491.

12. A town which places stones insecurely in a highway is not liable to a person injured by one of the stones falling upon him, the fall being caused by the act of a third person. *Ib.*

13. In an action against a city to recover for injuries occasioned by a defective highway, evidence that a boy sixteen years old, who had been employed to light and extinguish the street lamps, and had received a general direction from his superior to shut off the gas at midnight, was told of the existence

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of the defect just before the accident, and as he was in t
guishing the lights, and that, although warned, he put ou
neglected to barricade the spot, will not warrant the jury in
city had notice of the defect. *Monies* v. *Lynn*, 273.

4. In an action against a city for injuries occasioned by a de
if it appears that the plaintiff was driving at the time, and
ordinance of the city prohibiting the driving of a vehicle
the city at a greater rate of speed than six miles an hou
proof is on the plaintiff, upon the issue of due care, to show
of the injury he was not violating the ordinance. *Tuttle* v.

15. In an action against a town to recover for injuries occasi
ive highway, there was evidence tending to show that at
accident, the plaintiff was driving in a carryall; that suc
stopped, jumped aside, cramped the nigh wheel and began
plaintiff jumped out and was injured, the horse going c
ment; that the horse driven by him was one of a span of
had been accustomed to draw on the nigh side in double h
he had never been driven in the same carryall, but had bee
harness. The defendant asked the judge to instruct the
horse was most usually driven in double harness and on th
from the habit of taking the nigh rut, turned to the left
wheel and began to back, and the plaintiff jumped out i
cramping of the wheel, the plaintiff cannot recover for any
from the jumping out. The judge declined to give this i
with the qualification, "unless the act was done under a r
hension that the carriage would go over the bank." *Held*,
ant had no ground of exception. *Williams* v. *Leyden*, 237.

8. In an action against a town to recover for injuries caus
highway, which the town was bound to keep in repair, one
who were riding together in their carriage in the daytime,
defect was a hole in the way, caused by the dropping dow
of a culvert, that the other plaintiff was driving, and that
time looking ahead, but was looking as any other perso
driving in a carriage. The plaintiff who was driving test
no previous knowledge of the defect, that the horse wa
walking at the time, and that she was then looking strai
evidence also showed that the road was rough, that th
water upon it, and that there was room to pass safely up
way. One witness for the plaintiff testified that any on
lookout could have seen the hole. The presiding judge,
request, instructed the jury in substance, that if the plai
time, and at a walk upon a broad and substantially level
width for passing by the hole, went into it, when it was co
and in plain sight, they were not in the exercise of due
show some excuse for their inattention to their track; an
quires of one riding in the daytime such attention to the r

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is about to pass, as to see large holes that are conspicuous, obvious and in plain sight, unless some sufficient reason excuses the inattention, and refused to give the further instructions requested by the defendant, that no such excuse was offered or shown by the evidence in this case, and that there was no evidence in the case of due care on the part of the plaintiffs, or either of them. The judge, at the request of the plaintiffs, also instructed the jury that it was enough if the plaintiffs looked ahead in such a manner as persons of ordinary prudence usually do in riding upon a highway. The jury found for the plaintiffs. *Held*, that the last instruction was correct, that the other instructions were sufficiently favorable to the defendant, and that the case was rightly submitted to the jury. *Hill* v. *Seekonk*, 85.

17. In an action against a town for personal injuries caused by a defect in a foot-path, by the side and within the location of a highway, instructions were requested that the jury could not find "merely" from certain specified circumstances that the town had recognized the path as a part of the highway that they were bound to keep in proper condition for travel. *Held*, that such instructions were properly refused; and that the recognition and adoption of the path by the town was a question of fact for the jury to determine, in view of all the evidence in the case. *Whitford* v. *Southbridge*, 564.

18. A person knowing the unsafe condition of a part of a foot-path by the side of a highway in a town, fell and was injured in the attempt to pass over it. In an action brought against the town for the injuries caused by the alleged defect, the defendant requested the judge to instruct the jury that the plaintiff's election, with such knowledge, to travel along the path instead of by the safe portion of the way might be considered by them as such want of due care upon her part as would prevent her recovering. The judge ruled that such knowledge would not be conclusive that the plaintiff did not exercise due care; but that if, with her knowledge, the plaintiff did not exercise due care and prudence, either in entering upon the way or in proceeding thereon after she had entered, she could not recover. *Held*, that this ruling properly left the jury to determine whether there was any want of due care in going upon the foot-path. *Ib.*

See ACTION, 1, 2; CERTIORARI, 2–4; DAMAGES, 2; DEED, 8, 7–13; EVIDENCE, 15, 16, 22; EXCEPTIONS, 11, 13, 14, 21; JURISDICTION; NEGLIGENCE; NEW TRIAL.

WIDOW.

A testator left property in trust to pay one third the income to his widow for life, and the other two thirds to his daughters, and in case of the death of either daughter, her share was to be paid to her heirs. The widow waived the provisions of the will, under the St. of 1861, *c.* 164. *Held*, on the death of a daughter, that the widow, although an heir of the daughter, could take no beneficial interest, as such heir, under the will. *Upham* v. *Emerson*, 509.

See DEVISE AND LEGACY, 5.

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WITNESS.

See EVIDENCE, 11, 24, 26.

WORDS.

"Attested." See *Wait* v. *Demeritt*, 158.
"Bequeathed." See *Laing* v. *Barbour*, 523, 525.
"Depart." See *Young* v. *The Orpheus*, 179, 185.
"Fitting up." See *Pratt* v. *Paine*, 439, 446.
"Greater part in interest." See *Henry* v. *Thomas*, 583.
"Legatee." See *Laing* v. *Barbour*, 523, 525.
"Manner." See *Harris* v. *Doherty*, 142, 143.
"Occupancy." See *Cunningham* v. *Washburn*, 224, 227.
"Property." See *Laing* v. *Barbour*, 523, 525.
"Within." See *Young* v. *The Orpheus*, 179, 185.

WORK AND LABOR.

See MASTER AND SERVANT, 1–3; PRINCIPAL AND AGENT, 1;

WRIT.

See TRUSTEE PROCESS, 1, 2.

WRIT OF ENTRY.

See DEED, 2; EQUITY, 4; EXCEPTIONS, 12.

WRIT OF ERROR.

See ERROR.

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MASSACHUSETTS REPORTS

120

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

MARCH — SEPTEMBER 1876

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

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Hon. SETH AMES.
Hon. MARCUS MORTON.
Hon. WILLIAM C. ENDICOTT.
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ATTORNEY GENERAL.

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head of each case, the county in which it arose
argument and judgment, and the judges pres
one date is so given, the case was argued and
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TABLE

OF THE CASES REPORTED.

Acton (Reed *v.*) 180
Adams (O'Connor *v.*) 427
Ætna Ins. Co. (Taylor *v.*) . . 254
Allen (Jackson *v.*) 64
——— (Wamesit Power Co. *v.*) 352
Alley (Hopkins *v.*) 223
Ames (McNeil *v.*) 481
——— *v.* Stevens 218
Annis (O'Brien *v.*) 143
Ashburnham Railroad (Reed *v.*) 43
Atlanta Mills *v.* Mason . . . 244
Atlantic Ins. Co. (Soper *v.*) . 267
Atwill *v.* Mackintosh 177

Bachelder (Black *v.*) 171
Baldwin (Cook *v.*) 317
Bangs (King *v.*) 514
Barnstable Savings Bank *v.* Moors 459
Bartlett *v.* Farrington . . . 284
——— *v.* Hawley 92
Beers (Walling *v.*) 548
Bigelow *v.* Bigelow 320
——— *v.* Boston 326
Bishop (Parks *v.*) 340
Black *v.* Bachelder 171
Blanchard *v.* Ilsley 487
Blasdel *v.* Fowle 447
Boston (Bigelow *v.*) 326
——— (Chapel of the Good Shepherd *v.*) 212
——— (Gardner *v.*) 266
——— (Geraghty *v.*) 416
——— (Gould *v.*) 300
——— (Keith *v.*) 138
——— (Kelso *v.*) 297
——— (McCormick *v.*) . . . 492
——— (Murphy *v.*) 419
Boston (Neuert *v.*) 338
——— (Somerville *v.*) 574
Boston & Albany Railroad (Wiggin *v.*) 201
Boston & Maine Railroad (Smith *v.*) 490
Boston, Hartford & Erie Railroad (Munson *v.*) 81
Bowers (Hill *v.*) 135
Boynton (Walker *v.*) 349
Bramhall (Cummings *v.*) . . 552
Briggs (Burrage *v.*) 103
Brine (Moley *v.*) 324
Brown (Cadigan *v.*) 493
——— (Clark *v.*) 206
——— *v.* Jewett 215
——— *v.* Lawrence 1
Buckley (Perkins *v.*) 8
Builders' Ins. Co. (Kaler *v.*) . 333
——— (Medina *v.*) 225
Bullock (Massachusetts National Bank *v.*) 86
Burke (Loveland *v.*) 139
Burrage *v.* Briggs 103

Cadigan *v.* Brown 493
Cambridge (Leavitt *v.*) . . . 157
Campbell (Johnson *v.*) . . . 449
——— *v.* Johnson 449
——— (Martin *v.*) 126
Cape Cod Railroad (Hinckley *v.*) 257
Capen (Melendy *v.*) 222
Cassidy *v.* Hyland 221
Caswell *v.* Cross 545
Caverly (Davis *v.*) 414
Chapel of the Good Shepherd *v.* Boston 212
Clark *v.* Brown 206
——— *v.* Martin 543

Digitized by Google

Cleary *v.* Sohier 210
Clemence (Morrison *v.*) . . 565
Cobb (Commonwealth *v.*) . . 356
Cohen (Commonwealth *v.*) . 198
Cole (Page *v.*) 87
——— (Tainter *v.*) 162
Coleman *v.* Hawkes 594
Collamore (Putnam *v.*) . . . 454
Commonwealth *v.* Cobb . . 356
——— *v.* Cohen 198
——— *v.* Costello 358
——— *v.* Cusick 183
——— (Fanning *v.*) . . . 388
——— *v.* Fitchburg Railroad 372
——— *v.* Hamilton Manuf. Co. 388
——— *v.* Kenney 387
——— *v.* Lattinville . . . 385
——— *v.* Mechanics' Ins. Co. . 495
——— *v.* Piper 185
——— *v.* Reynolds 190
Connecticut Ins. Co. (White *v.*) 380
Cook *v.* Baldwin 317
——— (Guernsey *v.*) . . . 501
Costello (Commonwealth *v.*) . 358
County Commissioners (Richards *v.*) 401
Cowley *v.* Patch 137
Cross (Caswell *v.*) 545
Cummings *v.* Bramhall . . . 552
Cusick (Commonwealth *v.*) . 183

Davis *v.* Caverly 414
——— (Perkins *v.*) 408
——— *v.* Stone 228
De Best (McCarty *v.*) . . . 89
Dodd *v.* Gloucester Ins. Co. . 468
Dows *v.* Swett 322
Dunham *v.* Presby 285
Dwight (Snell *v.*) 9

Eastern Railroad, *In re* . . . 412

Fanning *v.* Commonwealth . 388
Farrington (Bartlett *v.*) . . 284
Fitchburg Railroad (Commonwealth *v.*) 372
Flynn (Scollans *v.*) 271
Fowle (Blasdel *v.*) 447
Freeman *v.* Venner 424
Frue *v.* Loring 507

Gardner *v.* Bos
Gary (Gerrish
Gay (Hyde Pa
Geraghty *v.* Bo
Gerrish *v.* Gary
Gilson *v.* Hutch
Glendon Co. (N
tional Bank *v*
——— *v.* Town
Gloucester Ins.
Godfrey *v.* Mun
Golden *v.* Know
Gould *v.* Bostor
Greenwood *v.* M
Grout (Safford
Guernsey *v.* Co
Gurney (Robert

Haley *v.* Manu
Co. . . .
Hall *v.* Williams
Hamilton Manu
monwealth *v.*)
Hampden (Park
Hardy (Sears *v.*
——— *v.* Sears
Hatch *v.* Mutual
Hawkes (Colem
Hawley (Bartlet
Herrick *v.* Sulliv
Hilbourne *v.* Sul
Hill *v.* Bowers
Hinckley *v.* Cape
Homer (Newell
Hood (Partridge
Hooper, petition
Hopkins *v.* Alley
Howe (Morrison
Hoyt (Wiley *v.*)
Hurley (Morrill
Hutchinson (Gil
Hyannis Saving
Moors . .
Hyde Park *v.* G
Hyland (Cassidy

Ilaley (Blanchar

Jackson *v.* Allen
Jewett (Brown *v*
Johnson *v.* Camp

Digitized by Google

Johnson (Campbell *v.*) . . . 449
——— *v.* Johnson . . . 465

Kaler *v.* Builders' Ins. Co. . . 333
Keith *v.* Boston 108
Kelley (Killion *v.*) 47
Kelso *v.* Boston 297
Kendall *v.* Kingsley 94
Kenney (Commonwealth *v.*) . 387
Killion *v.* Kelley 47
King *v.* Bangs 514
Kingsley (Kendall *v.*) . . . 94
Knight *v.* Mann 219
——— (Preston *v.*) 5
Knowles (Golden *v.*) . . . 336
Kohlhepp *v.* West Roxbury . 596

Langley (Sullivan *v.*) . . . 437
Lattinville (Commonwealth *v.*) 385
Lawrence (Brown *v.*) . . . 1
Leavitt *v.* Cambridge . . . 157
Loring (Frue *v.*) 507
Loveland *v.* Burke 189

Mackintosh (Atwill *v.*) . . . 177
Mann (Knight *v.*) 219
Manufacturers' Ins. Co. (Haley *v.*) 292
Marks *v.* Sewall 174
Martin *v.* Campbell 126
——— (Clark *v.*) 543
Mason (Atlanta Mills *v.*) . . 244
——— (Pearson *v.*) . . . 58
Massachusetts General Hospital (McDonald *v.*) . . . 432
Massachusetts National Bank *v.* Bullock 86
McCarty *v.* De Best 89
McCormick *v.* Boston . . . 499
——— (Pennock *v.*) . . . 275
McDonald *v.* Massachusetts General Hospital 432
McDonough (Safford *v.*) . . 290
McGilvray (Greenwood *v.*) . 516
McNeil *v.* Ames 481
Mechanics' Ins. Co. (Commonwealth *v.*) 495
Medina *v.* Builders' Ins. Co. 225
Melendy *v.* Capen 222
Merchants' National Bank *v.* Glendon Co. 97
Mills *v.* Perkins 41
Moley *v.* Brine 324
Moors (Barnstable Savings Bank *v.*) 459
——— (Hyannis Savings Bank *v.*) 459
Morrill *v.* Hurley 99
Morris *v.* Penn Ins. Co. . . 503
Morrison *v.* Clemence . . . 565
——— *v.* Howe 565
Moulton (Symmes *v.*) . . . 343
Munson *v.* Boston, Hartford & Erie Railroad 81
Munyan (Godfrey *v.*) . . . 240
Murphy *v.* Boston 419
Mutual Life Ins. Co. (Hatch *v.*) 550

National Bank of Clinton *v.* Taylor 124
National Bank of South Reading (Upton *v.*) 153
Neuert *v.* Boston 338
New Bedford Railroad *v.* Old Colony Railroad 397
Newell *v.* Homer 277
New England Ins. Co. (Ross *v.*) 113
Nickerson (Severy *v.*) . . . 306
——— (Westcott *v.*) . . . 410
Norris (Smith *v.*) 58

Oakman *v.* Rogers 214
O'Brien *v.* Annis 143
O'Connor *v.* Adams 427
——— *v.* Roberts 227
Old Colony Railroad (New Bedford Railroad *v.*) . . . 397
Opinion of the Justices . . . 600

Page *v.* Cole 37
Parks *v.* Bishop 340
——— *v.* Hampden 395
——— *v.* Waltham 160
Partridge *v.* Hood 403
Patch (Cowley *v.*) 137
Patrick *v.* Smith 510
Pearson *v.* Mason 58
Penn Ins. Co. (Morris *v.*) . . 503
Pennock *v.* McCormick . . . 275
Peppard (Pettee *v.*) 522
Perkins *v.* Buckley 8
——— *v.* Davis 408
——— (Mills *v.*) 41

Digitized by Google

Pettee v. Peppard 522
Piper (Commonwealth v.) . . 185
Platt (West v.) 421
Presby (Dunham v.) . . . 285
Preston v. Knight 5
Providence Tool Co. v. United States Manuf. Co. 35
Provincetown v. Smith . . . 96
——— (Snow v.) 580
Putnam v. Collamore . . . 454

Reed v. Acton 130
——— v. Ashburnham Railroad 43
Reid v. Stevens 209
Remick v. Sandford 309
Reynolds (Commonwealth v.) 190
Richards v. County Commissioners 401
Roberts v. Gurney 33
——— (O'Connor v.) . . . 227
——— v. Taft 169
Rogers (Oakman v.) 214
Ross v. New England Ins. Co. 113

Safford v. Grout 20
——— v. McDonough . . . 290
Sandford (Remick v.) . . . 309
Scollans v. Flynn 271
Sears v. Hardy 524
——— (Hardy v.) 524
Severy v. Nickerson 306
Sewall (Marks v.) 174
Simonds v. Turner 328
Simpson v. Trivett 147
Smith v. Boston & Maine Railroad 490
——— v. Norris 58
——— (Patrick v.) 510
——— (Provincetown v.) . . 96
——— v. Union Ins. Co. . . 90
——— (Waters' Patent Heater Co. v.) 444
Snell v. Dwight 9
Snow v. Provincetown . . . 580
Sohier (Cleary v.) 210
Somerville v. Boston . . . 574

Somerville (Squ
Soper v. Atlanti
Sparhawk v. Sp
Squire v. Somer
Stevens (Ames
——— (Reid v.
Stone (Davis v.)
Suffolk (Hilbou
Sullivan (Herric
——— v. Langl
Swett (Dows v.)
Symmes v. Moul

Taft (Roberts v.
Tainter v. Cole
Taylor v. Ætna
——— (Nation
Clinton v.) .
Townsend (Glen
Trivett (Simpson
Tuckerman (Wa
Turner (Simonds

Union Ins. Co. (
United States
(Providence T
Upton v. Natio
South Reading

Venner (Freema

Wainwright v. T
Walker v. Boynt
Walling v. Beers
Waltham (Parks
Wamesit Power
Waters' Patent H
Smith . .
West v. Platt .
Westcott v. Nicke
West Roxbury (I
Whitcomb's case
White v. Connect
Wiggin v. Bosto
Railroad . .
Wiley v. Hoyt
Williams (Hall v.

Digitized by Google

TABLE OF CASES

CITED BY THE COURT.

Adam v. Briggs Iron Co. 7 Cush. 361 176
Adams v. Adams, 100 Mass. 365 321
——— v. Stone, 13 Gray, 396 243
Albro v. Agawam Canal, 6 Cush. 75 228
Aldrich v. Abrahams, Hill & Denio, 423 326
Alger v. Scoville, 1 Gray, 391 416
Allen v. Charlestown, 109 Mass. 243 394, 397
——— v. Impett, 8 Taunt. 263 466
Ames v. Foster, 106 Mass. 400 328, 416
Amicable Society v. Bolland, 4 Bligh N. R. 194 552
Anderson v. Dunn, 6 Wheat. 204 122
Anon., 3 Leon. 211 96
———, Comb. 401 319
Arms v. Ashley, 4 Pick. 71 466
Armstrong v. Lear, 8 Pet. 52 531
——— v. Toler, 11 Wheat. 258 16, 289
Atherton v. Phœnix Ins. Co. 109 Mass. 32 91
Atkins v. Boylston Ins. Co. 5 Met. 439 95
Atlantic National Bank v. Harris, 118 Mass. 147 423
Attorney-General v. Boston Wharf, 12 Gray, 553 134
——— v. Old South Society, 13 Allen, 474 435
Atwater v. Bodfish, 11 Gray, 150 341
Austin v. Cox, 118 Mass. 58 89

Babcock v. Thompson, 3 Pick. 446 274
Bacon v. Gassett, 13 Allen, 334 560
Bailey v. Kilburn, 10 Met. 176 413
Baker v. Biddle, Baldw. 394 467
——— v. Townshend, 1 Moore, 120 405
——— v. ———, 7 Taunt. 422 405
Balcom v. Haynes, 14 Allen, 204 136
Baldey v. Parker, 2 B. & C. 37 291
Ballard v. Dyson, 1 Taunt. 279 341
Ballou v. Hopkinton, 4 Gray, 324 495
Bancroft v. Lynnfield, 18 Pick. 566 162
Bannister v. Alderman, 111 Mass. 261 26
Barker v. Taunton, 119 Mass. 392 418, 421
Barnes v. Foley, 5 Burr. 2711 142
Barre Boot Co. v. Milford Ins. Co. 7 Allen, 42 256
Barter v. Commonwealth, 3 Penn. 253 122
Bartlett v. Parks, 1 Cush. 82 531
Barton v. Rice, 22 Pick. 508 560
——— v. Springfield, 110 Mass. 131 588
Bassett v. Brown, 105 Mass. 551 423
Bates v. Equitable Ins. Co. 10 Wall. 33 91
——— v. Smith, 100 Mass. 181 102
Bay State Brick Co. v. Foster, 115 Mass. 431 499, 572
Beaumont v. Barrett, 1 Moore P. C. 59 122
Beeley v. Wingfield, 11 East, 46 405
Bemis v. Leonard, 118 Mass. 502 95
Benedict v. Cutting, 13 Met. 181 129
Benjamin v. Wheeler, 15 Gray, 486 500, 572
Bennett v. Brooks, 9 Allen, 118 492
Benson v. Remington, 2 Mass. 113 489
Bent v. Hartshorn, 1 Met. 24 222
Bigelow v. Newell, 10 Pick. 348 8
Biggs v. Lawrence, 3 T. R. 454 16
Blackler v. Webb, 2 P. Wms. 383 136
Blake's case, 6 Rep. 43 *b*, 44 *c* 405
Blake v. Baker, 115 Mass. 188 329
Blanchard v. Beers, 2 Blatchf. C. C. 411 75
Bliss v. Negus, 8 Mass. 46 77
Booth v. Commonwealth, 5 Met. 535 367
Boston v. Richardson, 13 Allen, 146 133
——— v. ———, 105 Mass. 351 133
Boston & Fairhaven Iron Works v. Montague, 108 Mass. 248 510
Boston & Sandwich Glass Co. v. Moore, 119 Mass. 435 222
Boston Diatite Co. v. Florence Manuf. Co. 114 Mass. 69 406
Boston Seamen's Friend Society v. Boston, 116 Mass. 181 267, 327
Boston Water Power Co. v. Boston & Worcester Railroad, 16 Pick. 512 494
Bosworth v. Swansey, 10 Met. 363 492
Bourne v. Boston, 2 Gray, 494 214
Bouton v. American Life Ins. Co. 25 Conn. 542 333
Bowditch v. Bannelos, 1 Gray, 220 413
Bowen v. Buck, 28 Vt. 308 407
Bowman v. Taylor, 2 A. & E. 278 77

Digitized by Google

Bowman v. Taylor, 4 Nev. & Man. 264 77
Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228 564
Brady v. Giles, 1 Mood. & Rob. 494 8
Braley v. Boomer, 116 Mass. 527 85
Braman v. Dowse, 12 Cush. 227 458
Breed v. Judd, 1 Gray, 455 326
Brightman v. Hicks, 108 Mass. 246 323
Brooks v. Martin, 2 Wall. 70 15
Brow v. Hathaway, 13 Allen, 239 183
Brown, Ex parte, 5 B. & S. 280 122
Brown v. Brown, 8 El. & Bl. 876 281
——— v. Gellatly, L. R. 2 Ch. 751 412
——— v. Jackson, 3 Wheat. 449 79
——— v. Lapham, 3 Cush. 551 458
——— v. Stone, 10 Gray, 61 52
Burdett v. Abbott, 14 East, 1 121, 196
——— v. ———, 5 Dow, 165 121
Burke v. Savage, 13 Allen, 408 26
Burlingame v. Hobbs, 12 Gray, 367 509
Burnham v. Morrissey, 14 Gray, 226 122
Burritt v. Saratoga County Ins. Co. 5 Hill, 188 256
Butler v. Stratton, 3 Bro. Ch. 367 136
——— v. Worcester, 112 Mass. 541 299
Buttrick v. King, 7 Met. 20 467
Byrom v. Chapin, 113 Mass. 308 515

Cabot Bank v. Russell, 4 Gray, 167 171
——— v. Warner, 10 Allen, 522 94
Caldwell v. Taggart, 4 Pet. 190 530
Callender v. Marsh, 1 Pick. 418 500
Cameron v. M'Farland, 2 Car. Law Repos. 415 407
Campbell v. Knights, 24 Maine, 332 79
——— v. New England Ins. Co. 98 Mass. 381 256
Capen v. Doty, 13 Allen, 262 146
Cardoze v. Swift, 113 Mass. 250 289
Carlton v. Commonwealth, 5 Met. 532 367
Carpenter v. Turrell, 100 Mass. 450 125
Cartwright's case, 114 Mass. 230 120
Case of the Sheriff of Middlesex, 11 A. & E. 273 121
Case v. Gerrish, 15 Pick. 49 448, 502
——— v. Roberts, Holt N. P. 500 466
Castle v. Sworder, 6 H. & N. 828 291
Chaffee v. Boston & Lowell Railroad, 104 Mass. 108 266
Chamberlin v. Huguenot Manuf. Co. 118 Mass. 532 85
——— v. Shaw, 18 Pick. 278 515
Chandler v. Doody, 101 Mass. 267 4
Chenery v. Davis, 16 Gray, 89 523
Chiles, In re, 22 Wall. 157 120
Cholmondeley v. Clinton, 2 J. & W. 1 531
——— v. ———, 4 Bligh, 1 531
——— v. ———, Turn. & Russ. 107 531
Clark v. Reyburn, 8 Wall. 318 530
Clarke's case, 12 Cush. 320 121
Clerk v. Withers, 1 Salk. 322 146
Clifton v. Foster, 103 Mass. 233 85, 348
Clinton v. York, 26 Maine, 167 489
Clouston v. Shearer, 99 Mass. 209 486
Clubb v. Hutson, 18 C. B. (N. S.) 414 406
Coates v. Blush, 1 Cush. 564 448
Cockshott v. Ben
Coddington v. Go
Coles v. Forrest,
Collins v. Blanter
——— v. Hoxie,
Commonwealth v 10
——— v. Boston,
——— v. Cain, 1
——— v. ———,
——— v. Coombs
——— v. Cuffee,
——— v. Cullen,
——— v. Dowdic 133
——— v. Foster,
——— v. Glover,
——— v. Gould,
——— v. Hinds,
——— v. Hitchin
——— v. Hollisto
——— v. Irwin, 1
——— v. James,
——— v. Jenkins
——— v. King, 9
——— v. McCart
——— v. Miller
——— v. Norfolk
——— v. Rickets
——— v. Smith,
——— v. ———,
——— v. Sullivan
——— v. Very, 1
——— v. Vosburg
Connolly v. Bosto
Cook v. Berth, 10
Cooke v. Wildes,
Coombs v. New Co. 102 Mass.
Cooper, In re, 32
Coote v. Boyd, 2
Copeland v. New 22 Pick. 135
Coppell v. Hall, 7
Corley v. William
Courtenay v. ———
Cowling v. Higg 245
Craft v. Boite, 1
Crafts v. Boston,
Craig v. New Y Railroad, 118 M
Creely v. Bay St Mass. 514
Crittenden v. Fiel
Crosby's case, 3 V
———, 2 W. Bl.
Crossley v. Dixon
Cunningham v. P
Curtice v. Bothan
Curtis's case, Fost
Curtis v. Aspinw
——— v. Mansfie
——— v. Pierce,
——— v. Pugh, 1

Digitized by Google

Cusack v. Robinson, 1 B. & S. 299 291
Cutner v. United States, 17 Wall. 517 15

Dale v. Roosevelt, 6 Johns. Ch. 255 117
Dandridge v. Washington, 2 Pet. 370 530
Dare v. Heathcote, 25 L. J. (N. S.) Exch. 245 341
Davis v. Quincy Ins. Co. 10 Allen, 113 296
——— v. Sigourney, 8 Met. 487 281
——— v. Stone, 117 Mass. 486 231
Day v. Green, 4 Cush. 433 572
De Forest v. Fulton Fire Ins. Co. 1 Hall, 84 453
Delaney v. Towns, 1 Allen, 407 219
De Witt v. Harvey, 4 Gray, 486 164
——— v. Pierson, 112 Mass. 8 284
Dexter v. Snow, 12 Cush. 594 448
Dias v. Brunell, 24 Wend. 9 466
Dickenson v. Fitchburg, 13 Gray, 546 394
Dickinson v. Gay, 7 Allen, 29 40
Dill v. Murphy, 1 Moore (N. S.) 487 122
Doane v. Bartlett, 4 Allen, 74 243
Dodsley v. Varley, 12 A. & E. 632 291
Doe v. Childress, 21 Wall. 642 85
Doll, Ex parte, 7 Phila. 595 121
Dowd v. Chicopee, 116 Mass. 93 588
Downs v. Lewis, 11 Cush. 76 448
Doyle v. Falconer, L. R. 1 P. C. 328 122
Drage v. Ibberson, 2 Esp. 643 405
Drake v. Curtis, 9 Cush. 446 n. 134
Dufaur v. Oxenden, 1 Mood. & Rob. 90 319
Dunavan v. Flynn, 118 Mass. 537 319
Dunklee v. Crane, 103 Mass. 470 347
Durfee v. Durfee, 8 Met. 490 n. 281
Dyer v. Homer, 22 Pick. 253 16

Easterbrooks v. Tillinghast, 5 Gray, 17 541
Eastern Railroad v. Relief Ins. Co. 98 Mass. 420 256
Eckersley v. Platt, L. R. 1 P. & D. 281 281
Edgcombe v. Rodd, 5 East, 294 405
——— v. ———, 1 Smith, 515 405
Edwards v. Bates, 7 Man. & Gr. 590 466
Egan v. Mutual Ins. Co. 5 Denio, 326 256
Elkins v. Boston & Albany Railroad, 115 Mass. 190 588
Ellicott v. Coffin, 106 Mass. 365 8, 267
Elliott v. Balcom, 11 Gray, 286 117
——— v. Richardson, L. R. 5 C. P. 744 502
Ellis v. Boston, Hartford, & Erie Railroad, 107 Mass. 1 413
Emery's case, 107 Mass. 172 122
Emery v. Gowen, 4 Greenl. 33 489
Evans v. Richardson, 3 Meriv. 469 15, 289
Exchange Bank v. Rice, 107 Mass. 37 523

Fallowes v. Taylor, Peake Ad. Cas. 155 405
——— v. ———, 7 T. R. 475 405
Fall River Iron Works Co. v. Old Colony Railroad, 5 Allen, 221 494
Falvey's case, 7 Wis. 630 122
Farmer v. Russell, 1 B. & P. 296 16
Farmers' & Mechanics' Bank v. Champlain Transportation Co. 18 Vt. 131 142
——— v. ———, 23 Vt. 186 142
Farnum v. Farnum, 13 Gray, 508 336
Farwell v. Cambridge, 11 Gray, 413 394
Fearns v. Young, 9 Ves. 549 412
Feital v. Middlesex Railroad, 109 Mass. 398 493
Felch v. Hooper, 119 Mass. 52 413
Fenton v. Hampton, 11 Moore P. C. 347 122
Fernandes, In re, 6 H. & N. 717 120
——— v. ———, 10 C. B. (N. S.) 3 120
Fickett v. Durham, 119 Mass. 159 85
Field v. Crawford, 6 Gray, 116 88
Finch v. Finch, L. R. 1 P. & D. 371 281
Fisher v. Appollinaris Co. L. R. 10 Ch. 297 406
Fitzgerald v. Commonwealth, 5 Allen, 509 339
Fletcher v. Boston & Maine Railroad, 1 Allen, 9 336
Foley v. Hill, 2 H. L. Cas. 28 509
Folger v. Worth, 19 Pick. 108 306
Folsom v. Haskell, 11 Cush 470 88
Forsyth v. Hooper, 11 Allen, 419 47, 587
Foster v. Ames, 1 Lowell, 313 85
——— v. Moore, 1 Curtis, 279 75
Fowle v. Common Council of Alexandria, 11 Wheat. 320 337
Fox v. Adams Express Co. 116 Mass. 292 423
——— v. Harding, 7 Cush. 516 423
Franklin v. Greene, 2 Allen, 519 117
Franklin Savings Institution v. Central Ins. Co. 119 Mass. 240 91
Fraser v. Byng, 1 Russ. & Myl. 90 238
French v. Taunton Branch Railroad, 116 Mass. 537 263, 588
Fryer v. Kinnersley, 15 C. B. (N. S.) 422 183
Fulham v. McCarthy, 1 H. L. Cas. 703 531
Fuller v. Dame, 18 Pick. 472 502
——— v. Meehan, 118 Mass. 135 153
Furbish v. Goodnow, 98 Mass. 296 416
Furman v. Van Sise, 56 N. Y. 435 489

Gannon v. Hargadon, 10 Allen, 106 102
Gardner v. Heartt, 3 Denio, 232 535
Gaw v. Hughes, 111 Mass. 296 52
Gayler v. Wilder, 10 How. 477 77
Gaynor v. Old Colony & Newport Railway, 100 Mass. 208 265
Geraghty v. Boston, 120 Mass. 416 421
Gerald v. ———, 108 Mass. 580 588
Gibbens v. Peeler, 8 Pick. 254 33
Gibbs v. Smith, 115 Mass. 592 502
Gibson v. Crehore, 3 Pick. 475 458
——— v. Culver, 17 Wend. 305 142
——— v. Hunter, 2 H. Bl. 187 337
Gifford v. Rockett, 119 Mass. 71 88
Gill v. Herrick, 111 Mass. 501 323

Digitized by Google

Goddard v. Boston, 20 Pick. 407 575
——— v. May, 109 Mass. 468 559
Gooch v. Association for Relief of Aged Females, 109 Mass. 558 435
Gooding v. Shea, 108 Mass. 360 515
Goodyear v. Bishop, 4 Blatchf. C. C. 438 77
——— v. McBurney, 3 Blatchf. C. C. 32 77
Gordon v. Clapp, 111 Mass. 22 510
——— v. Green, 113 Mass. 259 531
Gould v. Emerson, 99 Mass. 154 467
Grant v. Shaw, 16 Mass. 341 319
Graves v. Graves, 108 Mass. 314 391
——— v. Shattuck, 35 N. H. 257 572
Griffiths v. Teetgen, 15 C. B. 344 489
Griswold v. Waddington, 16 Johns. 438 16

Hall v. Davis, 3 Pick. 450 559
——— v. Pike, 100 Mass. 495 47
Hampson v. Hampson, 3 V. & B. 41 116
Hancock v. Hubbard, 19 Pick. 167 561
Harper v. Ross, 10 Allen, 332 277
Harrison v. Bush, 5 E. & B. 344 183
Hartshorn v. South Reading, 3 Allen, 501 494
——— v. Worcester, 113 Mass. 111 421
Harvard College v. Boston, 104 Mass. 470 267
Harvey v. Varney, 98 Mass. 118 17
Haskins v. Warren, 115 Mass. 514 291
Hatch v. Hobbs, 12 Gray, 447 222
Hawkes v. Remington, 111 Mass. 171 76
Hawks v. Charlemont, 110 Mass. 110 190
Hayden v. Attleborough, 7 Gray, 338 401
——— v. Foster, 13 Pick. 492 300
Hayne v. Maltby, 3 T. R. 438 78
Hazelton v. Valentine, 113 Mass. 472 523
Heald v. Lang, 98 Mass. 581 572
Heard v. Pierce, 8 Cush. 338 121
Heath v. Stevens, 48 N. H. 251 326
Hedges v. Tagg, L. R. 7 Ex. 283 490
Heland v. Lowell, 3 Allen, 407 492
Heming v. Clutterbuck, 1 Bligh N. R. 479 238
Hemphill v. Boston, 8 Cush. 195 304
Heron v. Stokes, 2 Dru. & War. 89 136
——— v. ———, 1 Con. & Laws. 270 136
——— v. ———, 4 Irish Eq. 284 136
Hewitt v. Prime, 21 Wend. 79 489
Hicks v. McDonnell, 99 Mass. 459 8
Hilbourne v. Suffolk, 119 Mass. 393 397
Hill v. Duncan, 110 Mass. 238 89
——— v. Weldon, 3 Kerr N. B. 1 122
Hilton v. Merrill, 106 Mass. 528 62, 410
Hinds v. Chamberlin, 6 N. H. 225 407
Hoar v. Goulding, 116 Mass. 132 231
Hobart v. Andrews, 21 Pick. 526 509
Holbrook v. Jackson, 7 Cush. 136 26
Holden v. Eaton, 7 Pick. 15 300
Holland v. Baker, 3 Hare, 68 530
——— v. Cruft, 20 Pick. 321 32
Holliday v. St. Leonard's, 11 C. B. (N. S.) 192 436
Holmes v. Blogg, 2 Moore, 552 226
Holmes v. Blogg, 8
Hooley v. Hatton
——— v. ———,
——— v. ———,
Hopkins v. Cromt
——— v. Hopkin
——— v. ———,
Horn v. Anglo-A
Co. 30 L. J. (N
Horton v. Benson
Howland v. Coffin
Hoyt v. Swift, 13
Hubbe v. Clark, 1
Hunt v. Hecht, 8
——— v. Thomps
Hyde Park v. Cc
ers, 117 Mass. 4

Idley v. Bowen, 1
Indermaur v. Dan
274
——— v. ———,
Ipswich Manuf. C
310
Isaacs v. Royal In
296

Jackson v. Phillip
——— v. Roberts,
——— v. Waldron
Jacot v. Wyatt, 1(
James v. Semmen
Jarvis v. Rogers, 1
Jecker v. Montgon
Jenks v. Dyer, 102
Jennings v. Tisbur

Joannes v. Bennet
——— v. Burt, 6
Johnson's Will, 40
Johnson v. Cuttle,
——— v. Ogilby,
——— v. Rayner,
Jones v. Andover,
——— v. Newhall,
——— v. Rice, 18
Jordon v. Money,
Joslyn v. Wyman,
Josslyn v. Comm
236

Kaley v. Shed, 10
Keir v. Leeman, 6
——— v. ———, 9
Kelly v. Laws, 109
Kennedy v. Shea, 1
Kershaw v. Kelsey,
——— v. Wright, 1
Kielley v. Carson, 4
Kilborn v. Robbins
Kimball v. Ætna
540
——— v. Cushman
——— v. Story, 10
King v. Hoare, 13 1
——— v. State Ins.

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King, The, v. Almon, Wilmot, 243 121
——— v. Stevens, 5 East, 244 96
Kinmonth v. Brigham, 5 Allen, 270 412
Kinney v. Ensign, 16 Pick. 232 524
Kinsman v. Parkhurst, 18 How. 289 16, 79
Knapp v. Knapp, 6 Seld. 276 282
Kneas v. Fitler, 2 S. & R. 263 196
Knight v. Mann, 118 Mass. 143 220, 291, 316
——— v. Peacock, 116 Mass. 362 26

Lane v. Atlantic Works, 111 Mass. 136 592
——— v. Hitchcock, 14 Johns. 213 515
Langdon v. Dond, 10 Allen, 433 79
Lanman v. Lebanon Valley Railroad, 30 Penn. St. 42 400
Launock v. Brown, 2 B. & Ald. 592 196
Lawes v. Purser, 6 E. & B. 930 79
Lawrence v. Holyoke Ins. Co. 11 Allen, 387 91
Leather v. Simpson, L. R. 11 Eq. 398 498
Leland v. Felton, 1 Allen, 531 523
Lewis v. Beattie, 105 Mass. 410 351
——— v. Shattuck, 4 Gray, 572 125
——— v. Western Railroad, 11 Met. 509 143
Lincoln v. Pelham, 10 Ves. 166 136
Lobdell v. Baker, 3 Met. 469 25
Locke v. Bennett, 7 Cush. 445 509
Lord v. Wheeler, 1 Gray, 282 211
Loring v. Manufacturers' Ins. Co. 8 Gray, 28 91
Lovering v. Minot, 9 Cush. 151 467
Lowell v. County Commissioners, 3 Allen, 546 327
——— v. Hadley, 8 Met. 180 299, 390
——— v. Wentworth, 6 Cush. 221 299
Lowell Meeting-house v. Lowell, 1 Met. 538 214
Luce v. Dorchester Ins. Co. 105 Mass. 297 256
Lyman v. Amherst, 107 Mass. 339 588
Lynn v. Nahant, 113 Mass. 433 133

Maddox v. United States, 15 Wall. 58 13
Mahoney v. Metropolitan Railroad, 104 Mass. 73 588
Marshall v. Baltimore & Ohio Railroad, 16 How. 314 502
Martin v. Payne, Bigelow Lead. Cas. Torts, 286 489
——— v. Root, 17 Mass. 222 33
Mason v. Daly, 117 Mass. 403 392
——— v. Eldred, 6 Wall. 231 138
——— v. Waite, 17 Mass. 560 274
Matthews v. Bliss, 22 Pick. 48 25
Maurer v. Mitchell, 9 W. & S. 69 407
Maynard v. Buck, 100 Mass. 40 34
Mayo v. Boston & Maine Railroad, 104 Mass. 137 262
McBlair v. Gibbes, 17 How. 232 16
McCabe v. Swap, 14 Allen, 188 458
McCormick v. Talcott, 20 How. 402 75
McGrath v. Merwin, 112 Mass. 467 492
McKee v. United States, 8 Wall. 163 289
Meacham v. Fitchburg Railroad, 4 Cush. 291 394
Mead v. Young, 4 T. R. 28 371
Medbury v. Watrous, 7 Hill, 110 326
Meehan v. Barry, 97 Mass. 447 52
Mellen v. Whipple, 1 Gray, 317 523
Mercer v. Jones, 3 Camp. 477 426
Metallic Compression Co. v. Fitchburg Railroad, 109 Mass. 277 593
Meyer v. Simonsen, 5 De G. & Sm. 723 412
Michigan State Bank v. Gardner, 3 Gray, 305 530
Middlesex Co. v. Osgood, 4 Gray, 447 210
Middleton v. Speright, Cary, 80 121
Milkman v. Ordway, 106 Mass. 232 165
Miller v. Butler, 6 Cush. 71 182
——— v. Ewing, 6 Cush. 34 79
——— v. Life Ins. Co. 12 Wall. 285 333
——— v. Washburn, 117 Mass. 371 249
Milliken v. Thorndike, 103 Mass. 382 25
Minter v. Mower, 1 Nev. & P. 595 74
——— v. ———, 6 A. & E. 735 74
——— v. ———, 1 Webst. Pat. Cas. 138 74
——— v. Wells, 1 Webst. Pat. Cas. 127 75
——— v. ———, 5 Tyrwh. 163 75
——— v. ———, 1 C., M. & R. 505 75
Mirick v. Hoppin, 118 Mass. 582 284
Moggridge v. Thackwell, 1 Ves. Jr. 464 238
Moody v. Gay, 15 Gray, 457 550
Moore v. Boston, 8 Cush. 274 355
——— v. Woolsey, 4 E. & B. 243 552
Morgan, Ex parte, 2 Ch. D. 72 117
Morrill v. Norton, 116 Mass. 487 243
Morrison v. McDonald, 21 Maine, 550 121
Morse v. Connecticut River Railroad, 6 Gray, 450 205
——— v. Sherman, 106 Mass. 430 291
Morton v. Tibbett, 15 Q. B. 428 316
——— v. Westcott, 8 Cush. 425 171
Mullaney v. National Ins. Co. 118 Mass. 393 256
Murphy v. Deane, 101 Mass. 455 262
Murray v. Hay, 1 Barb. Ch. 59 495
Myers v. Meinrath, 101 Mass. 366 508

Nelson v. Boynton, 3 Met. 396 323, 416
——— v. Milford, 7 Pick. 18 162
New Haven & Northampton Co. v. Hayden, 119 Mass. 361 139
New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656 85
Nichols v. Ramsel, 2 Mod. 280 95
Nickerson v. Loud, 115 Mass. 94 486
Nicol v. Vaughan, 5 Bligh N. R. 505 116
——— v. ———, 2 Dow & Cl. 420 116
Noble v. Peebles, 13 S. & R. 319 407
Noton v. Brooks, 7 H. & N. 499 79

Digitized by Google

Odiorne v. Winkley, 2 Gallis. 51 75
O'Linda v. Lothrop, 21 Pick. 292 51
Oliver v. Worcester, 102 Mass. 489 304
Osgood v. Breed, 17 Mass. 356 559
Ouachita Cotton, The, 6 Wall. 521 15

Page v. Bent, 2 Met. 371 25
Palmer v. Everett, 7 Allen, 358 242
Parker v. Nightingale, 6 Allen, 341 494
——— v. Parker, 118 Mass. 110 413
Partridge v. Messer, 14 Gray, 180 448
Pasley v. Freeman, 3 T. R. 51 427
Patrick v. Pote, 117 Mass. 297 588
Patten v. Deshon, 1 Gray, 325 485
Peabody v. School Committee of Boston, 115 Mass. 383 124
Peebles v. Boston & Albany Railroad, 112 Mass. 498 205
Pelletreau v. Jackson, 11 Wend. 110 79
People v. Allen, 6 Wend. 486 390
——— v. Bishop, 5 Wend. 111 407
Perry v. Thornton, 7 R. I. 15 88
Phelps v. Thomas, 6 Gray, 327 448
Phillips v. Ward, 2 H. & C. 717 138
Phippen v. Stickney, 3 Met. 384 502
Pierce v. Benjamin, 14 Pick. 356 515
——— v. Cambridge, 2 Cush. 611 214
Pike v. Brown, 7 Cush. 133 523
——— v. Fay, 101 Mass. 134 447
——— v. Galvin, 29 Maine, 183 79
Piper v. Pearson, 2 Gray, 120 121
——— v. Richardson, 9 Met. 155 134
Pond v. Negus, 3 Mass. 230 390
Pool v. Bousfield, 1 Camp. 55 405
Poole v. Poole, L. R. 7 Ch. 17 560
Post v. Kearney, 2 Comst. 394 329
Pratt v. Pond, 5 Allen, 59 486
Prentiss v. Boston, 112 Mass. 43 266
Prescott v. Prescott, 7 Met. 141 559
Prudential Assurance Co. v. Knott, L. R. 10 Ch. 142 406

Queen, The, v. Blakemore, 14 Q. B. 544 406
——— v. Gossett, 3 P. & D. 349 121
——— v. Hardey, 14 Q. B. 529 406

Railroad Co. v. Fort, 17 Wall. 553 431
Ramsdell v. Edgarton, 8 Met. 227 448
Ray v. Norseworthy, 23 Wall. 128 85
——— v. Wight, 119 Mass. 426 85, 125
Raynham Congregational Society v. Trustees of Fund in Raynham, 23 Pick. 148 509
Reed v. Northfield, 13 Pick. 94 306
Reform, The, 3 Wall. 617 15
Regina v. Rogers, 8 C. & P. 629 371
Remick v. Sandford, 118 Mass. 102 315
Rex v. Alton, 1 Burr. 307 575
——— v. Bontien, Russ. & Ry. 260 371
——— v. Peacock, Russ. & Ry. 278 371
——— v. St. Gregory, 2 A. & E. 99 390
——— v. Syderstone, Cald. 19 96
——— v. Whiley, Russ. & Ry. 90 371
Richards v. Delbridge, L. R. 18 Eq. 11 564

Richardson v. Pc
Rider v. Ocean 259
Right v. Bucknel
Rogers v. Daniel
Roper v. Holland
Rose v. Gould, 1
Royce v. Guggen
Russell v. Dicks 133
——— v. ———
——— v. ———
——— v. Goodri
Ryan v. Boston,

Sanderson v. Wl
Sargent v. Sarge
Sawyer v. Wisw
Sea Lion, The, 5
Semayne's case,
Sewall v. Robert
Shailer v. Bumst
Shannon v. Shar
Sharp v. Taylor,
Shaw v. McIntie
——— v. Reed,
——— v. Spoon
Sheldon v. Atlar 460
——— v. Connc 25 Conn. 207
Shelton v. Codm
Short Mountain 114 Mass. 197
Shumway v. Ru
Shurtleff v. Fra
Skinner v. Frost
Sloan v. Hollida 757
Smith v. Broml
——— v. Chand
——— v. Collin
——— v. Hayn
——— v. Living
——— v. Sanbo
——— v. Scott,
——— v. Town
Snell v. Dwight
Snow v. Provi 123
Sohier v. Inche
Somers v. Kelih
Sparhawk v. S 315
Speaker v. Glas
Spear v. Pratt,
——— v. Tinkl
Springfield v. G
Sprott v. Unitec
Spurr v. Scovil
Squire v. Holle
Stanton v. Metr Allen, 485
Stark v. Coffin,
State v. Copp,
——— v. Hunt

Digitized by Google

State v. Jersey City Common Council, 1 Dutcher, 536 124
——— v. Matthews, 37 N. H. 450 122
Stewart v. Gibson, 7 Cl. & Fin. 707 15
Stillwell v. Staples, 19 N. Y. 401 453
St. John v. Van Santvoord, 25 Wend. 660 142
St. Michael v. Nunny, 1 Stra. 544 575
Stockbridge Iron Co. v. Hudson Iron Co. 102 Mass. 45 116, 281, 341
——— v. ———, 107 Mass. 290 117
Stone v. Charlestown, 114 Mass. 214 121
——— v. Lane, 10 Allen, 74 156
——— v. Russell, 11 Gray, 226 243
——— v. Sanborn, 104 Mass. 319 205
Suffolk Ins. Co. v. Boyden, 9 Allen, 123 296
Sullivan v. India Manuf. Co. 113 Mass. 396 431
Summersell v. Fish, 117 Mass. 312 228
Suter v. Matthews, 115 Mass. 253 510
Sweeny v. Old Colony Railroad, 10 Allen, 368 307

Tayloe v. Merchants' Ins. Co. 9 How. 390 333
Taylor, Ex parte, 8 De G., M. & G. 254 326
——— v. Chester, L. R. 4 Q. B. 309 503
Tenant v. Elliott, 1 B. & P. 3 16
Thacher v. Williams, 14 Gray, 324 243
Thayer v. Commonwealth, 12 Met. 9 120
Thomas v. Poole, 7 Gray, 83 52
Thompson v. Alger, 12 Met. 428 58
Thomson v. Thomson, 7 Ves. 470 16, 289
Thorndike v. Locke, 98 Mass. 340 58
Toogood v. Spyring, 4 Tyrw. 582 182
Torrey v. Millbury, 21 Pick. 64 299
Towne v. Fitchburg Ins. Co. 7 Allen, 51 256
Townsend v. Hargraves, 118 Mass. 325 291
Treadwell v. Cordis, 5 Gray, 341 558
Tucker Manuf. Co. v. Fairbanks, 98 Mass. 101 94
Tufts v. Charlestown, 2 Gray, 271 52
——— v. Newton, 119 Mass. 476 87
Twitchell v. Commonwealth, 7 Wall. 321 321
Tyler v. Sturdy, 108 Mass. 196 305

United States v. Grossmayer, 9 Wall. 72 15
——— v. Lane, 8 Wall. 185 13
——— v. Lapène, 17 Wall. 601 15
Upham v. Worcester, 113 Mass. 97 394
Upton v. Prince, Cas. temp. Talbot, 71 557
——— v. South Reading Branch Railroad, 8 Cush. 600 394

Vale v. Butler, 111 Mass. 55 447
Valentine v. Piper, 22 Pick. 85 134
Van Rensselaer v. Kearney, 11 How. 297 79
Vincent v. Groom, 1 Yerger, 430 407

Waldo v. Martin, 4 B. & C. 319 502
Wallace v. Hardacre, 1 Camp. 45 405
Ward v. Allen, 2 Met. 53 318
——— v. Hill, 4 Gray, 593 117
——— v. Johnson, 13 Mass. 148 138
——— v. Peck, 114 Mass. 121 510
Warriner v. Rogers, L. R. 16 Eq. 340 564
Waters v. Monarch Assurance Co. 5 El. & Bl. 870 453
Weare v. Fitchburg, 110 Mass. 334 588
Weidner v. Foster, 2 Penn. 23 330
Wells v. Brigham, 6 Cush. 6 318
——— v. Calnan, 107 Mass. 514 211
Welsh v. Joy, 13 Pick. 477 146
Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 145 498
Weston v. Foster, 7 Met. 297 136
Wheelock v. Boston & Albany Railroad, 105 Mass. 203 266
Whitcomb v. Converse, 119 Mass. 38 325
White v. Buss, 3 Cush. 448 274
——— v. Franklin Bank, 22 Pick. 181 503
——— v. Godfrey, 97 Mass. 472 351
Whitman v. Boston & Maine Railroad, 3 Allen, 133 394
Whiton v. Nichols, 3 Allen, 583 231
Wicker v. Norris, Cas. temp. Hardw. 116 95
Wight v. Shaw, 5 Cush. 56 79
Williams v. Bayley, L. R. 1 H. L. 200 406
——— v. Bosanquet, 1 Brod. & Bing. 238 330
——— v. ———, 3 Moore, 500 330
——— v. Cummington, 18 Pick. 312 306
——— v. Grealy, 112 Mass. 79 264
——— v. James, L. R. 2 C. P. 577 341
——— v. Powell, 101 Mass. 467 231
——— v. School District, 21 Pick. 75 390
Wills v. Brown, 118 Mass. 137 416
Wilson v. Lynn, 119 Mass. 174 354
Wimbledon Commons v. Dixon, 1 Ch. D. 362 342
Winans v. Denmead, 15 How. 330 75
——— v. New York & Erie Railroad, 21 How. 88 74
Winslow v. Cummings, 3 Cush. 358 413
Wooley v. Groton, 2 Cush. 305 134
Workman v. Worcester, 118 Mass. 168 112
——— v. Workman, 2 Allen, 472 558
Wright v. Dame, 22 Pick. 55 508
——— v. Malden & Melrose Railroad, 4 Allen, 283 592
——— v. Wright, 13 Allen, 207 281, 341, 399

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

GEORGE H. BROWN *vs.* CITY OF LAWRENCE.

ESSEX. Nov. 5, 1875. — March 1, 1876. COLT, MORTON & LORD, JJ., absent.

Evidence of a vote of a town to repair a road, passed within six years before an accident caused by a defect in the road, is not evidence of the location of the road by the town, no repairs having been made by the town under the vote until after the accident.

TORT for personal injuries alleged to have been caused on the night of December 9, 1873, by a defect in a highway in the defendant city. The answer denied that the city was bound to keep the way in repair.

At the trial in this court, before *Ames*, J., the plaintiff, upon the question of the liability of the city, introduced evidence tending to show that the highway was an old road within the limits of the defendant city, but no evidence was offered that it had ever been laid out or in terms accepted, or of the original laying out of the way. The plaintiff also introduced evidence to show that the defendant had made some slight repairs upon the road within six years before the injury to the plaintiff. The plaintiff also offered in evidence, to show liability upon the part of the defendant to keep said road in repair, the records of the board of aldermen of Lawrence for 1873, which

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showed that on July 7, 1873, a petition was received by the mayor and aldermen, addressed to them, signed by *persons* dwelling upon the road in question, stating that said road was out of repair, and praying for repairs upon the same; that the petition was referred by the board of aldermen to the committee upon streets, which reference was concurred in by the common council of said city; that the committee on streets, in October following, made a report to the board of aldermen, referring the subject matter of the petition to the commissioner of streets for said city, with authority to make such repairs as he should deem necessary, which report was accepted by the board of aldermen, and repairs were subsequently made by said commissioner, but not until after the date of the injury for which the plaintiff seeks to recover. The defendant objected to the introduction of the petition, record and report, as incompetent for the purpose for which they were offered; but the judge overruled the objection, and they were introduced and read to the jury. The jury returned a verdict for the plaintiff for $9000; and to the introduction of this evidence the defendant alleged exceptions.

W. S. Knox, for the defendant.

C. Saunders & C. G. Saunders, for the plaintiff.

AMES, J. The only question raised by this bill of exceptions relates to the competency of a portion of the evidence admitted at the trial, namely, the vote of the city council of Lawrence. It is provided by Gen. Sts. *c.* 44, § 26, that if it appears that the town against which the suit is brought has at any time, within six years before the injury complained of, made repairs upon the way, it "shall not deny the location thereof." It is argued on behalf of the plaintiff, that the act of making such repairs is only an implied admission of the continued existence of the way, and is one mode of proof of the defendant's recognition of it as such; *Commonwealth* v. *Holliston*, 107 Mass. 232; but that the vote of the city council of Lawrence is a formal, express and solemn recognition of the liability of the city to make repairs upon the way in question, provided any should be found to be necessary. But the meaning of the statute is that when a town has made repairs upon the way, as above described, it shall be estopped to deny its proper location. There is no provision that

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any other act or proceeding on the part of the town, short of a regular laying out, shall have that effect. No authority is given to towns, or to city councils, to establish town ways or public ways of any description by mere admissions or votes, however formal, or by any proceedings whatever, except such as are pointed out by statute. The act of repairing a public way is unequivocal and irrevocable in its nature, and the Legislature has deemed it of sufficient importance to give to it the effect of an estoppel. A vote to make repairs, so long as it remained unexecuted, as it did in this case, may be reconsidered and revoked; and there is no law attaching to it the consequences which follow the actual making of repairs. The defendant's objection to the evidence was therefore well taken, and the

Exceptions are sustained.

JOSEPH PERKINS, JR., *vs.* FRANKLIN BUCKLEY & another.

Essex. Nov. 4, 1875. — March 3, 1876. COLT, MORTON & LORD, JJ., absent.

Where a vessel signals for a pilot before entering the harbor of Salem and Beverly, and the pilot does not offer his services until after she has passed the harbor lines and the signal has been taken down, the vessel may decline his services, and is not liable for compulsory pilotage fees under the statutes of this Commonwealth.

CONTRACT against the owners of the schooner Bay State, to recover pilotage fees. At the trial in the Superior Court, *Bacon*, J., ruled that, upon the facts presented, the plaintiff could not recover, and directed a verdict for the defendants. The plaintiff alleged exceptions, the substance of which appears in the opinion.

C. W. Richardson, for the plaintiff.

C. A. Benjamin, for the defendants.

ENDICOTT, J. The schooner Bay State, a coasting vessel, bound for Beverly, when outside the harbor lines of Salem and Beverly, set her signal for a pilot. The pilot boat Ariomedes, under the charge of the plaintiff, saw the signal and made sail for the Bay State, but did not reach her till after the signal was

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she was within the harbor lines.
is services, which were declined, and
ld hold the Bay State liable for his
the plaintiff cannot maintain this ac
, under the statutes.
in the coasting trade, declining the
ed to pay compulsory pilotage. St. 18
, § 24. And within the harbor lines
re is no compulsory inward pilotage
. 176, § 24, regulations as to Salem
harbor lines, a duly appointed pilot is
o take charge of any vessels bound
f his commission, except coasting ves
t from compulsory pilotage, and to
d to their port of destination. St. 18
. *c.* 52. The pilot therefore must
dy to take charge of such vessel be
he harbor lines. If he does so, he is
er his services are accepted or not.
onably, so that the vessel can avail
ches the harbor limits; for after she
e cannot be held to pay compulsory
Ricketson, 5 Met. 412, 420. It is a
his services and go on board any
vessels, having a signal set for a
t of destination. If he makes such
is duty to inform the vessel that she
r fees for pilotage, whether his ser
St. 1862, *c.* 176, § 24, regulation 5.
Mass. 267. But it is clear from
ation that this duty imposed on pi
ls who signal for a pilot, refers to
its. And in such cases the offer
ly made to the coasting vessel, as to
lot be in a position to take charge of
he harbor lines, in order to hold her
or after she is within those lines she
rvices, in the same manner as any o
lsory pilotage may decline.

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The signal of the Bay State was for a pilot to take her into the harbor of Salem and Beverly. As the plaintiff failed to offer his services before the vessel passed the harbor lines, she was at liberty to decline his services, and was not liable for compulsory pilotage. It does not appear by the bill of exceptions that the signal was flying after the Bay State passed within the harbor lines, and no question arises as to what would be the rights of the plaintiff if she had signalled or continued to signal for his services while within the lines.

The only ruling at the trial was, that the plaintiff could not recover the statutory fees upon the facts presented.

Exceptions overruled.

RICHARD J. PRESTON *vs.* JOHN KNIGHT.

Essex. Nov. 5, 1875. Jan. 24. — March 7, 1876.

An action of tort for injuries alleged to have been caused by the negligence of the defendant's servant in driving his wagon, was referred, by agreement of parties and under rule of court, to an arbitrator, judgment on whose report was to be final. His report stated the evidence presented before him, by which it appeared that the defendant was a tanner and currier, employing the wagon and its driver in his business, usually sending it away weekly with a load of stock, and occasionally, upon its return empty, agreeing to bring back a load for some other person; that at the time of the injury the defendant had so agreed to carry a load of machinery, which the owners thereof were to load and unload; that they loaded the machinery accordingly, the driver helping in lifting, but taking no part in stowing it; that a heavy table at the top of the load was not bound on, but a servant of the owners rode on the wagon to steady the table and keep it in place; that the driver, before starting, said to the owners that the table should be fastened on, and they answered that it was not necessary; the driver then asked them if the load was all on, and, on their answering that it was, started on his way; and that, in going down a descent in the road, the table fell and caused the injury sued for. The arbitrator reported that the horses, wagon and driver were suitable for the business in which they were employed; that the owners of the machinery were guilty of negligence in not properly binding their load upon the wagon, and in directing the driver to start with the load in the condition in which they had placed it; and that the driver was careless in attempting to carry the load through the street with the wagon so loaded; and that the main question was, whose servant the driver was in starting and driving the wagon as it was loaded; and the arbitrator reported the case to the Superior Court "for its determination as a matter of law" for which party judgment should be entered as depending upon this question. The Superior Court gave judgment for the plaintiff on the report. *Held*, on appeal to this

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court, that the question whether the driver was the servant of the defendant in starting and driving the wagon with the load so put upon it was a fact which the arbitrator was bound to decide, and that the judgment must be set aside.

TORT for injuries occasioned by the negligence of a person alleged to be the defendant's servant. The case was referred, by agreement of parties and rule of the Superior Court, to an arbitrator, judgment on whose report was to be final, and execution to issue accordingly. The report of the arbitrator was as follows:

"It appeared upon the evidence that the defendant was engaged in the tanning and currying business at Manchester, and the owner of a two-horse team employed in his business, with a teamster named John Lamaskie; that he usually sent his team, with the driver Lamaskie, to Peabody, once a week, with a load of stock, the team usually returning without a load, but sometimes the defendant would have a return load, and occasionally some person desiring a load to be taken from some point on the road to Manchester, would employ the defendant to carry it, which would be done by the team on its return from Peabody to Manchester; that about May 21, 1871, Rust and Marshall, of Manchester, had purchased a quantity of machinery at the building of one Webber in Beverly, on the western side and a short distance from the track of the Eastern Railroad, and contracted to have the team of the defendant, on its return trip from Peabody, take the machinery from that building to Manchester for the sum of three dollars. It was agreed between the defendant and Rust and Marshall that the latter should furnish men to load the same at Beverly and unload at Manchester, which they did, the teamster Lamaskie helping to lift the machinery, but taking no part in stowing it; that the machinery, except a table, after being loaded, was bound with a cart-rope; the table, being about six feet long and three feet wide, was put on top of the other machinery, but not bound on, but a man in the employ of Rust and Marshall rode on the wagon and promised to steady the table and keep it in the place where it was put. The wagon had side-boards and stakes; the load, exclusive of the table, was up to the top of the side-boards; the table was not above the tops of the stakes. The team so loaded by Rust and Marshall was started by the teamster, he first having said to

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Marshall that the table should be fastened on, and Marshall replying, 'It don't need it.' The teamster, before starting, asked Marshall if 'all the stuff was on, and he was ready to have him start,' to which Marshall replied 'Yes.' The table started a little before the team crossed the railroad, the man on the wagon saying 'I think I can hold it.' When the team was just over the railroad track and on descending ground, the railroad track being a little higher than the highway, which it passed at grade, the table fell off in front of the wagon, struck the thill horse, frightened him, and caused both horses to run and become unmanageable. The plaintiff's horse and carryall were in the highway going in an opposite direction. There were in the carryall the plaintiff's two daughters and his nephew. One of the daughters was driving, and attempted to get out of the way, but was unable to do so. The carryall was struck by the team while the horses were running, capsized, and damaged to the amount of one hundred and fifty dollars. The plaintiff and those in the carryall exercised due care.

"The horses, wagon and teamster furnished by the defendant were suitable for the business for which they were to be used. It was carelessness on the part of the teamster to attempt to carry the load through the street he was then on, with the wagon loaded as it then was, without the load being more securely bound on to the wagon. Rust and Marshall were guilty of negligence in not properly binding their load on to the wagon, and in directing the teamster to start for Manchester with the load in the condition in which they had placed it.

"The main question is, whose servant was the teamster in starting and driving the team as it was loaded. If, upon the facts, the teamster was not the servant of the defendant in starting and driving the team, then judgment is to be for the defendant, with costs of this reference and costs of court for the term of entry, the term of reference, the present term and one half of the other terms the case has been in court. If the teamster was the servant of the defendant in starting and driving the team so loaded, judgment is to be for the plaintiff for the sum of one hundred and fifty dollars, with interest from the date of the plaintiff's writ, as damages, with costs of this reference and costs of the writ and service and costs of court for the term of

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entry, the term of reference and the present term, wi
of the other terms that the action has been in cou
report this case to the Superior Court, upon the fore
for its determination as a matter of law, for which
ment should be entered, hereby expressly referring t
of law herein reserved to the decision of the court."

In the Superior Court judgment was ordered for
on the report of the arbitrator; and the defendant a

The case was argued in November, 1875, and
January, 1876, by

J. C. Perkins, for the plaintiff.

S. B. Ives, Jr., for the defendant.

GRAY, C. J. Under the submission by agreeme
and rule of court, the arbitrator was bound to de
facts, and could refer nothing but questions of law
Bigelow v. *Newell*, 10 Pick. 348. *Ellicott* v. *Coffi*
865. The question whether the driver was the se
defendant, in starting and driving the wagon with
upon it by Rust and Marshall, was a material que
which has not been decided by the arbitrator. *Ki*
man, 103 Mass. 194. *Brady* v. *Giles*, 1 Mood.
His calling this question of fact a question of law
it such, nor enlarge the authority of the court ov
The rule of reference might indeed have been
modified by agreement of the parties, sanctioned
so as to submit any question of fact to its decisi
such modification must appear of record. *Hicks*
99 Mass. 459. Upon the award as it stood und
rule of reference, no inference of fact appears to
could be, decided by the Superior Court. As a
tion of fact has not been determined, the judgme
aside, and the case stand for further proceedings i
low, by a recommitment to the arbitrator or othe

Judgm

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THOMAS SNELL & others *vs.* DANIEL A. DWIGHT & others.

Suffolk. Nov. 20, 1874. — March 1, 1876. DEVENS & LORD, JJ., absent.

The provisions of the U. S. St. of 1864, *c.* 225, §§ 8, 9, and of the treasury regulations of July 29, and September 24, 1864, respecting purchases of the products of the then insurgent states, and commercial intercourse with their inhabitants, did not authorize any such intercourse, excepting by the agents of the United States appointed to make such purchases. Nor did they authorize such agents to contract for such products with citizens of the states not in rebellion, nor for such products not, at the time of the contract, actually owned or controlled by the vendor.

Under the U. S. St. of 1864, *c.* 225, §§ 8, 9, and the treasury regulations of July 29, and September 24, 1864, no officer of the United States government, civil or military, had authority to grant permission to any person to take goods beyond the lines of the military occupation of the United States, for trade or exchange for the products of the insurgent states.

A bill in equity cannot be sustained by one of the parties to a contract for illegal trading with inhabitants of states declared in insurrection against the United States government, against another party to such contract, for an account of resulting profits.

BILL IN EQUITY by Thomas Snell, Samuel S. Keith and Abner Taylor, members of the firm of Snell, Taylor & Co., against Daniel A. Dwight, Benjamin F. Nourse and George M. Gill, for an account. Hearing before *Ames*, J., who ruled that the bill could be maintained, and referred the case to a master. The defendants appealed. The facts of the case appear in the opinion.

A. A. Ranney, for the plaintiffs.

C. B. Goodrich & E. F. Hodges, for the defendants.

ENDICOTT, J. In March, 1865, the defendant George M. Gill made an agreement with Samuel Tate to bring a steamboat into the Yazoo River in Mississippi, within the confederate lines, laden with supplies to be exchanged for cotton. Tate was to furnish the cotton, in payment for the supplies, under an arrangement which he had made with the confederate government through its cotton agent, and he was to receive one half the profits of the transaction. On March 7, 1865, Gill made a contract in writing with the plaintiffs, the owners of the steamboat S. B. Young, then lying at Memphis and laden with supplies, to proceed up the Yazoo River, and execute the agreement made with Tate. This contract purports to be made on the one part by Snell, Taylor & Co., the plaintiffs, and on the other by the defendants, under the name of Dwight, Gill & Co. The con-

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ract also recites that Dwight, Gill & Co. have contr
Charles H. Ray of Chicago for the use of permits, issu
by the President of the United States, to enable ther
the goods beyond the military lines of the United Sta
details of the contract, prescribing the manner of its e
the sum to be paid for the supplies, and the share of t
o be paid the plaintiffs for the use of their boat and o
vices, it is not important to recite.

Under this contract the boat proceeded under the c
Gill up the Yazoo River, beyond the military lines of th
States, and obtained from Tate, in exchange for the s
wo hundred and seventy-five bales of cotton. She also
oard as freight, on account of Tate and others, four
nd twenty-four bales of cotton, making a total cargo of
lred and ninety-nine bales which she conveyed to St. Lo

The plaintiffs bring this bill, alleging that the two hun
eventy-five bales of cotton were taken and disposed o
lefendants, and praying for an account, and that the de
nay be compelled to pay over to the plaintiffs the m
rofits which they are entitled to receive by the terms
ontract. The defendants, among other defences, set up
ontract was unlawful, and the plaintiffs can have no
nder it.

The parties contemplated by their contract, and, in
utton, actually carried on trade and had commercial int
within a state in insurrection against the laws of the
States. By the act of Congress, passed July 13, 1861,
roclamation of the President in pursuance thereof, Au
861, all commercial intercourse by and between the
ebellion and the citizens thereof and citizens of the re
United States was declared to be unlawful. A state of
hus declared by competent authorities to exist. U. S.
. 3, § 5; 12 U. S. Sts. at Large, 257. See *Kershaw* v.
00 Mass. 561, and cases cited. At the time this enterp
ndertaken, it was therefore illegal, unless the plain
how that it was duly authorized and permitted by the
ties of the United States, in conformity to the provisio
tatutes allowing commercial intercourse with the enem
ertain restrictions and regulations.

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It is contended by the plaintiffs that the defendants were licensed to proceed up the Yazoo River and procure the cotton under certain permits issued by the authorities of the United States and duly assigned to them. These permits are three in number, and are known and referred to in the record as the Ray, Topp and Swett permits.

Before considering the character of these licenses, it is necessary to examine how far trade could be permitted with the citizens of states in rebellion, under the statutes and regulations then in force.

Under the U. S. St. of 1861, *c.* 3, § 5, the President could license and permit commercial intercourse with any such part of the section of a state declared to be in insurrection, as he in his discretion might think conducive to the public interest; and such intercourse, so far as licensed by him, was to be carried on in pursuance of rules prescribed by the Secretary of the Treasury. In the rules as revised and published, September 11, 1863, by the Secretary of the Treasury, rule VII. provided as follows: "Commercial intercourse with localities beyond the lines of military occupation by the United States forces is strictly prohibited; and no permit will be granted for the transportation of any property to any place under the control of insurgents against the United States." So far as that act and the regulations under it are concerned, there could be no license to trade on the Yazoo River as provided in the contract.

The act passed July 2, 1864, *c.* 225, § 8, (13 U. S. Sts. at Large, 377,) provided that the Secretary of the Treasury might "authorize agents to purchase for the United States any products of states declared in insurrection, at such places therein as shall be designated by him, at such prices as shall be agreed on with the seller, not exceeding," &c. The treasury regulations, issued July 29, 1864, rule III., declared, "Commercial intercourse with localities beyond the lines of actual military occupation by the United States forces is absolutely prohibited, and no permit will be granted for the transportation of any property to any place under the control of insurgents." This rule is substantially the same as rule VII. promulgated September 11, 1863.

Additional regulations under this act were issued September 24, 1864, providing for the appointment of agents to purchase

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"agreed to purchase," &c.
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And in rule VIII., whenever
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laces and by the same route.
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ly 29, which prohibits trade wi

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ized, and had no effect to make the contract or the enterprise to the Yazoo River lawful; nor could the contract have been executed under any permits then authorized to be issued.

The Ray permit, referred to in the contract, is therein said to be a permit issued by the President, authorizing Ray to take such goods beyond the national military lines. The permit is not in evidence, and there is no proof of its contents beyond what appears in the contract. If the permit was such as [illegible] pears to be by the language of the contract, it was clearly lawful. The President had no authority to issue such permit any act of Congress or regulation of the treasury, and no [illegible] of any description could be granted to a citizen to obtain beyond the federal lines.

But it is said that the cotton was in fact procured under certain permits obtained from one Topp, and referred to as Topp permits. These are not put in evidence, and we have no means of ascertaining their purport, except that they were permits to bring out cotton. In the absence of any evidence of their contents, but taking them to be permits for this purpose, as appears by the evidence, they are open to the same objection as the Ray permit.

The Swett permit, so called, which is in evidence, was informal, and was an attempt to comply with the form prescribed by the treasury regulations of September, 1864. Risley, a treasury agent, made an agreement with Swett to purchase 50,000 bales of cotton; and the orders for safe conduct were duly issued by the President. But Swett was a citizen of Illinois in December, 1864, when the agreement was made; and the assignment of the agreement, if valid or within the intent of the regulations, was to the defendants, who were not insurgents. Nor did Swett or the defendants own or control, at the time of the issue or assignment, any products of the states in rebellion, but contracted with Tate to procure the cotton through his connection with the cotton agent of the confederate government. A similar transaction by the same agent was held not to be justified under the statute, the regulations of the treasury or the proclamation of the President. *United States* v. *Lane*, *ubi supra*.

The questions involved in this discussion have been considered in repeated decisions of the Supreme Court of the United States.

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& another *vs.* JOHN N. GROUT.

h 1, 1876. ENDICOTT & LORD, JJ., abs

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intiff was induced to take it, the defenda
intiff testified as to the representations m
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reby the plaintiff was induced to take the n
fendant, the plaintiff was asked by his co
the defendant relying upon his representa
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er and take the note?" *Held*, that the que
nce of any objection to their form.
representations as to the pecuniary ability
djudication of the bankruptcy of the maker,
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ence was properly admitted. *Held, also*, th

presentations, made in July, 1870, as to the
omissory note, whereby the plaintiff was in
goods sold the defendant, a witness was ask
claim against A. (the maker of the note)
irst of 1870?" He answered, "I did." H
e claim was due in January, 1870, and was s
for the amount of the claim and of a bill of
he note was signed or indorsed by the defen
preliminary, and that the evidence was pro
owledge on the part of the defendant that A.
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M. Gilley, who testified that
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olbrook v. *Jackson*, 7 Cush. 1
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The mortgage from Smith to
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to show affirmatively that i
11 Mass. 261. *Burke* v. *Sav*

Exceptions overrule

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the time of his death he owed debts but had no property except-
ing the estate on Northampton Street, of which he was then the
equitable owner; that in 1861, being then seised in fee simple of
the land on Northampton Street and of another estate upon Tre-
mont Street, he mortgaged both estates to Seneca A. Ladd for
$5000 payable in three years; that on March 14, 186
pally to defraud the complainant Abigail of her right o
he caused Ladd to assign this mortgage to Danville
procured Cole on April 12, 1866, to sell both parcels
power in the mortgage and convey them to the defend
on the same day Hutchinson made a new mortgage t
$5000 on the Tremont Street property; that Hutchi
nothing for the property at any time; that on April
the Tremont Street property was sold to Isaac Green for
that Green gave Hutchinson a mortgage for $1750 fo
the purchase money; that the mortgage to Cole for
paid out of the proceeds of this sale, and that the b
used to build the houses on the Northampton Street l
Hutchinson paid no money and was put to no expense
houses; that he had received the rents and profits f
since Gilson's decease, and had also since Gilson's de
paid by Green $1750 and interest for the mortgage abo
that Gilson built the houses on Northampton Street a
expense, and during his life received the rents and pr
them, and in all respects, excepting as to the bare l
dealt with them as his own; that Hutchinson held the
in trust for Gilson, and still appeared of record to hold
title, but now claimed to be the absolute owner of it, an
to reconvey to the plaintiffs or to account for what h
ceived therefrom. The prayer of the bill was for a co
of the property on Northampton Street and for an accou
rents and profits since Gilson's decease and of the pr
Green's mortgage.

The defendant, in his answer, denied the allegatio
bill, and alleged, in substance, that he purchased and paid for
the estate in good faith without fraud or collusion with Gilson,
and without any trust for him or any other person; that he built
the houses on Northampton Street with his own money and paid
for the labor and materials for them; that whatever Gilson did

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inson, and report the same
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me as justice and equity

otion, the judge ordered the
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he evidence that nothing w
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e, or which had not been nec
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hearing and before the en
le as follows: "1. That the
V. C. Gilson cannot be mai
lson, husband of the said
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intiffs cannot maintain a b
s having no more rights in
d, and that the cause of act
resentatives of said Samuel
e judge declined to make.
led his account, in three sc
s paid out by Reuben M. I
e No. 749 Tremont Street
and the repairs, taxes, &c.,
nson of the Tremont Street
he following sums paid by
sons in the building and c
npton Street, Boston, Nos.

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174, up to the time of the death of Samuel Gilson." Schedule C was of "The amounts received by Reuben M. Hutchinson and paid out by him on the Northampton Street estate in Boston, Mass., since the death of Samuel Gilson."

The judge, upon examination thereof, decided that the matters embraced in schedules A and B of the account involved no other matters than those which had already been considered and passed upon in the hearing and the decision before made, and refused to refer the same to a master; to which refusal the defendant excepted. The account of receipts and expenditures since the death of Samuel Gilson, which is included in schedule C, was admitted to be correct by the plaintiffs.

The judge refused to allow the amendment offered, and ordered a decree to be entered for the plaintiffs, adopting as the basis thereof, so far as the rents and profits were concerned, the account of the defendant.

The decree was as follows: "It is ordered, adjudged and decreed, that the defendant holds the property and estate described in the plaintiffs' bill of complaint in trust as therein alleged, and that the defendant shall, on or before the first day of June next, execute and deliver to the said Sarah Jane Stevens and Simeon Gilson a good and sufficient deed, with the usual and proper covenants against all incumbrances made or suffered by him, conveying to them all the real estate situated on Northampton Street in said Boston and described in said bill of complaint, subject, however, to the right and interest in lieu of dower, in said estate, of the said Abigail W. C. Gilson, as the widow of Samuel Gilson, deceased, and to her rights as administratrix of his estate; and that the defendant shall, on or before the first day of August, pay to the plaintiffs the sum of $1813.34, the same appearing to be due to them on account of the receipts and disbursements of said defendant on account of said estate, one half of said sum to be paid by the defendant to said Abigail W. C. Gilson, and one half to said Simeon Gilson and Sarah Jane Stevens; and that the defendant shall pay the plaintiffs' costs." From this decree the defendant appealed.

B. W. Potter & H. Wardwell, for the plaintiffs.

A. R. Brown & E. A. Alger, for the defendant.

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already seen, Mrs. Gilson, as administratrix, represents not only her husband, but also his creditors, and in that capacity may reclaim property fraudulently conveyed by her intestate. *Martin* v. *Root*, 17 Mass. 222. *Holland* v. *Cruft*, 20 Pick. 321. *Gibbens* v. *Peeler*, 8 Pick. 254. The administrator may assert claims which the intestate himself could not have asserted. Whether the reconveyance ordered by the decree would give to Mrs. Gilson a claim of dower, is a question in which this defendant is not interested. Both the rulings requested, therefore, were properly refused. *Decree affirmed.*

JOHN N. ROBERTS *vs.* J. T. GURNEY.

Suffolk. Nov. 9, 1875. — March 2, 1876. ENDICOTT & LORD, JJ., absent.

In an action against a warehouseman for the loss of goods stored with him, it is not enough for the plaintiff to show that the defendant was negligent; it must also be shown that the loss occurred by reason of such negligence.

CONTRACT against a warehouseman, for the value of a carriage stored with him, and alleged by him to have been stolen on June 6, 1873.

At the trial, before *Pitman*, J., the evidence on the part of the plaintiff tended to show that, during the months of May and June, 1873, the door of the building, wherein said carriage was stored, together with other carriages, of an aggregate value of from $4,000 to $6,000, was frequently left open during the day and night time and on Sundays; that the door, when locked, was fastened by a small padlock, hasp and staple; and one witness, who was at that time a workman for the defendant, testified that, about the time of the alleged loss, but prior thereto, the staple in which the padlock was fastened was so loose that it could be pulled out with the fingers, and that this was done by the witness on one occasion at the time referred to, but the witness testified that he did not communicate this fact to the defendant.

The evidence, on the part of the defendant, tended to show that the door was kept closed and secured by a suitable padlock;

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s were in proper condition; and t
xercise of due care in relation to
and that, on the morning of the
arriage was discovered, the lock

he judge to instruct the jury as
al or frequent acts of negligence
t the place, and at or near the
petent upon the question of wh
egligence of the defendant."
instruction, and, upon the su
ted the jury as follows: "Evic
s of negligence on the part of th
or near the time of the alleged
stion whether the loss resulted
dant, if such acts may have co
"

lict for the defendant; and the

laintiff.
for the defendant.
aintain his action, it was incum
t only that the defendant was neg
rred by reason of his neglect. Ma
, 48. It is manifest from the bill
of controversy before the jury w
uilding where the carriage was ke
mproperly and insufficiently fastene
and reasonably secured, it was vi
ef. In other words the question w
ioned by the defendant's negligence
which he was not responsible. A
, the plaintiff had the benefit of a
quent negligence on the part of th
me of the loss, and he has no groun
qualification added by the presidin
om the verdict, that the jury found
defendant did not contribute to the

Exceptions overruled.

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PROVIDENCE TOOL COMPANY *vs.* UNITED STATES MANUFACTURING COMPANY.

Suffolk. Nov. 10, 1875. — March 2, 1876. ENDICOTT & LORD, JJ., absent.

In an action against a corporation upon a promissory note made in its name by "G. F., treasurer," the issue was whether it was the note of the corporation; and the defendant having called G. F. as a witness, was allowed to ask him, against the plaintiff's objection, whether or not he had authority to make this note as treasurer of the defendant company. *Held*, that the question was inadmissible.

CONTRACT upon a promissory note, dated Boston, August 1, 1873, payable to the plaintiff three months after date and signed: "U. S. Manfg. Co., Geo. H. Fox, Treas."

At the trial in the Superior Court, before *Bacon*, J., the defendant offered as a witness George H. Fox, its treasurer, who made the promissory note declared upon, and asked him the following question: "whether or not he had authority to make this note as treasurer of the defendant company?" referring to the note in issue. The judge, against the plaintiff's objection that the question called for a conclusion of law and not of fact, allowed the witness to answer. He said "he had not."

It appeared in evidence that the defendant company after its organization rarely held meetings of its directors or officers, and that said Fox was treasurer, general agent and manager of the defendant company and acted in discharge of his duties in accordance with his own judgment, only occasionally consulting any of the other officers.

The defendant contended that the note in issue was made as the note of Fox and one Bacon, copartners, who had been doing business from March, 1872, to November, 1872, under the name of the United States Manufacturing Company, and signing their notes "U. S. Manfg. Co., George H. Fox, treasurer;" that on November 1, 1872, the defendant corporation was organized; that the same name was used by Fox and Bacon in closing up their business, and this note was given in so doing. The defendant also contended and offered evidence tending to prove, that the plaintiff had actual and express notice of all these facts, and dealt with Fox and Bacon down to November 1, 1872, and

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defendant after that date, all of which the pl
d offered evidence tending to prove such denia
in evidence that the defendant corporation bou
good will of Fox and Bacon, and continued the
the principal officers and stockholders of the
ation knew that the business had been carried
nd up to its organization, in the name of the
nufacturing Co.

ntiff asked the judge to rule that the defendant,
under which Fox and Bacon had done busines
f its organization, with full knowledge thereof
organizers, officers and stockholders, was estopp
the existence of Fox & Bacon as a separate co
judge refused to do; to this refusal to so rule,
ion of the evidence aforesaid the plaintiff excep
other instructions, to which no exceptions were
instructed the jury as follows: "1. If Fox w
ent as well as treasurer of the defendant corpo
rectors did not hold meetings for the purpose of
fairs of the corporation, but permitted Fox, as
ransact the business under such circumstance
the debt of the company existing at the time
's organization by giving the note of the defen
red it for the interest of the defendant to do so,
such debt, and upon such payment the plaint
claim upon such company, that would be a suf
ion for such note.

he defendant assumed the name of a company ex
time of its organization, and after such organi
usiness of said company, and continued to carr
name of said company, the defendant thereb
le upon notes given in such common name,
n good faith, and without notice of any chan
s in payment of their claims against such
the time of the organization of the defenda
hough said notes were given after the organi
lant corporation."

y returned a verdict for the defendant; and
l exceptions.

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W. A. Herrick, for the plaintiff.

O. Stevens, for the defendant.

AMES, J. The plaintiff's case depended entirely on the validity of the promissory note, which Fox had assumed to give in the character and capacity of treasurer of the defendant company. Whether he had authority to do so was a vital question. We must assume that the inquiry put to him did not relate to any express authority to sign that specific note. If that had been its meaning, the objection that it called for the witness's opinion upon a point of law would hardly have been raised, or if raised, it would have been obviated by a change in the form of the question. But, however that may be, it is obvious from this bill of exceptions that his answer might have been his conclusion as to the law of the case. Authority to do such an act might be proved by circumstantial evidence, and his answer may have been a mere expression of his own opinion as to the sufficiency of the evidence. All that could properly be obtained from him were the facts by which the inference of authority was to be supported or repelled, and it was for the counsel to argue, and for the jury to find, under the instructions of the court, whether the facts so given proved that he had the authority which he denied. This question is fully discussed in *Short Mountain Coal Co.* v. *Hardy*, 114 Mass. 197, in the judgment by Mr. Justice Colt, and is disposed of in that case. *Exceptions sustained.*

DANIEL E. PAGE *vs.* FREDERICK W. COLE.

Suffolk. Nov. 11, 1875. — March 2, 1876. COLT, ENDICOTT & LORD, JJ., absent.

The defendant by a written instrument conveyed to the plaintiff for a certain sum "a certain milk route, situated in the southerly part of Boston, with all the rights, privileges thereto belonging," "also the right and good will of supplying twenty-six full eight-quart cans of custom situated as above;" and guaranteed to the plaintiff "full and peaceable possession of the above named property and custom, free from all incumbrance and interference by me or any person or persons connected with me in any way whatever." In an action upon the agreement, the plaintiff offered in evidence the testimony of experts that milk trade is bought and sold by the can; that the right and good will of supplying customers has a

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value in the market and is worth $80 per can; tha
the trade for the person selling the right and good
rnish to the purchaser customers whose average dai
umber of cans sold; that in the milk trade the terms
ing custom" mean, when applied to sales of the tra
to the customers furnished and pointed out by the
to buy milk of him. This evidence was excluded.
vidence, which was also excluded, that he had bou
cans of milk trade and paid him for the same, an
ered but nineteen cans of trade. *Held*, that the ex
was erroneous.

reach of the following agreement dated
l, and signed by the defendant:
witnesseth that I, F. W. Cole, for an
e sum of twenty-five hundred dollars, t
, Jr., the receipt whereof is hereby ackn
ell and convey to said Page a certain
the southerly part of Boston, with all
ereunto belonging, together with the fo
bay horse, harness, wagon, pung, ice c
nd one hundred and twenty-six large c
good will of supplying twenty-six full ei
m situated as above. And I, the said F
o said Page full and peaceable possessio
operty and custom, free from all incumbr
me or any person or persons connected
tever."

alleged that there were not customers
n said route to the amount of twenty-six
, but all of said customers only bought
resaid capacity, and that there had bee
nty. At the trial in the Superior Co
on, J., ruled, at the request of the defend
contained no warranty, either express or
re twenty-six cans of trade sold by t
tiff; and the plaintiff excepted.
the construction of the bill of sale, a
eclaration, the plaintiff offered to pr
mpetent experts, that milk trade is

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customers has a known and recognized value in the market; that it is worth eighty dollars per can; that it is the uniform custom and usage in the milk trade for the person selling the right and good will of supplying custom to furnish to the purchaser, from persons in the habit of buying milk of him, customers whose average daily purchases amount to the number of cans sold, that in the milk trade, the terms "right and good will of supplying custom," among those conversant with the trade, have a peculiar signification; and that they mean, when applied to the sales of the trade, the right of supplying milk to the customers furnished and pointed out by the vendor from those accustomed to buy milk of him.

The judge ruled that this testimony of experts was incompetent, and rejected it; and the plaintiff excepted.

The plaintiff also offered to prove, by the testimony of witnesses, that the defendant had trade to the extent of twenty-six cans, but had only delivered and pointed out to the plaintiff customers who bought nineteen cans per day; that all the milk trade turned over by the defendant to the plaintiff was but nineteen cans per day; that the defendant had said that he had failed to turn over to the plaintiff the amount of trade agreed to, and that was called for by the bill of sale, by six cans per day, and had frequently promised to make up the deficiency; that the plaintiff had bought of the defendant twenty-six cans of milk trade, and paid him for the same, and that the defendant had delivered but nineteen cans of trade.

The judge ruled that this was inadmissible, and rejected the evidence; and the plaintiff excepted.

The judge, being of the opinion that the bill of sale contained no warranty or agreement to deliver to the plaintiff the amount of trade claimed, and that the plaintiff, as a matter of law, could not maintain his action, found for the defendant. The plaintiff alleged exceptions.

D. C. Linscott, for the plaintiff.

M. F. Dickinson, Jr., for the defendant.

AMES, J. The evidence offered as to the uniform custom and usage of the milk trade was admissible, and the defendant's contract is hardly intelligible without it. The sale of "a certain milk route, situated in the southerly part of Boston, with all the

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ging," is the sale *of the*
endor had been *in the*
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know who the *customer*
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principles of law; it wa
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e to written contracts g
ode of doing business in
certain terms, hardly in
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ting to convey "the right
full eight-quart cans of cu
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sale, "situated as afores
k route in question,) we
cent of twenty-six cans of
proving the alleged usa
dant had not delivered
ken to sell and had bee

d usage to make its ex
in *Dickinson* v. Gay, 7
relied upon.

Exceptions sust

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DEXTER T. MILLS & another *vs.* JOHN W. PERKINS & others.

Suffolk. Nov. 12, 1875. — March 2, 1876. COLT & LORD, JJ., absent.

The provision of the St. of 1869, *c.* 415, § 28, that "druggists may sell for medicinal purposes only, pure alcohol to other druggists, apothecaries and physicians, known to be such," does not apply to a sale of alcohol by a commission merchant, dealing principally in alcohol, to wholesale druggists.

It is not sufficient evidence of a sale of alcohol "for medicinal purposes only," within the St. of 1869, *c.* 415, § 28, that the buyers were wholesale druggists.

CONTRACT on an account annexed for alcohol and cologne spirits sold and delivered to the defendants, and for cartage thereon. The answer alleged that the several items in the account annexed were sold in violation of the St. of 1869, *c.* 415. Trial in the Superior Court, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

It was proved that the sales were made in Boston in the years 1872 and 1873. During those years the defendants were not licensed, nor either of them, nor appointed to sell intoxicating or spirituous liquors or alcohol. "Cologne spirits" are deodorized alcohol, that is, a purer quality of alcohol than what is denominated alcohol. No part of the alcohol and no part of the cologne spirits was imported, but all was of domestic manufacture.

The only evidence was the testimony of the plaintiffs, each of whom testified that they were, during 1872 and 1873, commission merchants in Boston; that the article they principally dealt in was alcohol; that the defendants were wholesale druggists, doing business in Portland; that the goods were forwarded from Boston to the defendants, or to other parties, as the defendants directed; that they kept a book containing an account of their sales, the date and quantity of each sale, with the name and residence of each purchaser; that alcohol is classed among drugs; also, that it is spirituous liquor, and forms an important part of intoxicating drinks. There was no other testimony tending to prove that the plaintiffs were druggists, or that the alcohol was sold for medicinal purposes only.

The defendants requested the judge to direct a nonsuit, or, if that should be refused, to instruct the jury that their verdict should be for the defendants. The request for a nonsuit, and for

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instructions, was denied; and the judge ruled th
evidence proper to be submitted to the jury that t
were druggists, and left it to the jury to determi
pon the above evidence, the plaintiffs were entitled
ct.

y found for the plaintiffs for the full amount claim
fendants alleged exceptions.

bott, for the defendants.

ns & H. Stevens, for the plaintiffs.

. A druggist, in the popular acceptation of t he w
deals in medicines, or in the materials that are
paration of medicines; the term "medicines" i
s largest signification. The St. of 1869, c. 415,
in force at the date of the sale in this case, evid
ord in this sense. Alcohol undoubtedly enter
sition of some medicines, but it also has othe
ent uses less innocent, and not under the protect
Like any other intoxicating liquor, it may be us
and when so used it may properly be describe
t a commission merchant, dealing principally i
properly be described as a druggist, in the s
word is used in the statute, merely because th
e deals is susceptible of use in the preparation
dmits of medical use.

y evidence that the sale in this case was for n
as that the buyers were wholesale druggists.
that the plaintiffs took any pains to infor
o the use that was to be made of the art
not know that it was to be used for medicinal
hey could not know that it would not be used
in the preparation of intoxicating drinks.
was sold for any purpose to which the buy
pply it.

e case as presented in the bill of exceptio
e that the plaintiffs were druggists within t
tute; and there is no evidence that the
purposes only. The result therefore must

Exceptions

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JOHN H. REED & another *vs.* ASHBURNHAM RAILROAD COMPANY.

Suffolk. Nov. 15, 1875.—March 2, 1876. ENDICOTT & LORD, JJ., absent.

In an action to recover for materials alleged to have been sold to a railroad corporation, it appeared that, immediately before the alleged sale, the president of the corporation made a large purchase of railroad iron of the plaintiff, and that the corporation sanctioned the proceeding, received and used the iron and paid for it in the manner agreed to by the president; that, upon the application to the plaintiff by the contractor for the building of the defendant's road, for railroad material to be used, and afterwards actually used in the building of the road, the plaintiff told the president that he would sell to the railroad company the material in question upon its order, but would not sell to the contractor, and that thereupon the president told him to send the materials to the company; that the plaintiff's bill was sent to the president, who replied that he would present it to the directors of the company. Evidence was also introduced that the president always acted for the railroad company on its part, and that the directors when spoken to upon this subject, always referred to the president, and took no part themselves. *Held*, that upon this evidence it was a question of fact for the jury whether the president was the authorized agent of the company in making the purchase.

CONTRACT upon an account annexed for railroad materials alleged to have been sold by the plaintiffs to the defendant corporation, and used in the construction of the defendant's railroad. Trial in the Superior Court, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

It appeared that the plaintiffs were agents of the Bay State Iron Company, and in that capacity, on September 4, 1872, concluded with George C. Winchester, as president of the defendant corporation, the negotiations for a sale of two hundred and forty tons of railroad iron to the defendant corporation amounting to about $20,000.

Winchester was one of the original corporators of the defendant corporation, then recently created by the St. of 1871, *c.* 251. The existence of the corporation and the connection of Winchester as president were admitted; and the weights, quantities and prices of the plaintiffs' bill were not in dispute.

It also appeared that one Lynch had undertaken to build the road by contract made with the corporation by Winchester, and was then engaged in building the road; and that by his contract he was to furnish the iron and the materials named in the plain-

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The plaintiffs, acting for the B
sed to sell to Lynch, his credit
ack of a broker's note of sale of
of railroad iron, in which Lync
terlined, the following indorsem
nchester:

2. I, George C. Winchester, p
ilroad Company, hereby guaran
d iron as follows, viz., one half
one half the Ashburnham Railro
ths from date of delivery, with
r annum." The iron was delive
given and paid.

e completion of the negotiatio
day, one of the plaintiffs testif
f Winchester to a memorandu
a memorandum of the quanti
for the road (being the same n
t by one Appleton in behalf of
r that his firm would not sell
the railroad company, if ordere
eplied, "Go ahead, send them
. Following this conversation,
ocured the articles from several
be forwarded, and entered th
the plaintiffs to the Ashburnha
sual form of charges on book a
e exhibited and offered in eviden
all been forwarded, the plaintiff
ng letter to Winchester, dated
gned by the plaintiffs: "Dear
l for spikes, splices and bolts fu
order for payment by your con
ending us check in payment of s
y much oblige, as we are sadly i

n cross-examination that he had n

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warded as a voucher. A copy of the bill was produced in form: "Ashburnham R. R. Co. Bought of John H. Reed & Co."

The plaintiffs offered a letter from Winchester, dated Ashburnham, November 12, 1872. So much of it as referred to this subject was read in evidence and was as follows: "Regarding the bills sent by you against the Ashburnham R. R. Co., having been brought to notice of treasurer, he will present them to directors of said Co. for their consideration at the next meeting."

The plaintiffs afterwards, under date of Nov. 25, 1872, wrote and mailed the following letter to Winchester, signed by them: "Dear Sir, We take the liberty of calling your attention to our bill against your road for spikes, splices, &c. Will you be kind enough to instruct your treasurer to send us a check for the amount of same. We have some amounts to pay, and are short of funds. By giving this your early attention you will very much oblige."

In reply to the foregoing, the plaintiffs testified to the receipt of the following letter, which was read as evidence, dated Ashburnham, Dec. 4, 1872, addressed to the plaintiffs, and signed by Winchester: "Yours of 30th ult. is rec'd. The Directors of the Asb. R. R. have not yet authorized the Treas'. to pay your bill. I will see you on Friday in regard to it."

The following correspondence was also read, having been sent and received in due course of mail. The following letter, dated Boston, Dec. 18, 1872, from the plaintiffs to Winchester: "Sir, Your acct. still remains unsettled. You will please settle it at once."

The following letter, dated Ashburnham, Dec. 19, 1872, from Winchester to the plaintiffs in reply: "Dear Sir, Yours of 18th inst. is recd. Your account is fully settled on my books for all that I know that I have had of you. If there is anything that I have omitted to cr. I should be pleased to know what it is."

The following letter, dated Boston, Dec. 20, 1872, from the plaintiffs to Winchester: "Sir, Your letter of the 19th is before us. In September last you bought of us for the Ashburnham R. R. splices — bolts & spikes as per inclosed statement — you saying to us at the time that you had to furnish the money and would see that the account was paid. We supposing you

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on whose word was to be relied on, took your wo
d the goods. We will thank you to see that t
ttled."

e plaintiffs testified that during the period of t
ce he had several interviews with Winchester,
on these occasions this bill was spoken of, and th
said on each occasion that money was short, that
able to get his directors together, or spoke in si
. Some time after the correspondence had cea
before the date of the writ, he met Winchest
Boston, who then said for the first time that
not purchased by the railroad, and charged
having sold them to the contractor.

ppleton, a witness called for the plaintiffs, t
was a civil engineer, and sometimes took cont
railroads; that he went with Lynch to Ashb
in negotiations for the contract to build this r
ester made the negotiations concerning the
ynch on the part of the railroad company;
ork was going on during a period of about a
se chiefly as to the monthly estimates of the
he contract, and that he, Appleton, acted for
these controversies; that Winchester always
oad company on its part, and that on seve
n he spoke to other directors on the subjec
red him to Winchester, but took no part

iffs rested their case upon the foregoing testimony,
ndant declined to offer any evidence, but requested
rule that the plaintiffs could not maintain this action
idence, and that no sufficient evidence of any con-
part of the defendant had been introduced; and
uled as requested. The jury found for the defend-
is ruling; and the plaintiffs alleged exceptions.

F. W. Hurd, for the plaintiffs.

rey, for the defendant.

Upon this bill of exceptions we are of opinion that
vidence in support of the plaintiffs' claim. It ap-
immediately before the alleged sale, Winchester, a

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president of the defendant corporation, made a large purchase of railroad iron of the plaintiffs, and that the corporation sanctioned the proceeding, received and used the iron, and paid for it in the manner agreed to by Winchester. It also appeared that upon the application to the plaintiffs by Lynch, the contractor for the building of the defendant's road, for spikes and other railroad material to be used, and afterwards actually used, in the building of that road, the plaintiffs told Winchester that they would sell to the railroad company the articles in question, and upon its order, but would not sell to Lynch; and that thereupon Winchester used language which was sufficient (provided he had authority to do so) to make the transaction a purchase by the defendants. There was other evidence showing that Winchester took such a part in the business of the corporation as tended to prove that he was to some extent its authorized agent. The fact of agency may be proved by circumstantial evidence, and if there is any such evidence, even though slight, it should be submitted to the jury. *Forsyth* v. *Hooper*, 11 Allen, 419. *Hall* v. *Pike*, 100 Mass. 495. *Smith* v. *Collins*, 115 Mass. 888.

Exceptions sustained.

JOHN KILLION & others *vs.* TIMOTHY KELLEY.

Suffolk. Nov. 16, 1875. — March 2, 1876. COLT & LORD, JJ., absent.

The owner of a tract of land divided it into lots, and laid out through it a private way, called a court, conveyed one lot to A. and the other lots to other persons. The street into which the court opened was raised by the city, and the owners of the lots, except A., began to fill and raise the grade of the court opposite the land of A., who interfered, and by threats and otherwise, prevented the prosecution of the work. The grade of the court, if raised as contemplated, would be two feet and a half above the level of A.'s roadway to his stable and sheds and of the landing at the basement door of his house, so as to require stairs or steps by which to descend from the court to his door. It appeared that A. could make changes in his estate so as to adapt it to the raised grade of the court. *Held*, upon a bill in equity by the other abuttors on the court to restrain A. from interfering with the prosecution of the work, that they had no right to impair A.'s estate by raising the court, even if they were willing to pay for such changes; and that the bill must be dismissed.

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lled June 3, 1875, to restrain the defendant
plaintiffs in the work of raising, impr
te way called Regent Court, leading o
oston. Hearing before *Wells*, J., wh
the consideration of the full court in

severally owners of houses and lots abutting
ommon rights of way through and over the
nt is owner of a lot at the corner of the
reet, by deed from Nourse, one of the plain-
lot as follows: "bounded southeast by Re-
t; southwest by land recently conveyed by
sixty-five feet; northwest by my own land
east by land of mine, to be left open twenty
ageway from Regent Street, sixty-five feet."
the land with all privileges and appurte-
e this deed was given Nourse was the owner
gh which the court was laid out, and still is
far as his deed to Kelley conveyed title or
xcept so far as his deeds to others bounding
nveyed title or rights now held by the other

s erected upon his lot a double house front-
t, which is considerably above the level of
gent Court. The side wall of his house is
n the line of the court, and has basement
wards the court, and cellar windows below
e to the basement from the court is by a
the house. He has a stable and shed upon
lot, the approach to which is also from Re-
the defendant took his deed, and before he
rse caused the court to be filled in against
l so as to improve the approach to Regent
ilt his house the court was again raised by
it, so as to be as high as or a little above the
he basement door of the defendant's house,
his cellar windows. About a year since
raded and raised by the city.

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The plaintiffs having commenced to fill and raise the grade of Regent Court still further, the defendant interfered and removed some of the material laid therein opposite to his land, and obstructed the work, and by threats and otherwise prevented its further prosecution.

At the hearing it appeared that, by raising the surface of the court to the grade contemplated by the plaintiffs, the cellar windows of the defendant would be still further darkened, and the embankment or wall would extend to such height as to obstruct the air, light and vision to and from the basement windows, thereby to some extent, and, as the defendant contended, seriously to injure and impair the value of his house. It also appeared that the court would thus be raised two or two and a half feet above the level of the defendant's present roadway to his stable and sheds, and of the landing at the basement door of his house, so as to require stairs or steps by which to descend from the court to his said door. The defendant contended that this would cause an injury to his premises and his rights of way, not remedied by the provisions contained in the decree hereafter stated. He also contended that the attempt of the plaintiffs to raise the grade of the court against his land was unlawful and in violation not only of his rights of way, but of his other rights as owner of that house and land abutting thereon, and that they ought not to be permitted by this court to proceed therein.

The judge ruled that the defendant's deed of his land gave him no title in any part of the land included in the limits of the court, and no right or interest therein, except the right to use it as a way for the purpose of passing and repassing thereon, and that the raising of the grade of said way was not in violation of any rights of the defendant, except so far as it might obstruct his use of said court for said purpose as a way; that the plaintiffs, or some of them, being owners of the land included in said court, and of rights of way in common over and through the same, they might lawfully raise the grade of said court against the defendant's land, provided the defendant's use of said way and access thereto were not obstructed or rendered difficult or inconvenient. The judge found on the evidence that the proposed change of grade was a reasonable one to be made for the con

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venient use thereof by all the persons interested therein, and that the provisions made in the decree hereafter stated, if complied with, would make the defendant's access and means of approach to said way, and to his land and buildings from said way, reasonably convenient for the use of his said land and buildings.

The judge then made the following decree:

"This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows:

"First. That the plaintiffs are entitled to improve, raise and grade the way called Regent Court, and to establish the grade thereof in such manner as will best subserve the convenience, in the use thereof as a way, of all the several persons owning lands abutting on said court, and entitled to use the same, provided the access, or means of access, of the defendant to said court for the purpose of using the same as a way for the convenient occupation of his land abutting on said court, and the buildings thereon, be not obstructed or made difficult, or otherwise unreasonably affected, except so far as necessary during the progress of the work herein provided for.

"Second. That the plaintiffs may proceed to improve and grade said court, and put the same in suitable condition for use as a way, for the convenience of all said owners abutting thereon, having regard also to the convenience of the defendant in respect to his access, or means of access, to said court from his said land and buildings for all purposes for which he may have occasion to use said court as a way.

"Third. In doing said work of improving said court, the plaintiffs shall (if the defendant will permit them, or such persons as may be employed to do the same, to enter upon his land for that purpose) construct such steps, stairs, causeways, roadways, walls or structures, do such filling and grading, and make such other changes in and upon said land, as shall be reasonably necessary to secure to him for his said land and buildings convenient approaches and access to said court for all purposes of use thereof as a way for the convenience of his said land and buildings. But if the defendant shall decline to permit such entry upon his land, then the plaintiffs shall pay to the defend

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ant such reasonable sum as will enable him to construct and provide for himself such approaches and means of access from his said land and buildings to said court, the amount thereof to be estimated by the engineer hereinafter named, subject to revision by this court, and paid to the defendant, or into court for his use, before raising said way against his said land.

"Fourth. Profiles or plans and measurements for the grading and improvement of said court, and also for such structures and changes as may be required or proposed to be made upon the land of the defendant, for securing his means of access to said way, shall be prepared and laid before said engineer for his approval, before proceeding with said work, and the same shall be modified in such manner as he may require and direct, and the work when done shall conform thereto, and shall in all respects be done to the satisfaction and approval of said engineer.

"Fifth. Thomas W. Davis is appointed to supervise said work, approve the plans, and direct their modification, if he shall see cause so to do, estimate the amount to be paid to the defendant as hereinbefore provided, if called upon so to do, and examine and approve or disapprove the work when completed.

"Sixth. The defendant is enjoined from obstructing, hindering or interfering with the plaintiffs, their agents or servants, in the work of grading and improving said court, if and so long as they comply with the requirements of this decree.

"Seventh. The case is to stand for further directions in respect to the execution of this decree, or such final order as may be necessary."

The defendant appealed from this decree; and the plaintiffs appealed from so much of said decree as required them to make expenditures outside of the limits of Regent Court.

J. M. Keith & J. W. Keith, for the plaintiffs.

J. D Thomson, for the defendant.

MORTON, J. Nourse, one of the plaintiffs, being the owner of a tract of land, divided it into lots, and laid out through it a private way twenty feet wide, now called Regent Court.

He conveyed to the other plaintiffs and the defendant, severally, lots bounding upon this private way. There is no doubt that his deeds conveyed to the several grantees a right of way over this private way. *O'Linda* v. *Lothrop*, 21 Pick. 292. *Tufts*

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v. *Hughes*, 111 Mass. 296
aring, that the defendant'
sageway, except the ri
of passing and repass
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Gray, 83. *Brown* v. *Sto*
15 Gray, 387. *Meehan*

egent Street having be
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surface of the court to the
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ffs had no right to do this
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make this change. Even if the plaintiffs were willing to pay him the expenses of thus adapting his land, which they are not, he could not be compelled thus to change his estate against his will. Neither the plaintiffs nor a court of equity can require him to do this without violating his right to the uninterrupted enjoyment of his estate. We are therefore of opinion that upon the facts shown at the hearing the plaintiffs cannot maintain their bill. *Bill dismissed.*

HENRY PEARSON *vs.* NICHOLAS MASON.

Suffolk. Nov. 12, 1875.—March 4, 1876. ENDICOTT & LORD, JJ., absent.

It is no ground of exception that instructions requested are not given in the form requested, if they are given in substance.

Upon a contract by the defendant to purchase certain stock then owned by the plaintiff, at his request, for an agreed price, and a tender of the stock before an action is brought, and a renewal of the tender at the trial, the plaintiff is entitled to recover as his damages the whole price that the defendant agreed to pay.

A. agreed with B. that if B. would find anybody that would trade with A. for certain land owned by him, he would pay B. $500. B. accordingly introduced to A. a person with whom A. made a written agreement for the sale of the property. *Held*, that, upon the execution of this agreement, B. became entitled to his commission, though the sale was never completed.

CONTRACT. The first and third counts of the declaration alleged that the plaintiff sold to the defendant a certain piece of land on Joy Street in Somerville, and ten shares of the capital stock of the American Steam Safe Co., and received in payment therefor from the defendant four hundred shares of the capital stock of the Haverhill Lime Co., of which the par value was $5 per share; that the defendant at the time, and in consideration of this sale, agreed to buy the four hundred shares of the Haverhill Lime Co., and, upon request by the plaintiff, pay him therefor $2.50 per share; that the plaintiff had often offered to the defendant to sell and assign the shares to him, and had demanded the agreed payment therefor; that the defendant had neglected to pay the same, and owed the plaintiff $1000 and interest.

The second and fourth counts alleged that the defendant agreed with the plaintiff, that if the plaintiff would introduce the de-

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who would trade with him for certain m
ill, New Hampshire, the defendant wo
sum of $500; that the plaintiff did i
who agreed to trade and did trade with
perty; that the defendant owed the plai
ich, though requested, he had failed to
denial.

erior Court, before *Putnam*, J., who allo
n substance as follows:

ified that he was to give the defendant
and ten shares of the American Steam
hundred shares of the Haverhill Lime
lefendant said, if I would trade with him
uld take it back at any time and give me
it; that this was the last of October, 18
interest on the house up to Novembe
knew any one in the trade but the def
or knew of any agency in the matter;
defendant a deed of the house in ques
he American Steam Safe Co. stock, and
ndant the four hundred shares of the
ock; that he subsequently called upon
m the fifty cents on a dollar for the st
of the stock, upon which the fifty per c
e time of the trade was agreed to be five
fendant refused to comply with this req
aintiff also put in testimony in addition
sustain his own testimony. The plai
, when he called upon the defendant to g
t., he took the stock out of his pocket
nd laid it on the table, the stock being
he plaintiff at the trial offered to assign
the defendant.

stified that in either January, February
laintiff wanted him to find some one w
ke an exchange of property and get so
stock, the defendant being agent of the co
fendant might procure him some, and he,
him for his trouble; that he immediately

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about to procure said Lime Co. stock, and, on November 5, wrote to the plaintiff that he had got "the stock fixed for him," and in order to do so had taken $575 worth of the stock, part of which was for his commission, from one Ransom; that he had a commission from both sides; that the papers were passed November 17, 1869, when the plaintiff gave him the following as his commission:

"Boston, Nov. 17, 1869. For value received I promise to transfer to Nicholas Mason twenty shares in the Haverhill Lime Co. stock, when said Mason may call for the same, amounting to $100 at $5 per share. Henry Pearson."

The defendant also testified that he never promised to pay the plaintiff fifty per cent. of the par value of said stock, and denied that any such statements were made as the witnesses for the plaintiff had testified to. He further offered in evidence a paper, a copy of which is printed in the margin,* which he contended was the agreement which was entered into between him and the plaintiff, but which the plaintiff denied. This paper was produced by the plaintiff at the call of the defendant.

The plaintiff further testified that in 1871 the defendant was in his office and "said if I would find anybody that would trade with him for the mill and land, that he would pay me $500 in cash, as soon as the agreement was made between him and the parties;" and that he found one Woodbury, and introduced him to the defendant in his office; and that they (the defendant and Woodbury) made an agreement to exchange property in writing, which was produced, dated January 13, 1872.

The testimony as to whether the defendant acted as the agent of the plaintiff or of other parties, and, if of other parties, whether the plaintiff knew it or not, in the exchange of property referred to in the first and third counts, was conflicting. The

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* "Octo. 29, Rec'd of H. Pearson 10 shares of Steam Safe Company's stock for Charles Martin, and said Martin is to transfer to said Pearson $2000 hundred [*sic*] dollars worth of Haverhill Lime Company stock, for said stock, and twenty-two hundred dollars more for a house in Somerville, on Joy Street, and Martin is to collect rent and Pearson is to pay int. to Nov. 12 on said house.

Charles Martin,
"By Nicholas Mason,
Agt. for the Parties."

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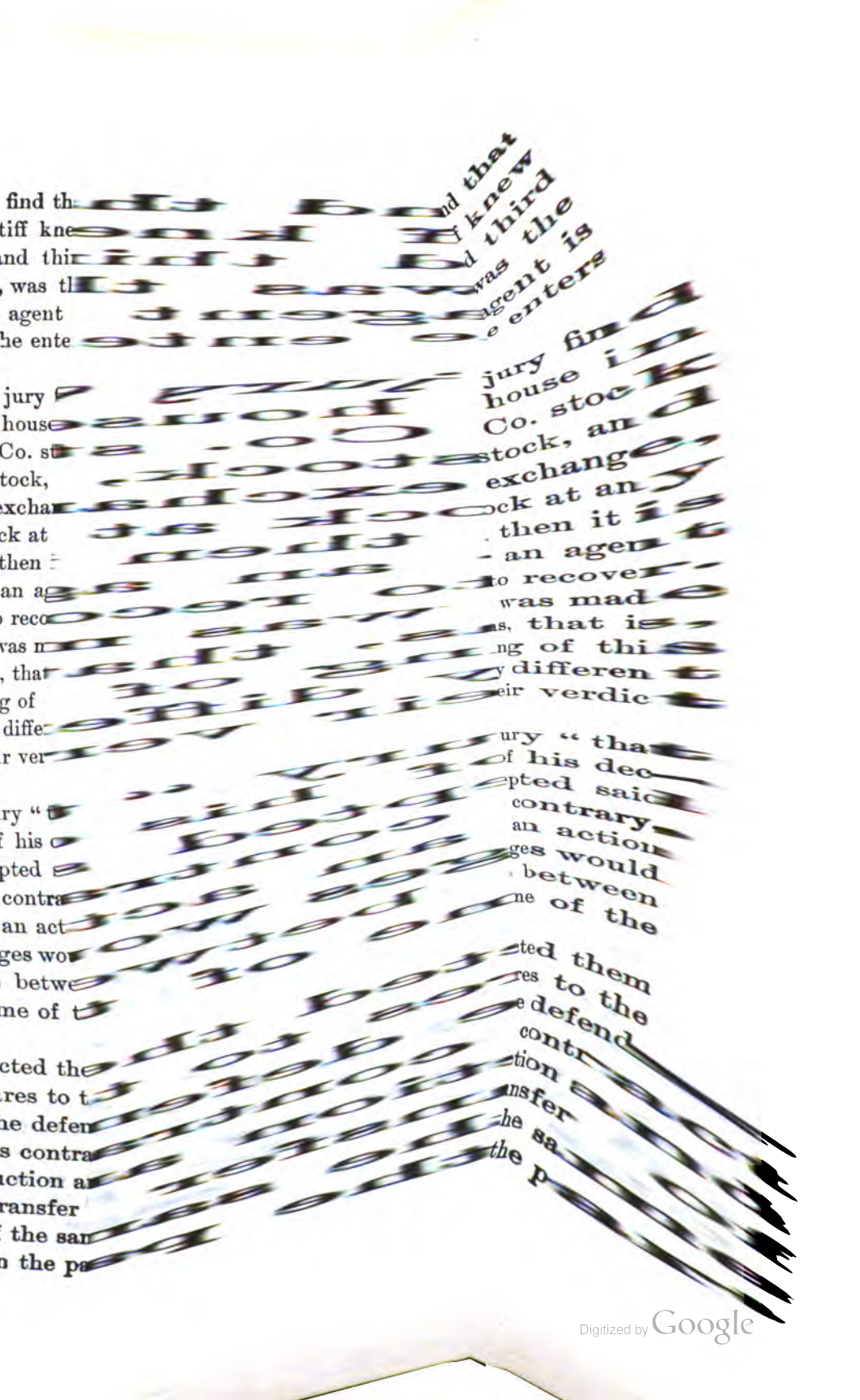

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of the plaintiff; and, if at the trial he renews the offer to assign and transfer the stock to the defendant, he is entitled to recover as his damages the whole price which the defendant agreed to pay for the stock, and not simply the difference between that sum and the value of the stock."

The defendant further requested the judge to instruct the jury "that a real estate broker is not entitled to his commission, as a matter of law, until the trade is completed and papers passed; that the mere signing an agreement to exchange property, which is never carried out, does not entitle a broker, who introduces the parties, to his commission."

The judge stated that this might be true as a general rule, but refused so to instruct the jury in this case, and instructed them that it was no matter in this case whether the agreement was complied with by the purchaser or not; that, if the contract between them was as the plaintiff had testified to, that is, if he was simply to introduce to the defendant a purchaser with whom the defendant was to make the trade, and he did so introduce him, and an agreement was made between them which bound the purchaser, the plaintiff's work was performed, and he was entitled to his commission of $500.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

C. H. Chellis, for the defendant.

R. Stone, Jr., for the plaintiff.

AMES, J. We see no ground upon which these exceptions can be sustained. Upon the first and third counts of the declaration, the evidence was conflicting as to the question whether the defendant's contract to take back and pay for the stock in the Haverhill Lime Company was made by him personally and on his own account, or whether in making it he was acting, and was known by the plaintiff to be acting, merely as the agent of another person. This was purely a question of fact, and was submitted to the jury with instructions to which we see no valid objection. The presiding judge did not adopt the defendant's language, but the instruction given included all that was suggested in his request.

With regard to the ruling given in answer to the second prayer for instructions, it was strictly correct, and in conformity to the

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decision of this court in *Thorndike* v. *Locke*, 98 Mass. 340, and the earlier case of *Thompson* v. *Alger*, 12 Met. 428. The stock had properly been tendered to the defendant before suit brought, and the tender was renewed at the trial.

In the defendant's third prayer for instructions, the general rule as to a broker's right to charge commissions may have been correctly stated, but the plaintiff's claim rested upon an alleged special contract upon the subject of his compensation, and the jury were correctly instructed that, if such contract were proved, he was entitled to the commission as agreed.

Exceptions overruled.

JAMES F. SMITH *vs.* BENJAMIN P. NORRIS.

Suffolk. Nov. 12, 1875. — March 6, 1876. ENDICOTT & LORD, JJ., absent.

A., the owner of a lot of land, made a contract with B., whereby A. was to advance money to B. to build houses on the land, and to convey the land to B. for a certain sum and the amount of advances; and B. was to build the houses and buy the land. B. made a contract with C. to do certain work on the houses for an entire sum. Before C. completed the work, B. went into bankruptcy, and C. afterwards in good faith went on and did some work on one of the houses under the contract, but did not complete his work owing to the failure of B. to comply with the terms of the contract. *Held*, that C. was entitled to a lien under the Gen. Sts. c. 150, for the value of his labor.

If the St. of 1872, c. 318, § 2, applies to the case of labor performed under an entire contract, the work called for by the contract not being wholly performed, owing to the failure of the other party to the contract to perform his part, it is no objection to the enforcement of a lien under the statute, that the petitioner, in his statement of a lien, has stated the value of his labor to be greater than it actually was, it not appearing that the petitioner had wilfully and knowingly claimed more than was due.

PETITION by James F. Smith and John H. Le Cain to enforce a mechanic's lien under the Gen. Sts. c. 150, for work done upon a block of five houses on Dennis Street in Boston.

The certificate, filed by the petitioners in the office of the city clerk on March 7, 1873, set forth that the petitioners had a claim against William Eadie and Theodore G. Brown, late co-partners under the firm name of Eadie & Brown, amounting to $400, according to an account annexed and made part of the cer-

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tificate. The first item of this account, under date of February 6, 1873, was: "For 247½ days' labor on five houses on Dennis Street, in Boston, $1050." The other items were various credits, made in 1872, amounting to $650, leaving a balance of $400. The certificate then set forth that the claim was made for and on account of labor performed and furnished in the erection of five brick houses on land owned by Benjamin P. Norris, and situate on Dennis Street in Boston, and described their situation on the street; that the houses constituted one block; that the labor was performed and furnished in and upon said houses by virtue of a contract entered into on September 24, 1872, between the petitioners of the one part and Eadie & Brown of the other part, a copy of the contract being annexed and made part of the certificate;* that the petitioners had performed and furnished labor under the contract upon said houses to the value of $1050, and had received the sum of $650, leaving a balance due of $400; that the completion of the work was stopped without any fault on the petitioners' part; and that they ceased laboring upon said houses on February 6, 1873. The petition also set forth a claim for extra work done on said houses in accordance with directions given from time to time by Eadie & Brown, amounting to $65, after deducting all just credits; and claimed a lien upon said houses and the land under them.

The case was sent to an auditor, who found that the respond-

* The material parts of this contract, which was made between Eadie & Brown of the first part, and the petitioners of the second part, were as follows: "The parties of the second part agree to and with the parties of the first part to furnish all the labor to complete all the carpenter work on a block of five houses on Dennis Street, now being erected by the parties of the first part, in the following manner." Then followed the specifications of the work to be done. "The work to be performed in a good, substantial and workmanlike manner, and satisfactory to the said Eadie & Brown, and to be laid out according to a plan drawn by B. P. Norris, and for the faithful performance of the same, the parties of the first part agree to pay parties of the second part the sum of three hundred dollars on each house, or fifteen hundred dollars on the whole five, in the manner following, to wit: two hundred dollars when the floor timbers are on the whole five, two hundred and fifty dollars when finished outside, two hundred and fifty dollars when ready for plastering, four hundred dollars when the standing finish is up, and the balance of four hundred dollars when the buildings are all completed."

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ent was the owner of the land described in the petition, that on August 20, 1872, he and Eadie & Brown made and signed the following contract under seal:

"Agreement of sale made and concluded this twentieth day of August, A. D. 1872, by and between Benjamin P. Norris, of Boston, in the county of Suffolk, of the first part, and William Eadie and Theodore G. Brown, both of said Boston, of the second part, witnesseth, that the said Norris agrees to sell and convey, and said Eadie & Brown agree to purchase, a certain parcel of land situated on the northwesterly side of Dennis Street in said Boston." Then followed a description of the land. "Said Eadie & Brown agree to pay for said land at the rate of one dollar per square foot, being sixty-eight hundred and four dollars in all, and interest as hereinafter stated. Said Eadie & Brown are to commence immediately to erect on said land five two-story and French roof brick dwelling houses, each measuring at least seventeen feet front by thirty-seven feet deep, with two-story bay windows, and each house containing ten rooms and cellar, and being fitted for two families, with separate gas-pipes for each family, to be finished in good style, and each house to cost not less than thirty-five hundred dollars above the land. And said Norris is to advance to an amount not exceeding two thousand dollars in money and materials for the building of each of the said houses, at such times and in such amounts as he shall deem safe and expedient, reference being had to the progress of the said buildings. Deed or deeds of said premises free from all incumbrances, shall be given within seven months from this date by said Norris, provided always said Eadie & Brown shall, within said period, pay to said Norris all of said purchase money, together with taxes and interest thereon from this date at the rate of seven and $\frac{3}{10}$ per centum per annum; and all moneys advanced by said Norris, together with interest thereon, at the rate of eighteen per centum per annum, from the respective times when such advances are made, and the value in money of all materials furnished by said Norris or procured by his order or indorsement, together with such interest or expenses on the same as the said Norris may be obliged to pay. But if said payments are not made within said period of seven months, then this agreement is to be null and void."

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Indorsed upon this contract was an assignment by the assignee in bankruptcy of Eadie & Brown, dated February 18, 1873, of all their rights in the contract to Isaac G. Caswell; and an agreement, dated February 21, 1873, signed by Norris, whereby he agreed to be bound, by all the covenants contained in the contract, to Caswell and one Weeks, as fully and completely as though the contract had been originally executed by them, and extending the contract to June 20, 1873.

The auditor further found that on September 24, 1872, Eadie & Brown, with the knowledge of the respondent, entered into the contract with the petitioners, as alleged in their petition; that the petitioners, with the knowledge and consent of the respondent, proceeded to build the houses as required by the contract; that most of the carpenter's work necessary to be done, before the houses were plastered, was done before December 12, 1872, on which day Eadie & Brown filed a petition in bankruptcy; that the petitioners were prevented from completing their contract with Eadie & Brown, by the failure of the latter to furnish the materials, as required by the contract; that some work was done by the petitioners after December 12, 1872, on one only of the houses, which work was done in good faith, with the expectation that they were to go forward and finish the work under the contract; that the labor on the houses ceased on February 6, 1873; that five eighths of the entire work called for by the contract was performed by the petitioners at the time the labor ceased; that one or the other of the petitioners either had knowledge of the bankruptcy of Eadie & Brown prior to February 6, 1873, or had knowledge of such facts as should have put them on inquiry; that the value of this work was $937.50; and that the petitioners were entitled to receive therefor the sum of $287.50, being the amount remaining after deducting $650, the amount of money received. The auditor also found that the petitioners had done extra work, with the knowledge and consent of the respondent, to the amount of $65, for which they were entitled to a lien; and that they were entitled to recover as compensation for the work done under the contract and for extra work the sum of $352.50.

The Superior Court ordered judgment for the petitioners for $357.79; and the respondent appealed to this court.

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R. Lund & J. M. Browne, for the petitioners.

J. R. Churchill & H. E. Ware, for the respondent. 1. If Eadie & Brown had authority to act for the respondent, in subjecting his land to a lien, their authority ceased by operation of law, without actual notice, upon the filing of their petition in bankruptcy, on December 12, 1872, and the consequent assignment of their estate and contracts to their assignee in bankruptcy. Bump on Bankruptcy, (8th ed.) 476. *Mays* v. *Manufacturers' National Bank*, 64 Penn. St. 74. *Johnson* v. *Geisriter*, 26 Ark. 44. *In re Anderson*, 9 Bankr. Reg. 360. The agreement of sale is the only authority which the petitioners have shown Eadie & Brown ever had in the matter; and, nearly three months before the certificate of the petitioners was recorded, they lost this authority by assignment, and the petitioners had constructive knowledge thereof. It also appears, if the fact is material, that the petitioners had actual knowledge of the bankruptcy.

2. The subsequent indorsement by the respondent upon the agreement of sale has, in law, the effect of an entirely new contract between the respondent and strangers. The petitioners are in no way parties thereto, and the respondent is not bound thereby as against them in this proceeding. If work, done subsequently to bankruptcy of Eadie & Brown, was done under a new contract, it was done upon one of the houses only, and the lien, if any, would only attach to that house. *Landers* v. *Dexter*, 106 Mass. 531.

3. By the Gen. Sts. *c.* 150, § 5, the amount claimed was to be set forth; the St. of 1872, *c.* 318, § 2, seems to require a statement of the actual value, and the statute must be strictly complied with. *Williams* v. *Amory*, 14 Mass. 20, 29.

DEVENS, J. The contract between Norris and Eadie & Brown was similar to that in *Hilton* v. *Merrill*, 106 Mass. 528. It was one of the purposes of their agreement that Eadie & Brown should proceed to erect a block of houses upon the land which, on certain terms, Norris was to convey to them, and for this purpose Norris was to advance a specified amount of money. By implication he authorized Eadie & Brown to employ, either directly or through sub-contractors, the workmen necessary for this object, and the labor thus employed was performed by intendment of the statute, with the consent of Norris.

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The petitioners, in making their contract and entering upon its performance, had a right to rely not only on the promise of Eadie & Brown, but also on their lien upon the property as security for the work which they might do under it. When, therefore, Eadie & Brown became bankrupt, even if they were no longer personally liable for what the petitioners might afterwards do under their contract, the petitioners could still go on, relying upon their lien on the property, and finish the work for which they had contracted, if in so doing they acted in good faith and for the purpose of completing their contract. The labor thus done would be under the authority which it must be inferred Norris had given Eadie & Brown to employ workmen, and would be performed on his estate with his consent.

Nor are the petitioners to lose their lien because, acting in good faith, they have failed fully to complete all the labor they agreed to perform; that which they have done has been under the contract, to which the respondent consented, and it is that consent which subjects his estate to the lien. If, by the failure of the workmen in such a case fully to perform, any injury should have been occasioned, or their labor should have been less valuable, there might be a deduction from the contract price by way of recoupment. No such question has, however, been here presented. It has been found that what the petitioners have done, since the bankruptcy of Eadie & Brown, they did in good faith, expecting to be able to finish their contract, and that they have failed because the necessary materials were not furnished. They are entitled, therefore, to judgment for the amount which the auditor has decided to be due, having filed the necessary certificate within thirty days after the completion of the labor which they were able to perform.

Assuming, but not deciding, that the St. of 1872, c. 318, was intended to apply to an entire contract like that in the case at bar, which was for work and labor only, the certificate filed was still sufficient to meet all the requisitions of § 2 of that statute. In addition to the statements required by the Gen. Sts, c. 150, § 5, it set forth the entire price for the entire contract, the number of days' labor performed, and the value of the same. Even if the value as stated was more than that which has been found to be due, the St. of 1872 is but an extension of the Gen. Sts. c. 150

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and, as it does not appear "that the person filing the certificate has wilfully and knowingly claimed more than is his due," the inaccuracy in the statement does not "invalidate the proceedings." Gen. Sts. *c.* 150, § 6. This certificate having been filed within thirty days after the completion of the labor which the petitioners were able to perform, they are therefore entitled to judgment for the amount which the auditor has found to be due.

Judgment affirmed.

JAMES L. JACKSON & another *vs.* AARON H. ALLEN.

Suffolk. March 17, 1874. — Sept. 8, 1875. COLT & ENDICOTT, JJ., absent.
Nov. 20, 1875. — March 7, 1876. MORTON & LORD, JJ., absent.

The extent of an invention claimed in letters patent is to be determined by the specification, which is to be construed by the court; and testimony of experts that, at the time the letters were issued, the invention, as described and claimed therein, was not novel, is inadmissible to control or limit the construction to be given to the specification.

The description of an invention claimed in letters patent was "a seat, moving upon a cross shaft or hinge in such manner as that the seat or front sitting portion thereof can be turned up or elevated to afford room in passing into or out of the seat or past it, and said seat forming a lever that, when down or adjusted to a sitting level, strikes and is supported by a stop, which may be located in rear of the seat fulcrum, and serves to sustain the seat and person occupying the same, the seat being extended backwards in rear of its fulcrum and coming up under said stop." The specific claim was for "a swinging or lever seat, set and moving upon a cross shaft or hinges, and sustained when in use by a stop or stops so disposed as that the rear portion of the seat comes in contact with said stop or stops when the seat is turned down, substantially as herein set forth; and whether combined or not with weights or springs whereby the said seat may assume and retain a vertical or raised position automatically, as herein specified." *Held*, that this patent was for a tilting seat, suspended upon a pivot back of the centre, and sustained as a lever under the weight of the sitter by a stop or stops bearing downwards at the back of the seat or in rear of the pivot, thus dispensing with supports in front of the fulcrum; that it was not limited to the particular form and position of the several parts by which this was effected as shown in the specification; but that if in another chair the like results were accomplished in substantially the same manner, the latter was an infringement, notwithstanding differences in the form, appearance and arrangement of the parts.

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An invention embracing as an essential part of its device one for which a former patent has been issued, is not less an infringement thereof by reason of its containing something additional, itself patentable as an improvement.

Whether a patented invention is or is not an infringement of a prior patent is a question of fact for the jury.

A patentee of a chair granted the exclusive right to make and sell the chair within the United States, and covenanted not to grant a license to any other person to make or sell chairs of the kind. He subsequently made an agreement under seal with a third person, the later patentee of another chair, reciting that a suit which had been brought by a former licensee under the first patent against the later patentee, for an infringement of the former patent, had terminated in favor of the later patentee and had been dismissed because it was held that the chair made by him was not deemed an infringement of the earlier patent, and agreeing for a money consideration to abide the decision in the said cause and to make no claim against the later patentee on account of any chair made or to be made under his patent. The suit referred to had in fact been dismissed by an arrangement of the parties thereto. *Held*, that if the chair of the later patentee was in fact an infringement of the earlier patent, the agreement with him was in substance a license, and constituted a breach of the covenant in the earlier agreement; and that after the execution of the contract with the later patentee neither the earlier patentee nor his first licensee could maintain any proceedings against the later patentee for making the chair patented by him on the ground of infringement of the earlier patent.

A patentee, reciting the issue of his letters patent, but not describing himself as the inventor of the improvement, granted an exclusive license to make and sell the same "as patented under and by said letters patent," and covenanted not to grant licenses to any other person to make and sell articles of the same character, and also to institute or cause to be instituted legal proceedings against all parties who might infringe said letters patent, and to exercise due diligence in such proceedings so as to restrain such parties as promptly as possible, in order that the licensee might enjoy the exclusive privilege of making and selling the articles in question without competition. *Held*, that this agreement did not amount to a warranty that the licensee should enjoy the privilege against persons not claiming rights under the licensor; nor estop the licensor to show that his patent was invalid, by way of affecting the damages in an action against him by the licensee for breach of the covenants to sue infringers and not to grant other licenses.

CONTRACT upon the following indenture, dated March 28, 1869, and signed by the plaintiffs and the defendant:

"Whereas certain letters patent of the United States, bearing date the 5th day of December, 1854, were issued to A. H. Allen, of Boston in the county of Suffolk and State of Massachusetts, for improvements in chairs for theatres, school-houses and dwelling houses, which said letters patent were afterwards surrendered, and new and reissued letters patent for the same invention granted to the said Aaron H. Allen on the 15th day of January, 1861, which reissued letters patent were extended for

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the term of seven years from the 5th day of December, 1865 and whereas James L. Jackson and Peter H. Jackson, composing the firm of James L. Jackson & Brother, of the city and State of New York, are desirous of obtaining a license to use the improvement so patented to the said Allen in and upon chairs for theatres and other buildings, to be manufactured and sold by them, the said James L. Jackson & Brother, excepting only folding portable chairs of the character and such as is commonly known as camp stools or chairs, and those now known as school furniture seats:

"Now this indenture witnesseth, that the said Aaron H. Allen, for and in consideration of the sum of one dollar to him in hand paid by the said James L. Jackson and Peter H. Jackson, composing the firm of Jas. L. Jackson & Brother, the receipt whereof is hereby acknowledged, and of the covenants hereinafter recited to be kept and performed by the said James L. Jackson & Brother, has given and granted, and by these presents does give and grant, unto the said James L. Jackson & Brother the exclusive liberty, license, power and authority to make, use and sell within and for the United States, for and during the unexpired term of said patent, the said improvement as patented under and by said letters patent, excepting only the adaptation of said improvements to camp chairs and school furniture as hereinbefore recited, upon the terms and conditions herein contained, and upon the payment of the sums of money as herein provided.

"1st. The said James L. Jackson & Brother covenant and agree to pay to the said Aaron H. Allen the following sums upon all chairs manufactured and sold by them, containing and using said improvements or any substantial part thereof, as follows, that is to say, upon each and every such chair the sum of thirty-five cents.

"2d. The said James L. Jackson & Brother also covenant and agree to keep full and correct books of account of any and all said chairs which they may manufacture containing or using the said invention, which said books of account shall be open at all reasonable times to the inspection of said Aaron H. Allen and his representatives, or his or their attorney; and on the first days of January, April, July and October of each and every

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year to make a true return of all such chairs manufactured and sold by them as herein authorized during the past quarter, and also remaining unsold, and within thirty days thereafter to pay to said Aaron H. Allen or his representatives, upon all such chairs so manufactured and sold, the sum of thirty-five cents each, royalty, as hereinbefore provided, and agreeable to the returns herein required.

"3d. The said Aaron H. Allen reserves to himself and does not grant to the said James L. Jackson & Brother the adaptation of said improvements so patented to folding portable chairs of the character and such as is commonly known as camp stools or chairs, and those now known as school furniture seats.

"4th. The said James L. Jackson & Brother further covenant and agree to mark or paint on each and every chair made and sold by them under this license, using or employing the said invention or any part thereof, the following: 'Patented December 5, 1854; January 15, 1861, ext'd December 5, 1868.'

"5th. The said Aaron H. Allen covenants and agrees that he will not grant licenses to any other person or persons to make and sell chairs of the character herein licensed to James L. Jackson & Brother: Provided the said James L. Jackson & Brother use due diligence in pushing the invention and supplying the public demand therefor. On their failure to do which at any time after twelve days' notice in writing being given, the said Aaron H. Allen reserves to himself the privilege to license other parties at his pleasure.

"6th. The said Aaron H. Allen hereby agrees to institute or cause to be instituted legal proceedings against any and all parties, at his own expense, who may from time to time infringe said letters patent; and he shall exercise due diligence in all such proceedings, so as to restrain such parties as promptly as possible, in order that the said James L. Jackson & Brother may enjoy the exclusive privilege of making and selling the chairs in question without competition.

"7th. This license and agreement shall be binding upon the heirs, executors, administrators, assigns or other legal representatives of either and all of the parties hereto."

The declaration alleged as breaches of this contract: first, that the defendant had granted a license to one Bernhard Koech-

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ling to make and sell the patented chair; and, second, that the defendant had refused and neglected to prosecute Koechling as an infringer. Answer, a general denial. Trial in this court, before *Wells*, J., who allowed a bill of exceptions in substance as follows:

On March 23, 1869, the plaintiffs and the defendant executed the instrument declared on, and it was recorded in the patent office on October 8, 1869. The defendant's reissued letters patent of January 15, 1861, were for an "improvement in seats for public buildings," described as follows: "The nature of my invention consists in a seat, set and moving upon a cross shaft or hinge, in such manner as that the seat, or front sitting portion thereof, can be turned up or elevated to afford room in passing into or out of the seat, or past it, and said seat forming a lever that, when down or adjusted to a sitting level, strikes and is supported by a stop which may be located in the rear of the seat fulcrum, and serves to sustain the seat and person occupying the same, the seat being extended backwards in rear of its fulcrum, and coming up under said stop. Such seat may be counterpoised so as to assume and retain a vertical or nearly vertical position when raised or not in use." "When there are a series of seats in a row, a continuous shaft or fulcrum may be used by forming on the end of each alternate section a screw arranged to pass through the frame or standard into a screw box or female thread connected with each adjoining section." "What is here claimed as new and useful is a swinging or lever seat, set and moving upon a cross shaft or hinges, and sustained when in use by a stop or stops so disposed as that the rear portion of the seat comes in contact with said stop or stops when the seat is turned down, substantially as herein set forth; and whether combined or not with weights or springs whereby the said seat may assume and retain a vertical or raised position automatically as herein specified."

The original patent was assigned by the defendant to Enos G. Allen, and in 1860 the plaintiffs obtained from him an exclusive license for the United States to make and sell the patented chair during the term of the original patent, which expired in December, 1868.

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On February 26, 1869, Bernhard Koechling took out letters patent of the United States for "a new and useful improvement in folding chairs," thus described: "This invention relates to an improvement in that class of chairs which are generally used for opera houses, theatres and similar localities. The invention consists in the manner of hanging the seat to the side frames, which is done in such a manner that, when any number of chairs are to be placed in a convex or concave line, the devices for attaching the seat will always answer as they are. In most cases, where the chairs are not placed in a straight line, the holes which are bored through the side frames to receive the pin on which the seat swings must be arranged separately on each chair, to agree with the position of the same on the curved line. By the use of my improvement, I can manufacture or cast any amount of side frames and seats, and all parts can be put together as they are, no matter if the chairs are to be placed into a straight or curved line. Provision is also made that the seats on my chair may be turned up or down at pleasure." The specific claim was for the arrangement of stop-pins, fitting into corresponding mortises, by which the seat is supported both in front and rear of the pintle on which the seat is hung, and of certain iron straps, playing in slots, in the side pieces of the chair, in combination with the back.

The plaintiffs had commenced legal proceedings in the Circuit Court of the United States for the Southern District of New York in the name of Enos G. Allen against Koechling, for making chairs under his patent, on the ground of infringement of Allen's patent. This suit was pending at the expiration of Allen's original patent. In October, 1868, a similar suit by Enos G. Allen against Koechling was pending in the Circuit Court of the United States for the District of Massachusetts, and was on May 7, 1869, dismissed by agreement of counsel by the following entry: "The plaintiff in the above entitled cause, having examined the proofs in the same, consents that the bill may be dismissed without costs, and disclaims all right of further action against the defendant upon the patent on which this suit is brought. It is therefore agreed that the bill may be dismissed without costs."

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On May 7, 1869, the defendant and Koechling executed the following contract under seal: "Whereas the case recently pending in the Circuit Court of the United States for the District of Massachusetts, by Enos G. Allen *v.* Bernhard Koechling, for an alleged infringement of letters patent of the United States, granted to Aaron H. Allen on the 5th day of December, 1854, for an improvement in seats for public buildings, has terminated in favor of the said Koechling, and the bill dismissed, because it was held that the chair made by said Koechling under letters patent of the United States, granted to him on the 26th day of February, 1867, was not deemed an infringement of the letters patent of said A. H. Allen.

"And whereas the said Koechling has agreed to pay said A. H. Allen the sum of two hundred and fifty dollars in hand, and the further sum of five hundred dollars each and every year during the continuance of the extended term of said letters patent, being seven years from the 5th day of December last, in consideration that the said Allen shall abide the decision of said cause, and shall not make any demand or claim on him for any alleged infringement by reason of any chair heretofore made by him, said Koechling, or which may hereafter be made by him under and in accordance with his, said Koechling's patent:

"Therefore this agreement witnesseth, that the said Aaron H. Allen shall and will abide the decision in said cause, and will not make any demand or claim against said Koechling on account of any chair heretofore made or shall hereafter be made as aforesaid; provided, however, that said Koechling shall well and truly pay the sum of five hundred dollars on the fifteenth day of November of each year during the extended term of said letters patent, being the sum of thirty-five hundred dollars.

"And the said Koechling promises to pay said sums on the days aforesaid, provided that he shall fully enjoy the exemption from all claim, demand, action or other proceeding or interference as herein stipulated, either by the said Allen or any person claiming under or through him."

The suit referred to in the above contract had been on the same day discontinued by the agreement of counsel before stated. It did not appear that either of the parties in the present suit had any part in that arrangement or knew of it until afterwards

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or had any control of the suit against Koechling. The plaintiffs, after they knew of the defendant's contract with Koechling of May 7, 1869, discontinued their suit in New York in the name of E. G. Allen against Koechling.

The plaintiffs required of the defendant before the commencement of this action to institute proceedings against Koechling on the ground that his chair was an infringement of the Allen patent. The defendant introduced evidence tending to show that he told the plaintiffs that he could not sue Koechling after his contract with him; but that the plaintiffs could do so in his name, or in his and their names jointly, and that if they would do so he would pay all expenses and costs of suit and render any assistance in his power; and that the plaintiffs declined to do this.

The defendant offered evidence tending to show that his patent was invalid on the ground of want of novelty, for the purpose of showing that he was not obliged to prosecute Koechling, or that, if he did do it, it could be of no benefit to the plaintiffs, because such suit could not be maintained. This evidence was excluded by the court, for the reason that it was incompetent for the defendant to prove his patent invalid.

The defendant also asked the judge to rule that the measure of damages, upon the defendant's breach of his contract to use reasonable diligence to sue and stop any one infringing on his patent, was such a sum as would fully compensate the plaintiffs for the costs, expenses, time and trouble of prosecuting the suits against infringers themselves in the name of the defendant, or in his name and their own jointly; and thus obtain the same protection of their rights under their license as they would get if the same suits had been prosecuted by the defendant. But the judge declined so to rule.

The defendant also asked the judge to rule that under the plaintiffs' exclusive license they could commence suits in the name of the defendant, or in his name and their own jointly, against Koechling, to stop him from making chairs under his patent if it infringed the defendant's patent, notwithstanding the contract of May 7, 1869, between the defendant and Koechling. But the judge refused so to rule; and did rule that after the execution of the contract of May 7, 1869, neither

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the defendant, nor the plaintiffs in his name, or in his name and their own jointly, could maintain any proceedings against Koechling for making the chair patented by him, on the ground that he infringed on the defendant's patent.

The defendant asked the judge to rule that the plaintiffs could have prosecuted the suit commenced by them in the name of E. G. Allen against said Koechling in New York, and pending at the time of the contract of May 7, 1869, to final judgment, and thus settled the question of infringement in that suit, notwithstanding said E. G. Allen had undertaken to release said Koechling from all claims, as appears by the docket entry therein. But the judge declined so to rule.

The judge ruled and instructed the jury, that if they found the Koechling chair to be an infringement upon Allen's patent, under which the plaintiffs had their license, then the agreement of May 7, 1869, between the defendant and Koechling, of itself constituted a breach of Allen's contract with the plaintiffs; so that, upon the point of liability, the only question for them to determine was whether there was an infringement.

The defendant introduced the testimony of an expert to show that, in view of the state of the art at the time his patent was issued, the substantial novelty described was limited to the specific means or device shown for operating the seat and connecting it with the standards of the chair; and claimed that the patent must be so construed and limited; also, that the Koechling chair differed from Allen's in the form and arrangement of these specific means or devices, and therefore was no infringement; and asked the judge to rule and instruct the jury accordingly. The judge ruled and instructed the jury that the Allen patent was for a tilting seat, suspended upon a pivot back of the centre, and sustained as a lever under the weight of the sitter by a stop or stops bearing downwards at the back of the seat or in rear of the pivot, thus dispensing with supports in front of the fulcrum; that it was not limited to the particular form and position of the several parts by which this was effected, as shown in the plaintiffs' chair or in the specifications of Allen's patent but that if, in the Koechling chair, the same or substantially the same results were accomplished in the same manner or by the same means, or substantially so, it was an infringement, not

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withstanding differences in the form, appearance and arrangement of the parts. The judge also ruled that it would be not less an infringement, even if it contained something additional to what was contained in the Allen chair, and that additional part or device was itself patentable as an improvement, provided the Koechling chair embraced, as an essential part of its device, that for which the Allen patent was issued.

Upon the question of damages, the judge instructed the jury as follows: "If the jury find for the plaintiffs, they are entitled as damages to a fair compensation for the injury they sustained by the defendant's act in licensing Koechling, or his omission to sue him after notice of what he was doing; and they are to consider, as evidence tending to show the amount of that injury, the number of chairs made and sold by Koechling between May 7, 1869, and the service of the writ in consequence of such act of licensing or omission to sue, and the loss to the plaintiffs by being deprived of the monopoly of the patent chairs to that extent; and they are further to consider, as evidence tending to show the amount of the plaintiffs' damage, their loss of profit on their own chairs made and sold during that time by reason of Koechling's making and selling chairs in competition with them in consequence of defendant's licensing him or omitting to sue him after notice of what he was doing, so far as that competition might have been prevented by a reasonable effort to stop it by legal proceedings. If the jury are satisfied that the plaintiffs were deprived of orders which they would otherwise have had for chairs of their own between May 7, 1869 and the service of the writ, by the acts of Koechling in securing such orders and in making and selling his chairs, then they may consider, as evidence tending to show the damages to the plaintiffs by such acts, the profit which the plaintiffs would reasonably have made from filling the orders of which they were so deprived. On the question of what their reasonable profit would have been, the jury may take into consideration evidence of the prices at which such chairs were sold in 1867. But they must also take into consideration, in connection with it, the fact that at the time of the contract, the Koechling chair had already been in the market for nearly two years; and it was for the jury to consider whether and how far the price, which had once

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uced, could be restored merely by removing the compe
by such reasonable efforts to do so as the defendant
nd to make. They must consider the whole matter
erence to the condition of things as they were when the
was made. (It did not appear that there was any ma-
ference between the cost of making such chairs in 1867
cost of making them after March, 1869, nor that there
difference in the conditions of the business for the two
and the plaintiff offered evidence that there was no
erence, except that, from and after 1867, the selling
depressed by the competition of Koechling.) If the
satisfied that, on the chairs made and sold by the plain-
ween May 7, 1869, and September 16, 1870, they were
y reason of the continued competition of Koechling to
prices down below the reasonable price they would
eived but for such competition, the plaintiffs are enti-
at difference as damage, so far as it might have been
l by a reasonable effort to stop such competition by
ceedings." To these rulings and refusals to rule the
alleged exceptions.

Abbott & B. Dean, for the defendant.

wne, (*Jabez S. Holmes* with him,) for the plaintiffs.

C. J. The questions of law presented in this
onveniently considered in a somewhat different o
in which they arose at the trial and are stated in
ceptions.

extent of the invention claimed by the defenda
must be determined by the specification of the p
is a question of construction, which in the case of
t, as of all other written contracts, is a question fo
any part of the invention thus claimed is not
nt may be invalid as claiming too much. *Mint*
Nev. & P. 595; *S. C.* 6 A. & E. 735; 1 Webst.
142. But the testimony of the expert called as a
the defendant was not introduced to show a wa
ffecting the validity of the patent, but only upon
of construction, to limit the meaning of the langu
ecification. It was therefore rightly disregarded

Winans v. *New York & Erie Railroad*, 21 How.

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2. The defendant, at the beginning of his specification, describes the nature of his invention as consisting in a seat, set and moving upon "a cross shaft or hinge" in such a manner that the front part of the seat can be raised to afford room in passing in, out or by, and form a lever that, when brought to a level, strikes and is supported by a stop in the rear of the fulcrum. In the further description given to enable others to use the invention, he shows that the fulcrum or centre of motion, by which the seat is suspended on or attached to the standards or frame of the chair, may consist either of a shaft extending across the seat or of a pin on each side. And what he finally claims as new and useful is "a swinging or lever seat, set and moving upon a cross shaft or hinges, and sustained when in use by a stop or stops so disposed as that the rear portion of the seat comes in contact with said stop or stops when the seat is turned down, substantially as herein set forth."

In short, the invention, as claimed by him, consists in a tilting seat, supported on each side upon a pivot, and which is kept in place, under the weight of the sitter upon the front, by one or more stops bearing down upon the seat behind the pivot; and this whether the pivot or fulcrum on either side is or is not part of a continuous shaft. The instruction given to the jury as to the extent of the invention claimed by the defendant was therefore correct.

Such being the legal construction of the defendant's patent, it was not limited to any particular form or arrangement of the several parts; and the jury were rightly instructed that a chair by which the same or substantially the same results were accomplished in the same manner or by the same means, or substantially so, was an infringement, notwithstanding differences in the form, appearance and arrangement of the parts. *Minter* v. *Wells*, 1 Webst. Pat. Cas. 127; *S. C.* 5 Tyrwh. 163; 1 C., M. & R. 505. *Winans* v. *Denmead*, 15 How. 330. *Odiorne* v. *Winkley*, 2 Gallis. 51. *Blanchard* v. *Beers*, 2 Blatchf. C. C. 411.

3. The further instruction, that if the later patent embraced, as an essential part of its device, that for which the first patent was issued, it would be not less an infringement, even if it contained something additional which was itself patentable as an improvement, was equally correct. *Foster* v. *Moore*, 1 Curtis, 279, 292. *McCormick* v. *Talcott*, 20 How. 402, 405.

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4. The question whether the Koechling patent was an infringement of the defendant's was rightly submitted as a question of fact to the jury. *Hawkes* v. *Remington*, 111 Mass. 171, and cases there cited.

5. By an indenture of March 23, 1869, the defendant granted to the plaintiffs "the exclusive liberty, license, power and authority to make, use and sell within and for the United States, for and during the unexpired term of said patent, the said improvement as patented under and by said letters patent, excepting only the adaptation of said improvement to camp chairs and school furniture;" and covenanted that he would not grant licenses to any other person to make and sell chairs of the character included in the license to the plaintiffs; and that he would at his own expense institute or cause to be instituted legal proceedings against all infringers of said letters patent, and exercise due diligence in such proceedings so as to restrain them as promptly as possible, in order that the plaintiffs might enjoy the exclusive privilege of making and selling the chairs in question without competition.

The declaration in the present case alleges two breaches of the covenants of the defendant in the indenture; the one by granting a license to Koechling, and the other by neglecting to sue him as an infringer.

The agreement of May 7, 1869, by which the defendant, in consideration of the payment of a certain sum annually by Koechling, agreed not to make any claim on him for any alleged infringement, was essentially a license. Its character is not affected by the false recital therein that the previous action against Koechling had been decided in his favor on the merits; it appearing that the entry of judgment in that action was made by an arrangement between the counsel of the parties thereto, and without any assent, knowledge or control of these plaintiffs. It was therefore rightly ruled that if the Koechling chair was an infringement of the defendant's patent, the agreement between the defendant and Koechling constituted a breach of the first covenant sued on.

6. The grant from the defendant to the plaintiff, contained in the indenture of March 23, 1869, not amounting to an assignment, either of the whole patent or of an undivided part thereof

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for the territory described therein, was a mere license, and gave the plaintiffs no interest in the patent itself, and no right to sue in their own names for any infringement thereof. *Gayler* v. *Wilder*, 10 How. 477. It might authorize the licensees to assert, by action in the name of the licensor, any right which he had in respect to the subject of the license, and prevent him from releasing any action so brought by them. *Goodyear* v. *McBurney*, 3 Blatchf. C. C. 32. *Goodyear* v. *Bishop*, 4 Blatchf. C. C. 438. But after he had executed the release under seal to Koechling, neither he, nor his licensees in his name, could institute or intervene in an action against Koechling. Upon this point, therefore, the rulings at the trial were correct.

7. This indenture contains no express covenant that the patent is valid, nor even a recital that the defendant is the inventor of the subject thereof. The recital is only of the issue of letters patent to the defendant, and the plaintiff's desire of obtaining a license to use the improvement so patented. The grant is of a license to make, use and sell "the said improvement as patented under and by said letters patent." The covenants are, 1st, not to license other persons; and 2d, to institute and prosecute legal proceedings against all who infringe the patent. The words "in order that the said James L. Jackson & Brother may enjoy the exclusive privilege of making and selling the chairs in question without competition" do not constitute an independent covenant, and are not declared on as such. They are inserted by way of stating the purpose of the covenant to which they are annexed. Reading them in connection with that covenant and with the rest of the instrument, we are all of opinion that they do not amount to a warranty by the licensor that the licensees shall enjoy the privilege of making the chairs in question against persons not claiming rights under the licensor.

The cases of *Bowman* v. *Taylor*, 2 A. & E. 278; *S. C.* 4 Nev. & Man. 264; and *Bliss* v. *Negus*, 8 Mass. 46, cited by the learned counsel for the plaintiffs, do not appear to us to support the opposite conclusion. In *Bowman* v. *Taylor*, the action was by the licensor against the licensee, the indenture contained a distinct recital that the licensor had invented the improvements in question; and the decision was put upon that ground, and, by the earlier and the later English authorities, could hardly be

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sustained upon any other. *Hayne* v. *Maltby*, 3 T. R. 438. *Smith* v. *Scott*, 6 C. B. (N. S.) 771, 782. In *Bliss* v. *Negus*, the deed from the plaintiff recited the issue of a patent securing to the patentee the exclusive right to the improvement in question, and its assignment to the plaintiff, and purported to assign to the defendant all the right and privilege so conveyed, with a covenant to warrant and defend the same against the claims of any other persons; and yet the court was of opinion that this deed contained no covenant which could sustain an action by reason of the invalidity of the patent for want of novelty, and held that, if the patent was invalid for that cause, the deed to the defendant constituted no consideration for a promissory note.

8. Upon the question of the correctness of the ruling excluding the evidence offered by the defendant to show that his patent was invalid, there is a difference of opinion among the judges, and the court desires the assistance of a further argument of counsel upon that question, as well as upon the instructions to the jury on the question of damages, before deciding the case.

Case to stand for further argument accordingly.

The case was reargued on these points by the same counsel in November, 1875.

GRAY, C. J. The question to which the strength of the second argument has been directed is thus stated in the bill of exceptions: "The defendant offered evidence tending to show that his patent was invalid on the ground of want of novelty, for the purpose of showing that he was not obliged to prosecute Koechling, or that, if he did do it, it could be of no benefit to the plaintiffs, because such suit could not be maintained. This evidence was excluded by the court, for the reason that it was incompetent for the defendant to prove his patent invalid."

Upon the first argument of this question, the very able and learned judge who presided at the trial adhered to the opinion which he had expressed to the jury, and one of the other judges was inclined to concur with him. But upon further consideration all the surviving judges are of opinion that the evidence should have been admitted, as affecting the measure of the damages which the plaintiffs were entitled to recover.

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The ruling at the trial evidently proceeded upon the ground that the defendant was estopped, either by deed or *in pais*, to show that his patent was invalid.

But to constitute an estoppel by deed, a distinct and precise assertion or admission of a fact is necessary. *Right* v. *Bucknell*, 2 B. & Ad. 278. *Wight* v. *Shaw*, 5 Cush. 56, 64. *Miller* v. *Ewing*, 6 Cush. 34. *Campbell* v. *Knights*, 24 Maine, 332. *Pike* v. *Galvin*, 29 Maine, 183. *Pelletreau* v. *Jackson*, 11 Wend. 110, 117; *S. C. nom. Jackson* v. *Waldron*, 13 Wend. 178. *Brown* v. *Jackson*, 3 Wheat. 449. *Van Rensselaer* v. *Kearney*, 11 How. 297, 325. We have already decided that the indenture contains no warranty or covenant that the defendant is the inventor of the improvement in question. It does not state that an exclusive privilege is owned by the defendant or conveyed to the plaintiffs. The defendant merely covenants that he will diligently proceed against infringers, so that the plaintiffs "may enjoy the exclusive privilege of making and selling the chair in question without competition," and that he will not grant inconsistent licenses. If he does grant such licenses, or fails to bring such suits, it is a breach of contract, for which he is liable in damages. But proving that his patent was invalid does not deny anything that he has ever asserted.

Nor does the case show any estoppel *in pais*. The defendant does not appear to have made any representation as to the validity of the patent, otherwise than as expressed in the indenture. To constitute an estoppel *in pais*, it is essential that the defendant should, by word or act, have represented the fact to be different from what he now attempts to show it to have been. Mere disappointment in expectation, or breach of promise or covenant relating to the future, cannot constitute an estoppel *in pais*. *Langdon* v. *Doud*, 10 Allen, 433. *Jorden* v. *Money*, 5 H. L. Cas. 185.

It was argued that this case was analogous to those in which it has been held that a licensee, continuing to enjoy the privilege of his license, is estopped to deny the validity of the patent, when sued for the royalty. *Kinsman* v. *Parkhurst*, 18 How. 289, 293. *Lawes* v. *Purser*, 6 E. & B. 930. *Noton* v. *Brooks*, 7 H. & N. 499. *Crossley* v. *Dixon*, 10 H. L. Cas. 293. But the distinction is obvious. In those cases, the licensee is held to pay

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the exact compensation stipulated for. In the present case, the licensor does not undertake to avoid the payment of anything which he has agreed to pay; but, the damages for the alleged breaches of his covenants not being ascertained or liquidated by the terms of the contract, he offers to prove the invalidity of the patent, as bearing upon the question what the amount of such damages really is.

So far as the plaintiff relied upon the covenant to prosecute infringers, the evidence offered was admissible, because, if the patent was invalid for want of novelty, no damages could have been recovered for infringing it, and the attempt to recover such damages could have produced no beneficial result, either to the patentee or to any one claiming rights under him, and therefore the plaintiffs would suffer no injury from the failure of the defendant to prosecute Koechling.

Upon the other breach of covenant, by licensing Koechling, the evidence of the invalidity of the patent would not be equally conclusive, but we are of opinion that it was competent. It would be for the jury to determine its weight, and, taking it into consideration with all the other evidence in the case, to decide whether and to what extent the defendant's act in licensing Koechling had excited competition injurious to the plaintiffs' business under their license from the defendant.

Upon either branch of the case, the plaintiffs can recover damages only for the injury which they prove that they have suffered by the defendant's acts in violation of his covenants. The fraudulent character of those acts, and the difficulty of proving such damages, cannot change the burden of proof or the measure of the defendant's liability.

Exceptions sustained.

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NORMAN C. MUNSON vs. BOSTON, HARTFORD AND ERIE RAILROAD COMPANY.

Suffolk. March 7.— 9, 1876. AMES & MORTON, JJ., absent.

An action, begun in a state court by attachment of the property of a corporation against which, pending the action, but not within four months after the attachment was made, proceedings in bankruptcy have been instituted, will not be dismissed on motion of the assignees in bankruptcy of the corporation, for want of jurisdiction.

CONTRACT. Writ dated March 1, 1870. On the same day, the real estate of the defendant in the county of Suffolk was attached. The declaration contained four counts. The first three counts were for breach of alleged contracts between the plaintiff and the defendants for services and materials in building the defendant's railroad and filling its flats. The fourth count was on an account annexed for a balance of $873,812.23; the items of this account embraced all the causes of action in the preceding counts. The answer contained a general denial, and also alleged that the plaintiff's charges were excessive; that all the services rendered and materials furnished had been fully paid for; and that all the property of the defendant had been placed in the hands of receivers under the orders of this court.

In October, 1870, proceedings in bankruptcy were begun against the defendant in the District Court of the United States for the District of Massachusetts, and it was adjudged a bankrupt; and in March, 1871, Charles S. Bradley, George M. Barnard and Charles R. Chapman were appointed assignees, and the proceedings in bankruptcy are still pending. At September term 1872 of this court, on motion of the plaintiff, an order was passed requiring the plaintiff to give notice to the assignees to appear and defend the action. Service of this order was made upon Bradley on October 18, 1872, and upon Barnard, October 21, 1872. No service was ever made on Chapman, he being out of the jurisdiction. On June 12, 1874, the St. of 1874, *c.* 334, entitled "An act to dissolve the Boston, Hartford & Erie Rail road Company," was passed by the Legislature. No claim for trial by jury having been filed in this action, it was set down by the court to be heard on April 22, 1875, and at the time for hear-

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ing, the assignees not appearing, the plaintiff moved for a default, and a qualified judgment, to be enforced against the property attached; whereupon Barnard appeared specially, and caused to be read and filed in the case, at the same time, a paper objecting to the jurisdiction of the court. On May 17, 1875, Barnard and Bradley appeared specially, and filed a motion to dismiss on the ground of want of jurisdiction. No other appearance has been made by the assignees, or any of them.

At the hearing on this motion, the facts above set forth appeared of record or were admitted. *Devens*, J., overruled the motion to dismiss, and reported the case to the full court for the determination of the question whether the motion to dismiss should have been overruled.

J. C. Gray, Jr., for the assignees in bankruptcy. As the defendant corporation is dissolved, the only object and possible effect of continuing proceedings in the state court is to enforce the lien acquired by the attachment. The point for decision is, therefore, whether the assignees are entitled to have the question of the validity and amount of the plaintiff's claim, and the dependent question of the validity and extent of his lien, determined in the bankruptcy court.

Congress has the power to give to the United States courts exclusive jurisdiction in all matters relating to the settlement of the bankrupt's estate and the distribution of his property. It may not only vest in them exclusive jurisdiction over liens acquired by proceedings in the state courts, but it may destroy such liens altogether. U. S. Rev. Sts. § 5044. U. S. St. 1800, *c.* 19, § 31. *Harrison* v. *Sterry*, 5 Cranch, 289, 301. *Payson* v. *Payson*, 1 Mass. 283, 290. *Davenport* v. *Tilton*, 10 Met. 320, 325 *& seq.*

Congress, as matter of fact, by the present bankrupt act, has given to assignees the right to have liens on the bankrupt's property ascertained and liquidated in the federal courts. U. S. Rev. Sts. §§ 4972, 5044.

The federal court may authorize property under a lien to be sold free from incumbrance, and the lien transferred to the proceeds. U. S. Rev. Sts. §§ 5063, 5066, 5075. *Clifton* v. *Foster* 103 Mass. 233. *Foster* v. *Ames*, 1 Lowell, 313. *Houston* v. *City Bank*, 6 How. 486. *Ray* v. *Norseworthy*, 23 Wall. 128. The

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jurisdiction of the state courts must be abridged, if inconsistent with the untrammelled control of the United States courts over bankrupt estates. The state insolvent courts have no jurisdiction during the existence of the bankrupt act, because the exercise of their powers would interfere with the rights and duties of the assignees, and there is no special virtue in a court of common law to preserve its jurisdiction above a court of insolvency.

The enforcement of a lien by attachment in the state court may interfere with the settlement of the estate in the federal court. By the U. S. Rev. Sts. § 5044, the bankrupt's property, though under attachment, vests in the assignee, and his right to sell it free from the attachment shows that he has the whole control over it. The judgment and execution sought in this suit would have for their effect to take away the property from the assignee without giving him a right to have the lien ascertained or liquidated in the court which appointed him.

The determination of liens is an essential part of that settlement or distribution of estates which it is the very object of the bankruptcy court to make.

There is nothing anomalous in a lien by attachment being liquidated in the United States court after the suit has ceased to exist in the state court. It is the regular practice when a suit is removed from a state court. U. S. Rev. Sts. § 646.

That the jurisdiction of the federal court to liquidate the lien is paramount appears from the fact that it can order the property to be sold free from the attachment.

Assuming that the state court can ascertain the lien, it can only do so by and after judgment. But the judgment would merge the debt. By U. S. Rev. Sts. § 5075, the debt cannot be proved till the lien is ascertained. Therefore the debt could not be proved until it had ceased to be provable. *Sampson* v. *Clark*, 2 Cush. 173. *Bradford* v. *Rice*, 102 Mass. 472.

When the defendant can have no future assets, there is no reason for continuing the proceedings under the U. S. Rev. Sts. § 5106. The jurisdiction is to be maintained, if at all, only for the purpose of liquidating the lien, and for that it has been already shown to be improper.

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In the case of *Ex parte Christy*, 3 How. 292, under the second bankrupt act, (U. S. St. 1841, *c.* 9,) Mr. Justice Story gave a very elaborate opinion, in which he laid down the doctrine that the whole jurisdiction in the ascertainment and liquidation of the lien was confided to a single court. 3 How. 321. Catron and Daniel, JJ., adopting an opinion delivered on circuit by Baldwin, J., dissented on the express ground that the assignee could not sell the property so as to pass an unincumbered title. 3 How. 331. A great controversy arose as to which of these views was correct; *Peck* v. *Jenness*, 7 How. 612; and to remove any doubt, the present bankrupt act adopts the very language of Judge Story, and expressly provides that the assignee may pass an unincumbered title. U. S. Rev. Sts. §§ 4972, 5063.

The assignee can abandon the attached property, if the attachment renders it valueless, just as he can refuse to take a lease which is worthless, and in that case the state court will decide the case between the bankrupt, or his grantee, and the attaching creditor, by giving judgment against the attached property. This is the case under the present, as it was under the former bankrupt act. *Peck* v. *Jenness*, *ubi supra*. *Davenport* v. *Tilton*, 10 Met. 320. *Kittredge* v. *Warren*, 14 N. H. 509. *Kittredge* v. *Emerson*, 15 N. H. 227. *Stockwell* v. *Silloway*, 113 Mass. 382. *Bates* v. *Tappan*, 99 Mass. 376. *Johnson* v. *Collins*, 116 Mass. 392. *Second Bank of Louisville* v. *National State Bank of Newark*, 10 Bush, 367, 380. The only case in which such a judgment has been granted where the assignee appeared is *Bosworth* v. *Pomeroy*, 112 Mass. 293, and there he not only raised no question of jurisdiction, but invoked the action of the court.

The courts of bankruptcy have repeatedly decided that they will enjoin proceedings to enforce liens by attachment or otherwise in the state court. *In re Vogel*, 7 Blatchf. C. C. 18. *In re Clark*, 9 Blatchf. C. C. 372. *In re Mallory*, 6 Bank. Reg. 22, 32.

In *Mays* v. *Fritton*, 20 Wall. 414, *Scott* v. *Kelly*, 22 Wall. 57, and *Doe* v. *Childress*, 21 Wall. 642, the Supreme Court of the United States, in accordance with its settled practice, refused to allow an objection to the jurisdiction, which had not been taken in the court below; but the language of the court in the last case strongly favors the contention of these assignees. 21 Wall. 645–647.

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This report does not require us to consider what effect a judgment for the plaintiff may have, as a merger of his cause of action, or upon his right to prove in bankruptcy. The only question before us is whether the action should be dismissed for want of jurisdiction, and for the reasons above stated we are of opinion that it should *Not be dismissed.*

MASSACHUSETTS NATIONAL BANK *vs.* BENJAMIN BULLOCK & others & trustees.

Suffolk. March 8, 1876. March 9.—11, 1876. AMES & MORTON, JJ., absent.

A case stated in an action at law cannot be heard or reserved by a single justice of this court, but is within the exclusive jurisdiction of the full court.

In trustee process, an agreed statement of facts, upon the question whether a trustee shall be charged or discharged upon his answer, must be signed in behalf of the trustee, and not of the plaintiff and the claimant only.

Where the property of a debtor is assigned to trustees for the benefit of his creditors in trust to convert the same into money, and, after such conversion and payment of the expenses of the trust, to distribute the balance *pro rata* among the creditors, the trustees are not, until after such conversion and payment, chargeable by trustee process for the debt of one of the creditors.

A mere equitable right cannot be attached by trustee process.

TRUSTEE PROCESS. The case was submitted to *Ames*, J., and by him reported to the full court, upon an agreed statement of facts, signed by the counsel of the plaintiff and of the claimant only, in which it was agreed that the trustees should be charged or discharged upon their answer, according to the opinion of the court upon the following facts:

Samuel B. Rindge and Hales W. Suter, summoned as trustees, were parties of the second part to an indenture executed March 3, 1873, whereby the firm of Sandford, Soule & Co., parties of the first part, conveyed their property to said Rindge and Suter, for the benefit of their creditors, who were parties of the third part to the indenture, upon the trust "as soon as may be to collect, sell and dispose of said trust property and reduce the same into money, and, after deducting and retaining therefrom all such costs, charges, expenses and disbursements as shall be sustained

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TIMOTHY H. SMITH *vs.* UNION INSURANCE COMPANY.

Suffolk. March 9, 10. — 11, 1876. AMES & MORTON, JJ., absent.

A building was insured against fire by a policy which provided that if the property should be sold, or if the policy should be assigned, without the consent of the company, "in every such case the risk shall cease and determine, and this policy be null and void." The building was conveyed, a mortgage given back for part of the purchase money, and the policy was assigned, with the consent of the company, to the grantee, who afterwards made an indorsement upon the policy by which it was to be payable, in case of loss, to the original insured "as his interest may appear." This was also assented to by the company. The grantee afterwards conveyed the building to another person without the consent of the company, and, on its destruction by fire, made proof to the company, stating that this person was sole owner. *Held*, that the policy was avoided by the last mentioned conveyance, so that neither the plaintiff nor any other person could maintain an action thereon.

CONTRACT upon a policy of insurance on a house issued May 24, 1872, by the defendant to the plaintiff, containing the following provision:

"And the assured hereby covenant and engage that if the assured shall have made or shall hereafter make any other insurance upon the said property without the knowledge and consent of the said company, or if the said property should be removed without necessity to any other place, or if the situation or circumstances affecting the risk thereupon shall be so altered or changed, by or with the advice, agency or consent of the assured, as to increase the risk thereupon, or if the said property should be sold, or if this policy should be assigned without the consent of the company, or if the assured shall make any attempt to defraud the company, that in every such case the risk shall cease and determine, and this policy be null and void."

The case was submitted to this court upon an agreed statement of facts in substance as follows:

The plaintiff, by deed dated May 31, 1873, conveyed the land on which the house stood to one Bigelow for $7000, and took back a mortgage, for a consideration of $4000, upon the premises, from Bigelow, of even date with his conveyance of the same to Bigelow. The mortgage was assigned July 8, 1873, by the plaintiff to one Bean for a consideration of $4000, and on February 5, 1874, was reassigned for a consideration of $4000 by Bean to the plaintiff, who still holds it. No notice of either of

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these assignments was given to the company, nor any consent asked or given. On June 9, 1873, the policy was assigned by the plaintiff to Bigelow, and this was approved by the company. On the same date Bigelow drew an order upon the back of the policy in these words, signed by him: "Boston, June 9, 1873. Please pay any loss under the within policy to T. H. Smith, as his interest may appear." This was assented to in writing by the company. A total loss occurred by fire in April, 1874, of which due proof was made to the company by Bigelow, stating that Henrietta A. Bigelow was sole owner. Subsequently to June 9, 1873, and prior to the fire, the premises were again sold and conveyed by Bigelow to Henrietta A. Bigelow, and no notice was given the company, and no assent was asked or procured.

If on the foregoing facts the action could be maintained, the case was to be sent to an assessor to ascertain the amount of the plaintiff's interest; otherwise judgment to be entered for the defendant.

N. B. Bryant, for the plaintiff.

J. C. Dodge, for the defendant.

GRAY, C. J. Upon the conveyance of the premises and the assignment of the policy, with the assent of the insurance company, from Smith to Bigelow, Bigelow became the owner of the property and the assured in the policy. The order, afterwards indorsed by him upon the policy, did not make the plaintiff the assignee of the policy, nor the party insured thereby, but merely the payee in case of loss. The subsequent conveyance and sale of the property by Bigelow, without the assent of the company, avoided the policy, so that neither the plaintiff nor any other person can maintain an action thereon. *Bates* v. *Equitable Ins. Co.* 10 Wall. 33. *Loring* v. *Manufacturers' Ins. Co.* 8 Gray, 28. *Lawrence* v. *Holyoke Ins. Co.* 11 Allen, 387. *Atherton* v *Phœnix Ins. Co.* 109 Mass. 32. *Franklin Savings Institution* v. *Central Ins. Co.* 119 Mass. 240.

Judgment for the defendant.

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NATHANIEL J. BARTLETT *vs.* FREDERIC A. HAWLEY & another.

Suffolk. March 10. — 11, 1876. AMES & MORTON, JJ., absent.

In an action by a holder of a bill of exchange against an indorser, there was evidence that notice of the dishonor and protest was forwarded from London to the plaintiff in Boston, by the next mail which left London for America after the protest, and was by him delivered to the defendant in person on the same day that it was received by him from the mail carrier in Boston. *Held*, that this evidence warranted the inference that the bill and protest were received by the defendant as soon as if they had been forwarded directly to him.

Where a bill of exchange is made payable to and indorsed by "A. B., Agent," the word "Agent" is a mere *designatio personæ*, and, in an action against him as indorser, parol evidence is inadmissible to show that he was merely an agent, and that the plaintiff knew this fact.

CONTRACT upon a bill of exchange, dated September 9, 1873, drawn by Henry Clews & Co., upon Clews, Habicht & Co. of London, payable thirty days after sight to "F. A. Hawley & Co., Agents," indorsed by "F. A. Hawley & Co., Agents," to the order of W. A. Chase, who indorsed it in blank. Trial in the Superior Court, without a jury, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The bill was duly presented by Chase to the drawees in London and accepted September 22, 1873. All the signatures were admitted or proved. The only defences made at the trial were, first, want of due notice of non-payment; second, that the defendants indorsed the bill as agents for Henry Clews & Co.; and, third, that they were not personally liable as indorsers thereon.

It appeared in evidence that the plaintiff bought the bill of the defendants on September 9, 1873, and the defendants indorsed it as above; that the same was duly presented to the acceptors in London for payment at maturity on October 25, 1873, and, payment being refused, was duly protested by a notary public there. The only testimony relating to notice of nonpayment given to the defendants was that Chase, the indorser, on October 25 or 26, 1873, and by the next mail which left London for America after the protest, sent by mail from London, postage prepaid, the bill and certificate of protest of the notary, to the plaintiff in Boston; that the same came by due course of mail,

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and that the plaintiff, on the same day that it was delivered by the mail carrier to him in Boston, and on or before the morning of November 12, 1873, called on the defendants in Boston, stated to them that the bill had not been paid, showed to them the bill and certificate of protest, which they examined, and demanded of them payment of the bill; that there were three mails a week between London and America, and that the usual time required for the mail to come from London to America at that season of the year was from fourteen to sixteen days. Upon this evidence, the defendants asked the judge to rule that due diligence had not been used in notifying the defendants of the dishonor. The judge refused so to rule, and found on this testimony that the defendants had due notice of its nonpayment.

The defendants also contended that the bill showed on its face that the defendants indorsed it as agents of Henry Clews & Co., and that, it so appearing on the bill, the defendants were not liable on the bill as indorsers, and requested the judge so to rule; but the judge refused.

The defendants offered parol evidence to show that they were agents of Henry Clews & Co., and were employed by them to sell such bills for them; that the bills were signed in blank by Henry Clews & Co. in New York, sent by them to the defendants, who filled up, dated and indorsed them as their agents as they sold them; that the plaintiff knew that the defendants were agents of Henry Clews & Co., on these bills. The judge ruled that this evidence was incompetent to alter or vary the defendants' liability. The defendants then said that they expected to be able to show by parol evidence that there was an agreement between the plaintiff and the defendants that they should not be held liable on this bill; and for this purpose the judge admitted the above testimony offered, but found upon all the evidence in the case that there was no such agreement.

The judge found for the plaintiff; and the defendants alleged exceptions to his rulings and refusals to rule as requested.

D. C. Linscott, for the defendants.

J. B. Richardson, for the plaintiff, was heard only on the point of notice.

GRAY, C. J. No error of law, prejudicial to the defendants, is shown in the rulings below. The evidence warranted the in-

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ference that the bill and protest were forwarded to the plaintiff upon the next day and by the next mail after the protest, and were received by the defendants as soon as if they had been forwarded directly to them. *Cabot Bank* v. *Warner*, 10 Allen, 522. The defendants appeared upon the face of the bill to be themselves the payees and indorsers, the word "agents" was a mere *designatio personarum*, and parol evidence was inadmissible to discharge them. *Tucker Manufacturing Co.* v. *Fairbanks*, 98 Mass. 101. *Exceptions overruled.*

HENRY A. KENDALL *vs.* GARDNER P. KINGSLEY & trustees.

Suffolk. March 15. — 17, 1876. AMES & MORTON, JJ., absent.

Rents payable under an ordinary contract of lease, which requires no personal services on the part of the lessor, are not "earnings" within the meaning of the St. of 1865, c. 43, § 2, which declares an unrecorded assignment of future earnings invalid against a trustee process.

Although the word "until" is ordinarily exclusive of the day to which it relates, such construction yields to the manifest intention of parties to a contract.

An assignment, executed on August 31, of "all rents due and coming due to me until October 1" from the tenant of a certain estate, who pays his rents on the first day of each month, includes the rents which fall due on October 1.

TRUSTEE PROCESS. The case was submitted to the Superior Court, and, after judgment discharging the trustees, to this court, on appeal, on an agreed statement of facts in substance as follows:

F. L. Toppan & Co. were sub-lessees of the defendant of a store in Boston, No. 778 Washington Street, and were summoned as trustees in this action September 24 and October 1, 1874. The answer of the alleged trustees disclosed funds of the defendant in their hands to the amount of $225, being the monthly instalments of rent which became due from them to the defendant on September 1 and October 1, 1874. The defendant has been defaulted.

The defendant, on August 31, 1874, made the following assignment in writing, signed by him, to the claimant, George Morrill: "I, Gardner P. Kingsley, in consideration of Geo. Morrill having signed a bond for me to dissolve an attachment, and

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of other indebtedness to him, hereby assign and set over all rents due and coming due to me until Oct. 1, 1874, from my tenants in Hotel Decatur and store 778 Washington Street, Boston, as security."

Morrill, on the day of the assignment, signed a bond with Kingsley to dissolve an attachment in a suit brought against Kingsley. At that time the defendant owed Morrill $300, and afterwards Morrill became liable for and paid $110, by reason of, and upon the bond referred to in said assignment, and no part of the defendant's indebtedness to him has ever been paid. The assignment was made for a valuable consideration, but never was recorded in the office of the city clerk of Boston, where the defendant resided, and the plaintiff had no knowledge of its existence until a short time before the claimant filed his claim.

C. T. Russell, Jr., for the plaintiff.

G. Morrill, pro se.

GRAY, C. J. The word "earnings," as used in the St. of 1865, *c.* 43, § 2, is not indeed limited to wages, but may include compensation for expenditures incurred or materials furnished, under one contract, together with work done or services rendered. *Jenks* v. *Dyer*, 102 Mass. 235. *Somers* v. *Keliher*, 115 Mass. 165. But it cannot, upon any construction, however liberal, include rents payable under an ordinary contract of lease, which requires no personal services on the part of the lessor. The assignment was not therefore invalidated by not being recorded.

It may be assumed, as argued for the plaintiff, that the preposition "until," like "from," or "between," generally excludes the day to which it relates. *Nichols* v. *Raynel*, 2 Mod. 280. *Wicker* v. *Norris*, Cas. temp. Hardw. 116. *Bemis* v. *Leonard*, 118 Mass. 502. *Atkins* v. *Boylston Ins. Co.* 5 Met. 439. But such general rules of construction must yield to the intention of the parties, apparent upon the face of the whole instrument, as applied to the subject matter; and it is manifest that an assignment, executed on the 31st of August, of "all rents due and coming due to me until October 1, 1874," from the tenants of a certain estate, who pay their rents on the first day of each month, is not intended to be limited to the rents falling due on the 1st of September, but includes those which fall due on the 1st

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of October. *Anon.* 3 Leon. 211. *Rex* v. *Syderstone*, Cald. 19. *The King* v. *Stevens*, 5 East, 244, 256, 257. *Isaacs* v. *Royal Ins. Co.* L. R. 5 Ex. 296. *Trustees discharged.*

INHABITANTS OF PROVINCETOWN *vs.* HEMAN SMITH.

Suffolk. March 10. — 20, 1876. AMES & MORTON, JJ., absent.

Under the Gen. Sts. *c.* 26, § 39, the owner of a vessel under quarantine regulations is not liable for the expenses of a seaman at a hospital, to which he had been transferred by order of the board of health of a town, and which was under their care.

BY THE COURT. This action, as appears by the report and by the declaration, is brought under the Gen. Sts. *c.* 26, § 39,* against the owner of a vessel for the expenses, incurred by the board of health of the town, of the vessel while under quarantine regulations, and of one of her seamen at a hospital to which he had been removed by order of that board, and which was under their care. Such expenses of the seaman clearly cannot be recovered of the owners of the vessel under this statute; and the case does not present the question, argued at the bar, whether the owners could be charged with them at common law, or under any other statute of the Commonwealth. The defendant is liable in this action for the expenses of the vessel only.

Judgment for the plaintiff accordingly.

J. Willard, for the plaintiff.

F. Dodge, for the defendant.

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* "All expenses incurred on account of any person, vessel or goods, under quarantine regulations, shall be paid by such person or the owner of such vessel or goods respectively."

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MERCHANTS' NATIONAL BANK OF BANGOR *vs.* GLENDON COMPANY.

Suffolk. March 17. — 20, 1876. AMES & MORTON, JJ., absent.

The affidavit of no defence, authorized by the St. of 1874, *c.* 248, § 3, need not set forth that the action is brought for a debt or liquidated demand in money, payable by the defendant.

The Superior Court has authority, independently of the St. of 1874, *c.* 248, to advance a case for speedy trial.

A banking corporation organized under the U. S. St. of 1864, *c.* 106, brought an action, describing itself as the Merchants' National Bank of Bangor, "a corporate body organized under the laws of the United States of America, and having an established place of business at Bangor in the State of Maine;" and, to prove its corporate existence, introduced a certificate of the comptroller of the currency that it had been duly organized, and the testimony of the bookkeeper of a bank in Boston that the Merchants' National Bank of Bangor did a banking business under that name, that he had been in their banking-house in Bangor, was well acquainted with the cashier, and that his own bank was in the habit of receiving remittances from the Merchants' National Bank of Bangor. *Held*, that the evidence was competent to show that the plaintiff was *de facto* a banking corporation and transacting business as such.

CONTRACT upon a promissory note made by the defendant corporation and indorsed to the plaintiff, described in the writ as "a corporate body organized under the laws of the United States of America, and having an established place of business at Bangor in the State of Maine." On November 5, 1875, the plaintiff made and filed the following affidavit under the St. of 1874, *c.* 248, § 3:

"And now comes the plaintiff in the above entitled action and on oath says that the allegations contained in the declaration filed in said action are true, and that in its belief there is no defence to said action, wherefore it prays that an order may be entered calling on the defendant to show cause why judgment in said action should not be given for the plaintiff."

The action was entered at October term 1875 of the Superior Court and advanced for speedy trial, trial by jury being waived by the parties.

At the trial in the Superior Court, before *Brigham*, C. J., the defendant asked the judge to rule that the action was not properly advanced, because the affidavit of the plaintiff did not set forth that it sought to recover a debt or liquidated demand in

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money, payable by the defendant; but the judge refused so to rule.

The plaintiff, for the purpose of proving the existence and organization of the plaintiff corporation, offered a certificate, under the hand and seal of the comptroller of the currency, setting forth that it had been made to appear that "the Merchants' National Bank of Bangor, in the city of Bangor, in the county of Penobscot and State of Maine," had been duly organized, and certifying that it was duly authorized to commence business under the U. S. St. of 1864, *c.* 106. The defendant objected to the admission of this evidence; but the objection was overruled.

The plaintiff called F. C. Knapp, who testified that he was bookkeeper in the National Bank of Commerce in Boston, and knew that the Merchants' National Bank of Bangor did a banking business under that name; that he was in Bangor last summer, and went into their banking-house, and was well acquainted with the cashier, and that the National Bank of Commerce was in the habit of receiving remittances from the Merchants' National Bank of Bangor. To this testimony the defendant objected; but the objection was overruled.

The defendant offered no testimony, and the judge ordered judgment for the plaintiff; and to the foregoing rulings, and refusals to rule, the defendant alleged exceptions.

E. M. Johnson, for the defendant. 1. The action was improperly advanced. The right to a speedy trial is limited by the St. of 1874, *c.* 248, § 3, to actions where the plaintiff seeks merely to recover a debt or liquidated demand in money, payable by the defendant; the plaintiff must bring himself within the terms of the statute by his affidavit, and in order to do so should state, in the affidavit, the nature of his demand, otherwise it becomes a question for the court to determine, in each case, whether the order shall issue, necessitating an inspection of the papers, and often, as in cases where counts in tort and contract are joined, a hearing of the evidence. See affidavit in *Rogers* v. *Ladd*, 117 Mass. 334.

2. The certificate of the comptroller of the currency was improperly admitted for the purpose for which it was offered. It is merely an authority for the bank to commence business; it

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does not prove the existence of the corporation or its organization under the laws of the United States. See U. S. Rev. Sts. §§ 885, 5133, 5134, 5135; *Tapley* v. *Martin*, 116 Mass. 275; *Washington Co. National Bank* v. *Lee*, 112 Mass. 521.

The corporation, if organized, is organized under the statutes above cited, and the fact recorded as provided by the statute; proof of such organization requires the production of the record itself, or a duly authenticated copy of so much thereof as relates to the fact in question. U. S. Rev. Sts. § 885. 1 Greenl. Ev. § 498. *Robbins* v. *Townsend*, 20 Pick. 345. *Oakes* v. *Hill*, 14 Pick. 442. *Wayland* v. *Ware*, 109 Mass. 248. *Hanson* v. *South Scituate*, 115 Mass. 336.

3. The testimony of Knapp was improperly admitted; it was not competent to prove the organization or existence of the corporation, and was immaterial and irrelevant, if admitted to prove that there was a banking business done by some person or association under that name; the plaintiff is bound to prove the allegations in its writ and declaration by the best evidence, which is, in this case, prescribed by statutes of the United States; the testimony of the witness presupposes better evidence, which should have been produced.

F. S. Hesseltine, for the plaintiff, was not called upon.

BY THE COURT. The affidavit complied with the St of 1874, c. 248, § 3; and the court had authority to advance the case for trial, independently of that statute. The evidence admitted was competent to show that the plaintiff was *de facto* a banking corporation and transacting business as such.

Exceptions overruled.

DUNCAN R. MORRILL *vs.* RICHARD HURLEY.

Suffolk. March 21. — 22, 1876. DEVENS & LORD, JJ., absent.

The owner of land is not liable for not preventing surface water from accumulating thereon and flowing thence upon the adjoining land of another, to his injury.

TORT for damages caused by surface water accumulated upon the defendant's land flowing upon that of the plaintiff. The

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case was submitted to the judgment of the Superior Court on an agreed statement of facts in substance as follows:

The plaintiff was tenant for years of a tenement house on Eighth Street, South Boston, under a lease providing that he should make all repairs at his own expense. The defendant owned a lot of vacant land adjoining the house and situated at the corner of Eighth Street, and a private way called Clapp Street. The lots of both the plaintiff and the defendant formerly belonged to one Clapp, who, before conveying them, lowered the surface of both lots about three inches below the natural level. The plaintiff's lot was conveyed by Clapp after his conveyance of the defendant's lot, and both were conveyed by full warranty deeds. The street and private way were above the natural surface, and the grading of the same by persons other than the defendant, combined with the erection of numerous houses by persons other than the defendant, caused a large increase in the flow of rain water towards and upon said lot. During rain storms the water collected on the roofs of the houses on Clapp Street, was discharged therefrom upon Clapp Street, and from thence ran upon the vacant lot; in many cases running by plainly marked channels from the spout directly to the lot. There was no pavement on the private way, and the lot on that side was washed away so as to form a sloping bank; and part of the soil was washed into the lot so as to form a mound in the middle of the lot and make the side of the lot towards Clapp Street higher than the side towards the house. During rain storms the water accumulated upon the defendant's lot more rapidly than his drain conveyed it away, to a depth varying from three to ten inches, and passed through the foundation wall of the plaintiff's house at six places, in parts of the wall two to three feet below the surface of the defendant's lot, flooding the plaintiff's cellar and damaging him to the amount of fifty dollars. The foundation wall was of rubble stone, twenty inches thick, laid without mortar, except that it was pointed on the inside. It extended seven inches above the surface of the defendant's lot to a brick wall above, which was impervious to the water. Prior to the building of the plaintiff's house the lot on which it stands was subject, like the defendant's lot, to floods of water from the same source, and there was thereby formed a

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pool of water common to both lots. Drains were afterwards placed upon each lot. The drain upon the plaintiff's lot was stopped up when his house was built, but was reopened to remove the water complained of from his cellar. The drain on the defendant's lot was eight inches in diameter, guarded by a wooden cover, through which were sixteen holes of one inch diameter for the flow of water. This drain was partially stopped up by persons unknown. The defendant opened the drain when informed of its condition. The defendant was not guilty of gross negligence. He lived on the same street and within a square of said vacant lot, and complaints were made to him that the water passed from his lot into the plaintiff's cellar. Whenever complaints were made the defendant opened his drain. The following ordinances of the city of Boston may be considered, so far as applicable to this case: Ordinances of 1869, p. 609, § 50; 1870–1874, p. 13, § 6; p. 76, § 48.

If the plaintiff was entitled to recover, judgment was to be for him for fifty dollars; otherwise judgment for the defendant.

Colburn, J., ruled that the plaintiff, on the facts stated, was not entitled to maintain his action, and ordered judgment for the defendant. The plaintiff alleged exceptions.

R. M. Thompson, for the plaintiff. 1. The owner of real estate is responsible for its condition, whether that condition is the result of his own acts, the lawful acts of other persons on their own land, or the effect of natural causes. *St. Helen's Smelting Co.* v. *Tipping*, 11 H. L. Cas. 642. *Shipley* v. *Fifty Associates*, 101 Mass. 251; *S. C.* 106 Mass. 194. *Salisbury* v. *Herchenroder*, 106 Mass. 458.

2. If the condition of real estate is such as to make it unreasonably dangerous to other persons or their property it is a nuisance, and the owner is liable in damages to persons specially injured. *Swett* v. *Cutts*, 50 N. H. 439.

3. As a matter of law the condition of the defendant's lot was such as to make it unreasonably dangerous to the property of the plaintiff. *Rylands* v. *Fletcher*, L. R. 3 H. L. 330. *Ball* v. *Nye*, 99 Mass. 582. Ordinances of Boston, 1870–1874, p 76, § 48.

4. As a matter of fact the condition of the defendant's lot was such as to make it unreasonably dangerous to the property of the plaintiff. *Swett* v. *Cutts*, 50 N. H. 439.

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5. As it is actionable to discharge rain water from the roof of one person's house upon the land of another, and as it is actionable for a city to discharge surface water into the cellar of a house by means of a defective sewer, there can be nothing in the nature of rain or surface water which prevents injuries caused by them from being actionable. *Emery* v. *Lowell*, 109 Mass. 197.

6. The plaintiff has not in any way legally contributed to the injury for which damages are claimed, as he had a right to build his house where he did, and as he did. *Gannon* v. *Hargadon*, 10 Allen, 106. *Bates* v. *Smith*, 100 Mass. 181. *Swett* v. *Cutts*, 50 N. H. 439. Ordinances of Boston, 1870–1874, p. 13, § 6.

J. A. Maxwell, for the defendant, was not called upon.

By the Court. The facts agreed show merely that the defendant did not prevent surface water from accumulating upon his own land and thence flowing upon the land of the plaintiff. This gave the plaintiff no cause of action. *Gannon* v. *Hargadon*, 10 Allen, 106. *Bates* v. *Smith*, 100 Mass. 181.

Exceptions overruled.

Edward W. Hooper, petitioner.

Suffolk. March 22, 1876. Devens & Lord, JJ., absent.

The guardian of an insane person may be authorized, under the Gen. Sts. c. 109, § 22, to invest all the property of the ward in the purchase of an annuity upon his life.

Petition by Edward W. Hooper, setting forth that he was the duly appointed guardian of Jane M. Bacon, a widow and an insane person; that her property consisted solely of money deposits to the amount of $4394.65, besides wearing apparel and similar personal effects, and was subject to certain debts; that the income of her property was wholly insufficient for her comfortable maintenance; that she had no issue living, but had two brothers and a sister said to be living at various designated places out of the Commonwealth; that the property might be more advantageously used for the ward in the purchase of an

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annuity than in any other way, and could in no other way be made to afford her a sufficient and certain support, and prayed for the authorization of the court, under the Gen. Sts. *c.* 109, § 22, for the investment of the whole of the ward's property in an annuity on her life.

Upon this petition, notice was ordered by mailing to the brothers and sister of the ward copies of the abstract of the petition and of the order thereon, and by publication thereof.

Upon the hearing upon the petition, by *Devens*, J., he found that the notices ordered had been given; that it would be for the interest of the ward that the money should be expended in the manner prayed for in the petition; and reserved for the opinion of the full court the question whether an order to that effect could properly be made.

J. C. Ropes, for the petitioner, cited *Kendall* v. *May*, 10 Allen, 59, 66; *May* v. *May*, 109 Mass. 252, 256; *Ex parte Chumley*, 1 Ves. Jr. 296; *Ex parte Dikes*, 8 Ves. 79; *Ex parte Hastings*, 14 Ves. 182; *Ex parte Stonard*, 18 Ves. 284; *Davies* v. *Davies*, 2 De G., M. & G. 51; *In re Dodsworth*, 10 Hare, 16; *In re Ward*, 29 L. J. (N. S.) Ch. 784; *In re Persse*, 3 Molloy, 94; Shelford on Lunacy, 199.

No counsel appeared to oppose the petition.

THE COURT, under the Gen. Sts. *c.* 109, § 22, made the

Order prayed for.

WILLIAM W. BURRAGE, administrator, *vs.* FRANCIS D. BRIGGS & others.

Suffolk. March 27, 1876. DEVENS & LORD, JJ., absent.

A testatrix, by her will, bequeathed property in trust, the income to be paid to her adopted daughter for life, remainder to her children, if any, in fee, and, in case of her death without issue, to the residuary legatee under the will, and, by another clause in the will, gave and bequeathed to her brother all the rest, residue and remainder of her property and estate, "to be taken, held and enjoyed by him and his heirs forever, in fee simple." The brother died five years before the testatrix, leaving no issue, but leaving brothers and sisters. *Held*, that the residuary bequest went to the adopted daughter.

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BILL IN EQUITY, filed October 5, 1875, by the administrator with the will annexed of Lucy Ann Sargent, to obtain the instructions of the court, and alleging the following facts:

The will of the testratrix, dated January 25, 1867, and duly admitted to probate, was, so far as is material to this case, as follows:

"Third. I give, devise and bequeath to my said brother Enos Briggs, in trust for the benefit of my adopted daughter, Carrie Briggs Sargent, the sum of twenty-five thousand dollars, to be invested by the said trustee, my said brother, as a separate and distinct trust fund, and to be managed, invested and reinvested from time to time, according to the best judgment of my said trustee, and the income thereof to be by him collected, and the net income to be by him faithfully expended for the nurture and education and benefit of the said Carrie Briggs Sargent until she shall arrive at the age of eighteen years, so far as its expenditure may be of advantage for her happiness, comfort and welfare; and any unexpended balance to be annually added to the principal; and after her arrival at the age of eighteen years, the net income of the said trust fund, and of all accretions and additions, shall be paid over once in every six months to the said Carrie Briggs Sargent during her natural life, upon her sole and separate receipt; and upon her decease, leaving lawful issue surviving her, the said trust fund, and any balance of net income thereof, if any, shall be paid over to such issue, discharged from the said trusts; namely, in equal portions to any child or children, if any, of said Carrie Briggs Sargent, and the issue, if any shall survive her, of any deceased child; such issue taking the same share which the parent of such issue would have taken, if living, by right of representation. In case the said Carrie Briggs Sargent shall die leaving no children nor issue, or in case that neither she nor any child, children, nor issue of her shall survive me, then the said twenty-five thousand dollars, and all increase thereof, and any unexpended balance of income, shall go to my residuary legatee.

"Fourth. I give to my beloved mother, Mrs. Lucy A. Briggs, in token of my love and reverence for her, the sum of five thousand dollars.

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"Fifth. I give to John Sargent, Joshua Sargent, Nathaniel Sargent and Sumner Sargent, brothers of my late beloved husband, and to his sister, Mrs. Miriam Carlton, the sum of one thousand dollars each.

"Sixth. I give to my nephew, Bodwell Sargent Briggs, two thousand dollars.

"Seventh. I give to my niece, Mrs. Lucy Ann Sargent Swan, one thousand dollars.

"Eighth. I give and bequeath to my sister, Mrs. Susan Maria Merriam, and to my brother, Francis Dean Briggs, two thousand dollars each.

"Ninth. I give and bequeath to my brother, Enos Briggs, all the rest, residue and remainder of all my property and estate of every description and wherever situated, or to which I may have any title or right at my decease, whether at law or in equity, to be taken, held and enjoyed by him and his heirs forever, in fee simple."

On March 5, 1866, the testatrix and her husband, Bodwell Sargent, who died July 28, 1866, adopted, by proceedings duly had in the Probate Court for the county of Suffolk, Carrie T. Briggs, being the same person called in the third article of the will Carrie B. Sargent, who was born on June 24, 1856, and was a daughter of Edward T. Briggs, a brother of the testatrix.

Enos Briggs, the residuary legatee, died on May 23, 1870, intestate, leaving a widow, but no issue. The testatrix died on February 18, 1875, leaving as her only heirs and next of kin a brother and a sister, and children of deceased brothers, unless Carrie B. Sargent became by adoption the sole heir at law and next of kin of the testatrix.

The residue of the estate of the testatrix, after payment of debts, legacies and expenses of administration, is of considerable amount, consisting partly of real and partly of personal estate.

The defendants' answers admitted the facts set forth in the bill to be true, and the case was reserved, on the pleadings, by *Endicott*, J., for the consideration of the full court.

A. B. Coffin, for the adopted child, was stopped by the court.

G. Swan, for the other defendants. 1. By the third clause, the testatrix has amply provided for the support and education of her adopted child, by giving her the income of $25,000 for life, care-

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fully guarding against her having any control of the principal fund, and providing that in case the legatee should die without issue, before or after the testatrix, the legacy should go into the residue. By the ninth clause, her brother Enos, having no children, and his next of kin being her own by blood, and constituting the Briggs family, she gives the residue to him, and at his death, whether before or after her decease, to his heirs, as a class representing her own blood kindred. Contending such to be the intention and general scheme of the testatrix for the disposal of her estate, it is submitted that the word "heirs," at the close of the ninth clause, is not to be taken in its strict legal sense as a word of limitation, but as a word of purchase, designating the persons who are to take the residue upon the death of Enos Briggs. This is not the ordinary form of words of inheritance as such; the word "heirs" is inappropriate to the personal estate included in the residue, and makes the following words, "in fee simple," redundant. They are unnecessary as words of inheritance. Gen. Sts. *c.* 92, § 5. *Willcut* v. *Calnan*, 98 Mass. 75. *Lincoln* v. *Lincoln*, 107 Mass. 590. The word "and" may be construed "or" to effect the intent of the testatrix. *Ray* v. *Enslin*, 2 Mass. 554. *Parker* v. *Parker*, 5 Met. 134. *Carpenter* v. *Heard*, 14 Pick. 449. *Hunt* v. *Hunt*, 11 Met. 88. The rule in *Shelley's case*, construing the word "heirs" as a word of limitation and not of purchase, is abolished by the St. of 1791, *c.* 60, § 8. Gen. Sts. *c.* 89, § 12. The legal import of technical words, or words of limitation, is not to prevail against the intent of the testator, otherwise appearing in the will. *Homer* v. *Shelton*, 2 Met. 194, 198. The sense in which the word "heirs" is used is always open to inquiry, and to be construed according to the intention of the testator and his general scheme for the disposal of his estate. *Brimmer* v. *Sohier*, 1 Cush. 118. *Halsy* v. *Boston*, 108 Mass. 576. *Sweet* v. *Dutton*, 109 Mass. 589. Every presumption is to be made against intestacy where a residue is given in terms by the will. The residuary clause ought not to be allowed to fail. A devise to the heirs of a third person designates not only the persons who are to take, but also the manner and proportions in which they are to take, that is, *per stirpes* and not *per capita*. *Balcom* v. *Haynes*, 14 Allen, 204. *Bassett* v. *Granger*, 100 Mass. 348. *Daggett* v. *Slack*, 8 Met. 450. *Holbrook* v *Harrington*, 16 Gray, 102.

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2. If the heirs of Enos Briggs take under the will *per stirpes*, Carrie B. Sargent, adopted in 1866, would not take by right of representation of her natural parent, as Enos Briggs died prior to the St. of 1871, *c.* 310, § 9. Gen. Sts. *c.* 110, §§ 7, 8.

3. A lapsed legacy falls into the residue; but in this case it is contended that an entire residue shall lapse for the benefit of an adopted child otherwise amply provided for by a legacy in trust, most carefully guarded against her having any control or disposition of the principal fund; and making the third clause of the will absurd by giving her a remainder after her own life estate, contingent upon her leaving no issue. There is no authority in any reported case for the lapse of an entire residue so conflicting with the intent of the testator, and with such a result.

4. The delay or omission of the testatrix to change her will after the death of Enos Briggs does not show that she intended her adopted child to take as her sole heir the residue, but rather that, having amply provided for her, she intended the residue to go to the heirs of Enos Briggs, who are also her own heirs and next of kin by blood. *Bowdlear* v. *Bowdlear*, 11 Mass. 184. *Davis* v. *Taul*, 6 Dana, 51.

5. If this residue lapses, it would not necessarily go to the adopted child as sole heir of the testatrix, if there is sufficient evidence in the will that the testatrix did not intend she should so take, but would go to the defendants designated as heirs of Enos Briggs, who are also her heirs and next of kin by blood. *Jackson* v. *Roberts*, 14 Gray, 546.

By the Court. The residuary bequest was to Enos Briggs absolutely, and by his death, without issue, lapsed and went to the adopted child of the testatrix. *Sohier* v. *Inches*, 12 Gray, 386. *Kimball* v. *Story*, 108 Mass. 382. *Sewall* v. *Roberts*, 115 Mass. 262. St. 1871, *c.* 310, § 8.

Decree accordingly.

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. KEITH *vs.* CITY OF BOSTON.

. — 28, 1876. DEVENS & LORD, JJ., absent.

tement of an assessment laid by a city for the construction
at culverts had been previously laid in the street and were
abuttors on the street for the purpose of drainage. *Held*,
vidence that the culverts were laid out as sewers or that
ad any right to drain from his estate into them, the exist-
d not affect the question whether his estate was benefited

ber of square feet in the estate of a person benefited by
ver does not make an assessment by the city thereon in
essed no more than its just proportion of the expen

f a petition for the abatement of a sewer tax, the
ding to prove the relative benefit received by the va
sewer. The judge ruled that if the petitioner's e
s to be assessed according to the value of the land,
s, and that the relative benefit, which each estate o
ceive, was of no consequence in determining the am
id on the estate, and rejected the evidence. The
nd that the petitioner's estate was benefited by the
ssed upon it was a just proportion of the whole ex
sewer. *Held*, that the jury, upon the appeal of the
o consider the relative benefit to other estates, and
ently favorable to the petitioner.

uperior Court, for the abatement of an
city of Boston upon the petitioner's est
ner of Shawmut Avenue and St. Ja
the construction of a sewer in Shawmu
gton Street to Circuit Street.

e Superior Court, before *Rockwell*, J., th
ence tending to prove the relative benefit
us estates on the line of the sewer, but the
he plaintiff's estate was benefited at all, i
cording to the value of the land, indepen
gs, and that the relative benefit which eac
the sewer might receive was of no conse
g the amount of the assessment to be laid
ected the testimony.

ed parol testimony tending to show that a
l, from Bartlett Street to Dudley Street, in

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Shawmut Avenue, in 1855, for which the city of Roxbury and certain abuttors thereon paid by voluntary contributions; that no assessment was laid upon any person or estate on account thereof, and that the culvert existed at this time, and some of the abuttors on Shawmut Avenue drain their estates into the same, and in connection with this proof offered the following record from the records of the city of Roxbury: "April 2, 1855. The committee on highways, bridges and sidewalks, to whom was referred the petition of Henry Bartlett and others, that a sewer may be laid in Bartlett Street, to take the water from that and other streets, and also the waters that come down the brook which crosses Bartlett Street, have considered the matter of the petition, viewed the land and obtained estimates of the cost of the work. They find that great damages have been suffered by the owners of land on Bartlett Street in consequence of the overflows occasioned by the nonconducting capacity of the present culvert. They feel confident that a sewer will be required soon in this locality, which must necessarily be made at the city's expense. Those now to be relieved are ready to contribute towards the cost of the work. This can be done for the sum of $2000. And this committee recommend that the sewer be made, provided the abuttors will contribute $1000 towards the cost. For the Committee, James Ritchie, Chairman.

"Read and accepted and sent down for concurrence.

"April 9th came up concurred."

The plaintiff also offered parol testimony tending to show that in 1858 a culvert was laid from Circuit Street along Shawmut Avenue, and past the plaintiff's estate, to connect with the last-named sewer at Bartlett Street, and in connection with said testimony offered the following record from the records of the city of Roxbury: "March 22, 1858. Ordered, that the joint standing committee on streets be, and they are hereby instructed to take such measures forthwith as they may deem expedient for the best interests of the city, for widening and grading and reconstructing or repairing that portion of Shawmut Avenue formerly known as the Dedham Turnpike, according to the plans and profiles and written directions furnished to the city government during the year 1857, by the county commissioners, with authority also, if they should deem it expedient, so to alter the cur-

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rent of the brook which now crosses the highway opposite Circuit Street as to conduct it by a stone culvert along the highway, until it connects the stone culvert leading from Bartlett Street to the square in front of Dudley Block, and constructed in 1855.

"Report read and accepted and order adopted. Sent down for concurrence.

"In Common Council March 22, 1858. Concurred.

"City Hall, Dec. 31, 1858. On the part of the committee on streets, to whom was confided the important work of grading and reconstructing that part of Shawmut Avenue formerly known as the Dedham Turnpike, and also of constructing a large culvert leading from Circuit Street to Bartlett Street, I beg leave to report that the work is completed, and the road is used as a travelled highway. It has been completed to the full satisfaction of the county commissioners, who have stated that they will accept it on the part of the county so soon as the overhanging rocks are removed from the ledges. Men have accordingly been employed for some weeks in attending to that work under the direction of the superintendent of streets.

"The original appropriations for this work . .	$15,000 00
"Received of Mr. S. Guild, as his proportion of the expense of the culvert	491 00
	$15,491 00
"The amount paid to the contractor agreeably to the contract and sundries, and also to the surveyor, superintendent of the work, and other persons, is	$16,236 00
Leaving a balance unprovided for of	$745 00

"In addition to the sum of $745 required to defray the expenses of the construction of the road and the culvert, there will also be an expense of some hundreds of dollars perhaps, for blasting and removing the overhanging rocks on the various ledges, which was done and is doing under the direction of the commissioner of streets and with the authority and at the suggestion of the county commissioners, who will accept the whole

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road when this laborious task is performed, — a portion of the work which was never anticipated.

"John S. Sleeper, Chairman Committee on Streets.

"Read, and on motion of Ald. Lewis, Ordered to be entered on the records. Sent down for concurrence."

There was evidence tending to show that this culvert was constructed to take the water of a natural stream or brook; that it was constructed without any artificial bottom, the sides of stone and the top of flat stones resting thereon; that no assessment was laid upon any person on account thereof.

The defendant contended that the laying out of a sewer could not be proved by parol, and that record evidence only could be received. In view of this testimony the plaintiff's counsel asked the judge to instruct the jury that in deciding whether the estate was benefited by the drain the jury must take into consideration the means of draining the estate which existed when the new sewer was built. The judge refused so to charge the jury, and did charge "that if the plaintiff's estate was not benefited by the new drain then his estate was not chargeable with the assessment in controversy, and that in deciding the question whether the estate was or was not benefited by said drain they were not to take into consideration any evidence concerning the old drain above referred to, because there was no evidence before them showing the existence of any drain into which the plaintiff had a right to conduct the drainage of his estate prior to the construction of the new sewer; and the plaintiff's estate was never drained into the old culvert."

It was also in evidence that the plaintiff's estate contained 7896 square feet only, and the assessment showed that it was estimated as containing 8580 square feet. The superintendent of sewers for the city of Boston testified that he made an estimate of an assessment, and reported to the board of aldermen, and that his plan was to make an accurate survey, get the number of assessable square feet in an estate, and assess it at so much per foot; that he used his own judgment in ascertaining the value, then compared his valuation with that of the assessors, and then made up the estimate and submitted it to the board of aldermen; that in estimating the plaintiff's estate he intended to estimate the whole estate owned by the plaintiff as

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the same measured in square feet, and taking the number of square feet in said estate to fix upon the same, per square foot, a valuation which should be fairly proportioned to the valuation, per square foot, of the other estates estimated upon for the sewer.

The plaintiff asked the judge to instruct the jury that if the petitioner's land was estimated in amount larger than he owns, then the assessment is erroneous, and must be set aside to the extent of the sum assessed upon the land not owned by him. The judge declined so to instruct the jury, but instructed them that if the assessment levied was the plaintiff's just proportion of the expense of constructing the sewer, the jury should find for the city, even though the plaintiff's estate had been estimated at a larger number of square feet than it contained.

The jury found that the assessment upon the petitioner's estate was properly laid in the sum assessed; and the petitioner alleged exceptions.

E. F. Hodges & J. W. Keith, for the petitioner.

J. P. Healy & H. W. Putnam, for the respondent.

GRAY, C. J. There was no evidence that either of the old culverts was laid out as a sewer, or that the petitioner drained, or had any right to drain, from his estate into it. The existence of those culverts, therefore, could not affect the question whether his estate was benefited by the new sewer.

An overestimate of the number of square feet in the petitioner's estate certainly did not make the assessment invalid, if that estate was assessed no more than its just proportion of the expense of constructing the sewer.

The jury, under the instructions of the court, have found that the petitioner's estate was benefited by the sewer; and that the amount assessed upon it was a just proportion of the whole expense of the construction of the sewer. Upon the appeal of the petitioner, they had no authority to consider the relative benefits to other estates. The rulings and instructions at the trial were sufficiently favorable to the petitioner. Gen. Sts. *c.* 48, §§ 4 St. 1869, *c.* 111. *Springfield* v. *Gay*, 12 Allen. 612. *Workman* v. *Worcester*, 118 Mass. 168.

Exceptions overruled.

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JAMES G. ROSS *vs.* NEW ENGLAND MUTUAL INSURANCE COMPANY.

Suffolk. March 22. — 28, 1876. DEVENS & LORD, JJ., absent.

On a bill in equity to reform a policy of insurance by inserting a clause which it is alleged the parties agreed to insert, the plaintiff cannot have issues framed for a jury as a matter of right; and the court will not in its discretion frame such issues, without evidence that the plaintiff's suggestion of mistake in the contract has any foundation, or circumstances indicating that the matter can be more satisfactorily tried by a jury than by the court.

BILL IN EQUITY, filed March 25, 1874, to reform a policy of marine insurance.

The bill alleged that the plaintiff, being the owner of the ship Oneida, on June 28, 1872, procured from the defendant a policy of insurance on said vessel for one year, in the sum of $5000; that the policy contained the clause "prohibited from the river and gulf of St. Lawrence, Northumberland Straits, Cape Breton, Pictou and Black Sea, between October 1 and May 1; that in September, 1872, expecting the ship to arrive at Quebec, he sent the policy to his agent in Boston, inclosed in a letter as follows: "Quebec, September 17, 1872. We inclose the policies on the Oneida to have the time extended for entering the St. Lawrence. We expect that she will arrive here early in October, and will be despatched again without delay. So please have the St. Lawrence clause erased."

That the agent exhibited this letter to the president of the defendant company, who agreed with him to make, for two per cent. additional premium, such change in the contract of insurance as would be adequate to protect the ship in entering the river and gulf of St. Lawrence, remaining there and departing thence, for the purpose, in the manner and at the time it appeared and was shown by the letter she was expected to do, provided she did not sail from Quebec later than November 15, and to preserve the validity of the insurance to the end of the term, notwithstanding the passage of the vessel into and out of the gulf and river of St. Lawrence, as above stated.

That no specific language to be indorsed upon the policy was stated or agreed upon between the parties, but the purpose was

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the president of the company thereupon
y and signed the following words: "Octo-
of using the river and gulf of St. Law-
October 1 and November 15, charging
premium therefor."
ived at Quebec on or about October 22,
in the river above the city until Novem-
ich day she sailed from Quebec, bound
argo of lumber on board.
or about December 4, the plaintiff went
formed his agent that the vessel sailed
ber 19, and directed him to make such
insurance company, and to have such
policy or the memorandum, as would
preserve the validity of the policy under
stated.
upon, on December 5, went to the
any, and informed the president
el sailed from Quebec on Novem
newspaper published at Quebec, b
pointed out to him a statement in the
sailed from Quebec on November 19, as
re agreed with him, that for an additional
cent., which was then and there paid by
ould be protected and insured under the
d remained in the river St. Lawrence
from Quebec on November 19; and
dertook to make such alterations in
that the vessel should be protected

of words to be indorsed or written u
on between the parties, but the presi
vessel had sailed on November 19,
f her having so sailed was pointed ou
; and it was fully agreed betwee
be made good, notwithstanding the fa
ained in the river St. Lawrence until N
led from Quebec on that day; and th
litional consideration paid as above,

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protected and insured under the policy, notwithstanding the facts that she had so remained and sailed.

That the president thereupon caused the memorandum indorsed upon the policy as above stated to be altered in the following particulars: the words and figures "Nov. 15th" were altered so as to read "Nov. 20th;" the figures "2 per cent." were so altered as to read "2½ per cent.;" and the whole memorandum, so altered, read as follows: "October 1, 1872. Privilege of using the river and gulf of St. Lawrence outward between October 1 and November 20, charging 2½ per cent. additional premium therefor. George C. Lord, president."

That the vessel, having sailed from Quebec as above set forth, encountered very heavy weather, during which her head sails and some other sails were blown away, so that she became in part unmanageable, and was finally wrecked and totally lost at Corach House Cove, Newfoundland, on December 1, 1872; and, on January 22, 1873, due notice and proof of loss were given to the defendant company, and in sixty days thereafter the insurance company became liable to pay to the plaintiff said sum of $5000 in gold coin of the United States; but the defendant had refused and neglected to pay the same, or any part thereof.

That by accident, mistake or inadvertence, the memorandum indorsed upon the policy, as above set forth, did not give effect to the agreement and intent of the parties, inasmuch as it only protected and insured the vessel in using the river and gulf of St. Lawrence outward as late as November 20; whereas the agreement and intent, as above set forth, were that she should be insured and protected, having sailed from Quebec on November 19, and should have the right to use the river and gulf of St. Lawrence for such time thereafter as should be found necessary to enable her to pass out of the same; that the plaintiff or his agent received the policy, with the said memorandum thereon, without any special notice or examination, fully believing and trusting that it had been so made as to give effect to the agreement and intent of the parties, as above set forth.

The prayer of the bill was that the defendant might be ordered to reform said policy, or said memorandum indorsed thereon, so as to conform to the concluded agreement for insurance hereinbefore stated, and to give full effect to the intent and agreement

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the vessel should be protected and insured
said memorandum, notwithstanding she re-
r St. Lawrence and set sail from Quebec as
d for further relief.

nitted the making of the policy and of the
denied the making of any other agreement.
ed, before *Morton*, J., that issues of fact, sub-
, should be framed, to be tried by a jury:
dant corporation, after November 19, 1872,
s of the loss of the ship Oneida had reached
or defendant, informed by the plaintiff or his
p Oneida had sailed from Quebec on Novem-
for Valparaiso?
nt corporation, after November 19, 1872, and
tion of the loss of said ship Oneida had
laintiff or defendant, agree with the plaintiff
aid ship Oneida should be insured and pro-
ain policy of insurance upon her, issued by
oration, June 28, 1872, for one year, from
noon, notwithstanding she had remained in
ence until November 19, 1872, as afor
m Quebec, bound for Valparaiso, on

nt corporation agree with the plaintiff,
an alteration in said policy, or indorsement
said policy, as should protect and insure said
ing she had remained in the river St. L
er 19, 1872, and had sailed from said Que
said?"

overruled; and the plaintiff appealed.

the plaintiff.

or the defendant, was not called upon.

nder our present system, as by the Eng
n equity, granting or refusing a motion
subject to revision on appeal. *Stockbr*
Iron Co. 102 Mass. 45. *Hampson* v. *Ha*
43. *Nicol* v. *Vaughan*, 5 Bligh N. R.
420. But in the case before us no cau
the order below.

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In a suit in equity, the plaintiff, at least, has no absolute right to a trial by jury; but when he avails himself of the jurisdiction in equity conferred by the Legislature upon this court, to obtain a remedy which he could not otherwise have, he must take it subject to the rules which govern courts of chancery, and can have a trial by jury only at the discretion of the court. *Ward* v. *Hill*, 4 Gray, 593. *Crittenden* v. *Field*, 8 Gray, 621. *Elliott* v. *Balcom*, 11 Gray, 286, 300, 301. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45, 48. *Dale* v. *Roosevelt*, 6 Johns. Ch. 255. 2 Dan. Ch. Pract. (4th Am. ed.) *c.* 27.

If an issue is ordered to be tried by a jury, their verdict is conclusive upon that issue, unless set aside by the court for good cause shown. *Franklin* v. *Greene*, 2 Allen, 519. *Ex parte Morgan*, 2 Ch. D. 72. The court, in the exercise of its discretion, should not order such a trial, unless it is satisfied that the issue is one which can be more satisfactorily tried by a jury than by the court.

The reformation of a written contract by parol evidence is a matter exclusively of equity jurisdiction, depending largely upon the discretion of the court as applied to the circumstances of each case, and never to be allowed except upon the clearest and most satisfactory proof of the intention of both parties. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45, and 107 Mass. 290.

In *Stockbridge Iron Co.* v. *Hudson Iron Co.* the issue to a jury was ordered upon the cross bill of the Hudson Iron Company, and by way of defence against the bill of the Stockbridge Iron Company, and the Hudson Iron Company was substantially in the position of a defendant objecting to being deprived of its property without a trial by jury, and therefore the court considered it to be in accordance with the spirit of the Constitution that a trial by jury should be ordered.

But in the present case it is the plaintiff who moves for an issue to a jury; and his motion only is before us, without any evidence that his suggestion of mistake in the written contract between the parties has any foundation, or any circumstances indicating that the matter can be more satisfactorily tried by a jury than by the court. He therefore fails to show any reason why a trial by jury should be directed upon the issues tendered.

Order affirmed.

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Ephraim D. Whitcomb's Case.

Suffolk. March 23. — 30, 1876. Devens & Lord, JJ., absent.

The common council of a city has no power to commit and punish for contempt and so much of the St. of 1863, c. 158, § 2, as undertakes to confer such authority is unconstitutional and void.

Habeas corpus, issued March 13, 1876, upon the petition of Ephraim D. Whitcomb, representing that he was unlawfully imprisoned and restrained of his liberty in the common jail in Boston, by John M. Clark, sheriff of the county of Suffolk; that the pretence of said imprisonment and restraint was a warrant or order purporting to have been issued by the common council of the city of Boston, a copy of which was annexed to the petition; that the warrant or order had been issued improvidently and in violation of law. The order of the common council, signed by the president thereof, was as follows:

"Whereas Ephraim D. Whitcomb, having been duly summoned to testify before a special committee of the common council, appointed with full powers to investigate and report upon any and all charges against members of the common council preferred in connection with action and votes, or either, in the original location or relocation of the public vegetable market by the city council, and also to inquire and report whether any money or other valuable consideration was paid, given or received, and if so, by whom, for services, votes or influence, or otherwise, in the matter of said location or relocation, unlawfully and unreasonably refused to answer a certain question lawfully propounded by the said committee, to wit, the question, 'Who was that person?' and did state in connection with said refusal that he did not refuse because the answer would criminate him, but did refuse for business reasons; and having been duly arraigned at the bar of the common council and heard the report of said committee setting forth said refusal, and by the order of the council inquired of whether he had any excuse to offer for refusing to answer said question propounded by said committee, and whether he was ready to appear before said committee and answer said question, in contempt of the authority of the common council did give unsatisfactory answers to the questions propounded, and

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did and does unlawfully persist in his refusal to appear before said committee and answer said question propounded by said committee: it is therefore

"Ordered, that the said Ephraim D. Whitcomb be committed to the custody of the city messenger, to be by him confined in the common jail of the county of Suffolk, for the term of twelve days, unless he shall sooner signify his willingness to appear and purge himself of his contempt, and answer the question propounded by the said special committee of the common council, which he refused to answer; and for the commitment and detention of said Ephraim D. Whitcomb, this order shall be sufficient warrant; and it is further ordered, that whenever the said Ephraim D. Whitcomb, while in custody under the foregoing order, shall inform the city messenger that he is willing to answer said question propounded by said committee, and to appear before said committee for that purpose, it shall be the duty of the city messenger to take said Ephraim D. Whitcomb immediately before the common council and hold him subject to its order."

On this warrant was indorsed the return of the city messenger, to the effect that he had on March 9, 1876, conveyed Ephraim D. Whitcomb to the said jail in Boston, and delivered him to the keeper thereof, with an attested copy of the order and his return indorsed thereon.

The return of the sheriff, who was also keeper of the common jail, to the writ, justified by virtue of the order of the common council.

Hearing before *Morton*, J., who reserved the questions arising on the above papers for the consideration of the full court, and admitted the petitioner to bail in the sum of one thousand dollars.

H. J. Boardman, for the petitioner.

J. P. Healy & H. W. Putnam, contra. The St. of 1863, *c.* 158, is constitutional. If it be said that the Legislature cannot confer such power upon a tribunal which has not judicial functions, the answer is that the common council of the city of Boston has judicial functions. It has authority to decide upon all questions relative to the qualifications, election and returns of its members. City Charter, St. 1854, *c.* 448, § 24. *Burnham* v. *Morrissey*, 14

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, 239. Const. Mass. *c.* 1, § 1, art. 3. The investigation
n, being as to the receipt of money by members for
cted their right to seats in the common council, and
ore within its jurisdiction. Gen. Sts. *c.* 163, § 8. All
record have at common law the right to imprison for
by summary process without trial by jury. 2 Bish.
, (5th ed.) § 269. 4 Bl. Com. 283 *& seq.* 1 Com.
ed.) 711, note. *Thwing* v. *Dennie*, Quincy, 338. *Hol-*
v. *Duane*, Wall. C. C. 77. The same common law
cidental to all legislative bodies, irrespective of special
e Constitution, and the common council would there-
the right even independently of the St. of 1863, *c.*
lerson v. *Dunn*, 6 Wheat. 204. *State* v. *Matthews*, 37
St. 1854, *c.* 448, § 35.

C. J. By the twelfth article of the Declaration of
fixed to the Constitution of the Commonwealth, "no
all be arrested, imprisoned, despoiled or deprived of
ty, immunities or privileges, put out of the protection
, exiled, or deprived of his life, liberty or estate, but
gment of his peers or the law of the land."
icle is a reënactment of the provision of Magna
"no freeman shall be taken or imprisoned, or
his freehold, or liberties, or free customs, or
exiled, or any other wise destroyed; nor will
him, nor condemn him, but by lawful judg
or by the law of the land."
achusetts, as in England, the power to commit
always existed in the higher courts of justice,
law of the land, within the meaning of Magna C
r Declaration of Rights. Bac. Ab. Courts E.
, 6 H. & N. 717, and 10 C. B. (N. S.) 3. *In re C*
57. *Cartwright's case*, 114 Mass. 230, and auth

of the peace are recognized in the Constitution o
ealth as exercising a part of the judiciary power,
he purposes courts of record. Const. Mass. *c.* 3, a
Commonwealth, 12 Met. 9. Their authority to pu
pts, at least so far as is indispensable to the or
of their business, and especially in the case o

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refusal of witnesses, after due summons and payment of their fees, to appear and testify before them, has been generally admitted, and has been regulated by statute from the earliest time of the Commonwealth. St. 1784, *c.* 28, § 6. Rev. Sts. *c.* 85, § 33, and Commissioners' note to § 31. St. 1838, *c.* 42. Gen. Sts. *c.* 120, § 50; *c.* 131, §§ 5, 6. *Clarke's case*, 12 Cush. 320. *Piper* v. *Pearson*, 2 Gray, 120. *State* v. *Copp*, 15 N. H. 212. *In re Cooper*, 32 Vt. 253.

The constitutionality of the provision, first introduced in the St. of 1838, *c.* 42, and reënacted in the Gen. Sts. *c.* 131, §§ 5, 6, giving to masters in chancery and auditors a like power over witnesses, may admit of more doubt. According to the usual practice in chancery, an attachment against a witness for contempt before a master requires an application to the court. *Middleton* v. *Speright*, Cary, 80. *The King* v. *Almon*, Wilmot, 243, 269. 2 Dan. Ch. Pract. (4th Am. ed.) 1178, 1198. 78th Equity Rule of U. S. Courts, 17 Pet. lxxiv. A like practice is prescribed by act of Congress in the cases of commissioners to take depositions to be used abroad, and of registers in bankruptcy. U. S. Rev. Sts. §§ 4071–4073, 4999, 5002, 5005, 5006. See also *Ex parte Doll*, 7 Phila. 595. So a witness who refuses to be sworn or to testify before a grand jury must be brought before the court to be dealt with. *Heard* v. *Pierce*, 8 Cush. 338. Yet, as a master or auditor is transacting the judicial business of the court, and is under its authority and control, he may perhaps be intrusted by the Legislature with this power. But we have no occasion now to consider that question, nor the validity of the statutes conferring a similar power upon county commissioners, who, though often called a court, and authorized to determine many questions between parties, do not hold their offices by the same appointment or tenure as judges. Gen. Sts. *c.* 10, §§ 1, 6; *c.* 17, § 14; *c.* 131, §§ 5, 6. *Stone* v. *Charlestown*, 114 Mass. 214, 225. *Morrison* v. *McDonald*, 21 Maine, 550, 556.

Each house of the British parliament had the largest power to punish every description of contempt of its authority. *Crosby's case*, 3 Wils. 188; *S. C.* 2 W. Bl. 754. *Burdett* v. *Abbott*, 14 East, 1, and 5 Dow, 165. *Case of the Sheriff of Middlesex*, 11 A. & E. 273; *S. C. nom. The Queen* v. *Gossett*, 3 P. & D. 349. But, according to the decisions of most eminent judges,

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either branch of a colonial legislature has no such power
ishment; *Kielley* v. *Carson*, 4 Moore P. C. 63; *Hill* v.
8 Kerr N. B. 1; even for refusal to attend as a witn
duly summoned; *Fenton* v. *Hampton*, 11 Moore P. C
for contempts committed in the face of the house; *Do*
oner, L. R. 1 P. C. 328 — unless by established usa
mont v. *Barrett*, 1 Moore P. C. 59; or by express
imperial parliament. *Dill* v. *Murphy*, 1 Moore (N
Speaker v. *Glass*, L. R. 3 P. C. 560. So in *Ex pa*
5 B. & S. 280, the Court of King's Bench held that
of Keys, which was the lower branch of the Legisla
Isle of Man, and had also judicial functions in appe
verdicts of juries, had no power to commit for con
acting in its legislative capacity.

It is universally admitted that by the law of En
or city council had no power, without express a
ment, to make an ordinance with penalty of impris
commit for contempt of its authority. Grant on
Parke, B., in 4 Moore P. C. 89. *Barter* v. *Con*
Penn. 253.

The British parliament has supreme and uncon
and may change the Constitution of England, a
Magna Charta, which is itself only an act of pa
in this Commonwealth the legislative, as well a
authority and the courts of justice, is controlled
the written constitution, and cannot violate th
tablished by the twelfth article of the Declar
Emery's case, 107 Mass. 172.

In the United States, each branch of a su
has the same power to commit for contempt
parliament. Such a power has been adjudged
the federal Senate and House of Representati
expressed in the Constitution. *Anderson* v. *D*
A like power doubtless exists in each bran
Court of Massachusetts, and of other state legi
supreme within their sphere, and not, like
olies of Great Britain, created by and subordi
egislature. *Burnham* v. *Morrissey*, 14 Gray
thews, 37 N. H. 450. *Falvey's case*, 7 Wis.

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cause. St. 1854, c. 448, § 24. *Peabody* v. *School Comm Boston*, 115 Mass. 383. *State* v. *Jersey City Common* (1 Dutcher, 536. The Legislature may also provide for t ishment, upon indictment and trial in the courts of ju any person who, being duly summoned, refuses to ap testify before any board or tribunal upon a matter wh authorized by law to investigate or decide. But the L cannot delegate to or confer upon municipal boards that are not courts of justice, and whose proceedin an exercise of judicial power, the authority to im punish, without right of appeal or trial by jury.

The result is that so much of the St. of 1868, c. 15 takes to confer such authority upon either branc council, or upon the selectmen of a town, is inop void, because it is a violation of the Constitution monwealth and contrary to the law of the land.

Prisoner

NATIONAL BANK OF CLINTON *vs.* EDWARD TA

Suffolk. March 28. — 30, 1876. DEVENS & LORI

Upon the filing by the defendant in an action of contract, after fore judgment, of a copy of the adjudication of his bankruptcy District Court, he is entitled to have the case continued to aw of that court upon the question of his discharge; and, upon discharge, to have judgment rendered in his favor.

CONTRACT against the maker and indorsers promissory note, made by the defendant Tayl other defendants, and by them indorsed to June 15, 1874, at a calling of the docket, in t the court ordered the action to be placed o trial, on June 22, 1874; and on that day t all defaulted. The same day, the defend udged a bankrupt by the United States D district of Massachusetts, and on the same d fault was entered, the defendant Taylor file of the adjudication in bankruptcy and a

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ance of the case, to await the result of the bankruptcy proceedings. No objection was made to judgment against the other defendants. The motion to continue was opposed by the plaintiff, but the presiding judge ruled that the court had no discretion, but was required by the bankrupt act to continue the case, bankruptcy having been suggested in proper form before final judgment, and ordered the case to be continued. To this ruling the plaintiff excepted.

On September 20, 1875, the defendant Taylor received his discharge in bankruptcy, discharging him from all debts provable against his estate which existed June 22, 1874, and this discharge was pleaded in this case on September 21, 1874.

The plaintiff moved for judgment against all the defendants on the default. Taylor moved that judgment be entered in his favor, without costs, by reason of his discharge in bankruptcy. *Colburn*, J., ruled that, the case having been continued to await the result of the bankruptcy proceedings, and Taylor having obtained and pleaded his discharge, the court had no discretion in the matter, and ordered judgment for the defendant Taylor, without costs, by reason of his discharge in bankruptcy, and against the other defendants; and the plaintiff alleged exceptions.

G. W. Morse, for the plaintiff.

P. A. Collins & G. A. Griffin, for Taylor, were not called upon.

GRAY, C. J. The defendant Taylor having been adjudged a bankrupt in the District Court of the United States, and having filed a copy of such adjudication before judgment against him in this action, the case was rightly continued, upon his motion, to await the determination of that court upon the question of his discharge. *Ray* v. *Wight*, 119 Mass. 426. Having afterwards obtained his discharge in bankruptcy, and produced a certificate thereof, judgment was rightly rendered in his favor. *Lewis* v *Shattuck*, 4 Gray, 572. *Carpenter* v. *Turrell*, 100 Mass. 450.

Exceptions overruled

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LUCY A. MARTIN *vs.* HUGH C. CAM

Middlesex. Jan. 12.— March 2, 1876. COLT &

The recognizance required by the provisions of the Gen from the judgment of a justice of the peace in a civ words of the magistrate to the effect that the conusor be indebted to the other party in a specified sum to b fails to enter and prosecute his appeal. A certifica sent with the copies of the case to the court appeale the recognizance to that court.

At the bottom of a memorandum of a recognizance by ment of a justice of the peace in a civil action, to pr signature of the magistrate, was an attestation by hi copy." *Held*, that this attestation might be treated

Upon an action by a conusee upon a recognizance to judgment of a justice of the peace in a civil action, filed and an affirmation of the judgment obtained by of the conusor to enter his appeal, no further judgn the recognizance be estreated is necessary to enable

The certificate of a recognizance to prosecute an appe tice of the peace, recited that the conusee recovered "for her title and possession in and to a certain pi thereon," describing them, "in a personal action" b tne conusors. *Held*, that this sufficed to show tha Sts. c. 137, §§ 5–9, and that the magistrate had aut the recognizance.

The condition of a recognizance upon an appeal fro the peace in an action of forcible entry and deta returned, that the conusors prosecute their appea become due, and all intervening damages and cos "rent to become due" must be construed to mea substantial conformity with the Gen. Sts. c. 137, §

That a person was induced to become a surety on a resentations does not affect the right of action agai to the fraud.

CONTRACT against Hugh C. Campl wife, and John McGrady, the first two d cipals, and the last the surety, on a reco fore a justice of the peace to prosecute ment in a case under the Gen. Sts. c. 1 defaulted, and the surety alone defende

At the trial in the Superior Court, b tering into the recognizance, the failu

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ants to prosecute their appeal, the affirmation of the judgment of the justice of the peace in the Superior Court, and the subsequent proceedings to fix the liability of the surety, were all proved or admitted. It appeared that among the copies entered by the plaintiff with her complaint for the affirmation of judgment was the following paper:

"Commonwealth of Massachusetts. Middlesex, ss. Memorandum. That on the thirteenth day of April, in the year of our Lord one thousand eight hundred and seventy-four, H. C. Campbell, Ann Campbell and John McGrady, Junior, of that name, all of Stoneham, in the county of Middlesex, personally appeared before me, Dexter Bucknam, a justice of the peace in and for the county of Middlesex, and acknowledged themselves to be severally indebted unto Lucy A. Martin, wife of Charles W. Martin, of Winchester, in said county, in the respective sums following, to wit: the said Ann Campbell, H. C. Campbell, as principals, in the sum of six hundred dollars, and the said John McGrady, Junior, as surety, in the sum of six hundred dollars, to be levied on their goods or chattels, lands or tenements, and in want thereof upon their bodies, to the use of the said Lucy A. Martin in her own right, if default be made in the performance of the condition hereunder written.

"The condition of the above written recognizance is such, that whereas the said Lucy A. Martin, by the consideration of me, the said justice, at a court held by me, in said Stoneham, on the eleventh day of April current, recovered judgment against the said Ann Campbell and H. C. Campbell for her title and possession in and to a certain piece of land, with the buildings thereon, situate on the easterly side of Colincote Road, in said Stoneham, and costs of suit, taxed at eight dollars and thirty-seven cents, in a personal action brought by said Lucy A. Martin against said Ann Campbell and H. C. Campbell, from which judgment said Ann Campbell and H. C. Campbell appealed to the next Superior Court, to be holden at Cambridge, within and for the county of Middlesex, on the first Monday of June next: Now if the said Ann Campbell and H. C. Campbell shall and do prosecute their said appeal at said Superior Court with effect, and pay all rent due and to become due, and all intervening damages and

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costs, then the above written recogniz
effect; otherwise to abide in full force,
" Dexter Bucknan
" A true copy.
" Attest, Dexter Bucknam, Just
This paper had remained on the fil
other papers in the case. There was r
treatment or forfeiture of said recogr
from this recital. McGrady offered to s
and fraudulently led, by others than tl
the recognizance aforesaid, supposing it
a criminal case, and only for the appea
fendants; but the judge rejected the e
The defendant thereupon asked the
cognizance was void, and that this ac
tained, upon these several grounds: "
did not appear to have been duly return
record of the court appealed to, and ha
and forfeited. 2. That a husband and v
principals in a recognizance. 3. That
principal, is void as to surety. 4. Th
tains an obligation not warranted by th
5. That the caption does not show that
had jurisdiction of the subject matter."
The judge withdrew the case from
parties, and reported the same for the de
upon the agreement that if either of tl
was fatal to the maintenance of this ac
entered for McGrady; otherwise, judg
the penal sum of the recognizance; un
of opinion that the evidence offered v
and that the defendant has a right to
in which case a new trial should be had
W. P. Harding, for the plaintiff.
B. F. Briggs, for the defendant McG
AMES, J. The act of recognizing, in
an appeal from the judgment of a just
action, is performed by assenting to the
to the effect that the conusors acknowl

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debted to the other party in a specified sum, to be paid if the party appealing fails to enter and prosecute his appeal. A brief minute of the transaction is entered on the record, in order that a more full memorandum may be prepared when it is wanted. This memorandum is not itself the recognizance, although it is not unfrequently so called, as it has been in this case. When it is sent, with copies of the case, to the court appealed to, it operates as a return of the recognizance to that court. Strictly speaking, it should not be certified as a copy, because being merely a certificate of an act of the party in court, and not of a bond or contract in writing, there is no original of which it can be said to be a copy. But the attestation, though unnecessary, cannot vitiate the proceeding, and the court appealed to still has the official certificate of the magistrate that the fact therein described did occur before him, and the words "A true copy. Attest," may be treated as surplusage. The plaintiff, having filed the appropriate papers, and obtained an affirmation of the judgment, upon the failure of the original defendants to enter their appeal, no further judgment of forfeiture, or order that the recognizance be estreated, was necessary to enable her to enforce it by suit. *Cook* v. *Berth*, 108 Mass. 73. *Benedict* v. *Cutting*, 18 Met. 181.

The point that the recognizance was not binding upon the wife was not insisted upon at the argument. She and her husband were joint defendants in the original suit, and no objection that they were improperly joined was there taken. There certainly is not enough disclosed in this report to show that she was not liable on the recognizance; *Curtice* v. *Bothamly*, 8 Allen, 336; and it may well be doubted whether at this stage of the case the surety can take that objection.

The objection that it does not appear upon the face of the recognizance that the magistrate had jurisdiction of the case in which it was taken, cannot be sustained. The condition of the recognizance describes the original case as "a personal action" in which the plaintiff recovered judgment against the original defendants for the possession of a piece of land, and makes it apparent that they were sued as tenants, and binds them to the payment of rent due and to become due. This is sufficient to show that it was a case under the Gen. Sts. *c.* 137, §§ 5–9, and

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that the magistrate had authority and
recognizance. *Benedict* v. *Cutting*, *ubi*

Neither is there any ground for saying
undertakes to impose any burden not req
is true that it is not in the exact words
substantially in conformity to its meanir
rial discrepancy. *Shaw* v. *McIntier*, 5 A
sion "rent to become due," as used in th
understood to mean "intervening rent."

As to the allegation of fraud, none is
plaintiff was a party, or which, for that
right of action. All the points relied u
the argument are therefore disposed of, a

Ex

ISAAC G. REED *vs.* INHABITAN

Middlesex. Jan. 13. — March 2, 1876. COL

On the issue whether the location of land taken by t
purposes of a school-house, under the Gen. Sts. c. 3
Gen. Sts. c. 43, § 65, "filed in the office of the town
the town meeting at which the doings of the selectr
that the town clerk prepared this location and left
town at his house, which was his only office as clerk
more than seven days before the meeting, a majo
his house, in his absence, procured the paper from
tures to it; and that the clerk never saw the paper
unsigned, in the safe, until he found it there on
though he was informed by his wife that the sele
the paper was duly filed.

WRIT OF ENTRY to recover a parcel
Plea, *nul disseisin*, with a specification o
was taken for a school-house in accordar
former decision, reported 117 Mass. 38
the Superior Court, without a jury, bef
lowed a bill of exceptions in substance

The demandant proved his title to
prior to the proceedings of the town,

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then put in the record of certain proceedings of the town, as to the regularity and sufficiency of which no question is now made, except as is herein stated. It appeared that after the designation of a lot by the town, at a town meeting held April 1, 1872, the selectmen, after due notice to the demandant, proceeded to the demanded premises, and determined upon the proper location and metes and bounds of the lot, which was then surveyed by the town clerk. This was on Saturday afternoon. They then separated, after giving the clerk instructions to draw up their report, ready for their signatures on the next Monday. The clerk prepared the report, and left it in the safe belonging to the town at his house, which was his only office as clerk. On Monday evening, April 29, two selectmen, separately, called at his house, in his absence, and, procuring from his wife this paper, affixed their signatures to it. The other selectman never signed it, not because he did not approve it, but because he lived at a distance. The town clerk testified that he never saw the paper, so far as he could recollect, from the time he wrote it and deposited it in the safe, unsigned, until he found it there, in its present condition, on the day of the town meeting, May 7, 1872, but he was informed by his wife that the selectmen had signed it. At a town meeting held May 7, with a proper article in the warrant, the report and doings of the selectmen were accepted by the town.

The demandant contended that, as matter of law, it was not competent for the judge to find that this report and location were "filed in the office of the town clerk seven days at least" before the town meeting, at which they were accepted. But the judge ruled otherwise, and found for the tenant; and the demandant alleged exceptions.

I. G. Reed, for the demandant.

G. A. Somerby, for the tenant.

AMES, J. The only question raised by this bill of exceptions is whether the report and location were filed in the office of the town clerk in the manner required by Gen. Sts. *c.* 43, § 65. The clerk's office may be his dwelling house, and undoubtedly is so in many of the towns in the Commonwealth. A document may properly be said to be filed with a town clerk when it is placed in his official custody, and is deposited in the place where his

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offi. al records and papers are usually ke
the statute requiring his constant atten
ce This case was in his custody, ready f
selectmen, and if a majority of the boa
signed the paper, and returned it to its
safe, more than seven days before the
sufficient compliance with the statute.
was absent when they called. His wife
his agent for the purpose of exhibiting t
it when signed to its place of deposit.
proper practice to indorse a memorandum
paper, but the statute does not make it i

GEORGE W. GERRISH *vs.* J

Middlesex. Jan. 14. — March 3, 1876. COLT

The town of Charlestown in 1640 established a ferry
ing places being upon the town's territory, and co
tained ferry ways upon each side of the river across
mark for the accommodation of travel across the
side of the river, together with "the beach leadin
ways," and "the ferry ways on each side of the riv
in 1755 to an individual, and reconveyed by him i
after the building of Malden Bridge across the river
town conveyed "the old ferry ways on the flats th
Bridge on both sides of channel." The ferry ways
were permanent structures of stone and wood.
cluded the land under and used with the ferry wa
mark, and that the easterly boundary line ran from
general course of the ferry way, to low water mark

GRAY, C. J. This is a writ of entry
flats in Charlestown, lying on the north
River, and westerly of a straight line, d
at high water mark to low water mark at
east of Malden Bridge, very nearly paral
substantially on the easterly line of th
admitted that the stone post is the bound
high water mark; and the question is, w

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across the flats is to be run, as the demandant contends, at right angles with a straight line drawn according to the general course of the shore at high water mark, which would include a parcel of flats west of the old ferry way; or, as the tenant contends, straight across the flats at low water mark in substantial accordance with the easterly side of the old ferry way.

The demanded premises were within the original bounds of the town of Charlestown, which might appropriate them to public uses or grant them in fee to individuals, at least after the passage of the ordinance of 1647. 1 Mass. Col. Rec. 106, 172. *Boston* v. *Richardson*, 13 Allen, 146, 150, and 105 Mass. 351, 356. *Lynn* v. *Nahant*, 113 Mass. 433.

The records introduced by the tenant show the following facts: In 1640 the town established, and for more than a century afterwards maintained, a ferry at this place, known as Penny Ferry. In 1648 the town ordered "the ways to be made passable for people to go to the boats at the low water mark," and that there should be a causeway made at the ferry.

On February 7, 1725–26, the town "agreed with Samuel Sweetser to have a lease of the northerly side of Penny Ferry for twenty-five years, he paying yearly five shillings for the use of the town, and he is to make and maintain good and sufficient ways from high to low water mark." Samuel Sweetser having surrendered his lease, the town on March 6, 1726–27, made a similar lease to Joseph Frost, and voted to give him "something towards the making a causeway across the flats on the north side of Penny Ferry;" and on May 15, 1727, voted to allow him forty pounds "towards the erecting a causeway across the flats on the north side of Penny Ferry, upon the condition that the said causeway be a substantial way and of a good width and to the full satisfaction of the selectmen." In 1751 Frost gave up his lease, in consideration of a sum of money paid him by the town, pursuant to an award of arbitrators.

In 1755 the town voted to sell and convey to Stephen Sweetser certain lands on each side of the river and the ferry ways on both sides. The deed from the town to him is not produced, but its contents may be inferred from a mortgage from him to the town in the same year, describing certain lands by metes and bounds, "together with the beach leading from the upland to

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the ferry ways between Thomas Jenner's n
with the ferry ways on each side of the ri
conveyed the same land to the town, "tog
leading from the upland to the head of saic
ferry ways on each side of the river, as th
used."

In 1788 the town conveyed to Henry P
land north of Mystic River and east of Mald
beach adjoining the premises aforesaid, an
on the flats the southeasterly side of Mal
sides of the channel." The title thus con
mesne conveyances to the tenant.

The conveyances of the "ferry ways," wh
structures of stone and plank, clearly inclu
them and used with them. *Wooley* v. *Gr*
Johnson v. *Rayner*, 6 Gray, 107, 110.

It appears by the report that the old plank
upper end of one of the ferry ways were upo
by the tenant, and that the stones and oth
causeway extending to low water mark were
of this line. The inference is inevitable th
the grants, under which the tenant claims
boundary line upon the east should run from
the upland, parallel with the general course
and of the bridge, to low water mark. *Val*
Pick. 85. *Piper* v. *Richardson*, 9 Met. 155.
9 Cush. 446, note. *Attorney General* v. *Bosto*
553.

None of the records introduced by the dema
are shown to have included these flats. It fo
mandant shows no title, as against the earlier t
to any part of the demanded premises.

Judgment

J. G. Abbott, for the demandant.

T. H. Sweetser, for the tenant.

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JAMES W. HILL, administrator, *vs.* WILLIAM B. BOWERS & others.

Middlesex. Jan. 18. — March 3, 1876. COLT & ENDICOTT, JJ., absent.

A testator left the residue of his property "to the children of my brother A. by his present wife, and the survivors of them, and to the children of my nephew B. and the survivor of them, their heirs and assigns forever." At the death of the testator, A. had eight children, and B. had two. *Held*, that the children of A. and of B. took *per capita* and not *per stirpes*.

BILL IN EQUITY by the administrator, with the will annexed, of Josiah Bowers, to obtain the instructions of the court, and alleging the following facts:

The will of the testator contained the following clause:

"Fourth. I give, devise and bequeath to the children of my brother Joseph by his present wife, and the survivors of them, and to the children of my said nephew Albert, and the survivor of them, all the rest and residue of all my property and estate, and the remainder and reversion thereof, after the decease of my wife and sister Ann aforesaid, to them, their heirs and assigns forever."

At the death of the testator there were living eight children of the testator's brother Joseph, "by his present wife," and one of them has since died without issue. There were also living two children of the nephew Albert, both of whom are living. The testator's wife and sister Ann died after him.

The administrator requested instructions as to whether the remaindermen took *per capita* or *per stirpes*.

The answers admitted the allegations of the bill, and the case was reserved by *Morton*, J., on the pleadings, for the consideration of the full court.

J. P. Healy, for the children of the nephew. It may well be conceded that "as a general rule of construction of wills, a gift to the children of several persons, or to a person described as standing in a certain relation to the testator and the children of another person standing in the same relation, the objects of the gift take *per capita* and not *per stirpes*." But this mode of interpretation rests upon a foundation not very stable, and "will yield to a very faint glimpse of a different intention in the con-

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text." *Balcom* v. *Haynes*, 14 Allen, 204 (4th Am. ed.) 111, 112, and notes. Tl applicable to this case; because the chi brother Joseph, and the children of his stand in the same relation to the testatc degrees of kindred to him; and because by more than "a very faint glimpse" that is, that the property and estate in q tributed *per stirpes* and not *per capita*. If tended a *per capita* distribution, he would his gift to the children of his brother and c survivors of them; but instead of so expr gives to the children of his brother Joseph ing, and the survivors of them, and to the c Albert, and the survivor of them, thus divi legatees into families, and providing separa of each family. This construction of the sustained by the current of the decisions of v. *Haynes*, *ubi supra*. *Leland* v. *Adams*, 1 *brook* v. *Harrington*, 16 Gray, 102. *Bass* Mass. 348.

G. A. Torrey, for the children of the brot

GRAY, C. J. The general rule is that l children of A. and to the children of B., tl *capita* and not *per stirpes*, in the absence of different intention. There are no such word repetition of the words "and the survivors of clear the intention of the testator not to inclu either person named, who did not survive the death, the children who should take were a residue of the estate was to be equally div *Blackler* v. *Webb*, 2 P. Wms. 383. *Butler* Ch. 367. *Lincoln* v. *Pelham*, 10 Ves. 166, 176 2 Dru. & War. 89; *S. C.* 1 Con. & Laws. 270 *Collins* v. *Hoxie*, 9 Paige, 81. *Weston* v. *F* *Balcom* v. *Haynes*, 14 Allen, 204. *De*

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CHARLES COWLEY *vs.* EPHRAIM B. PATCH, executor.

Middlesex. Jan. 24. — March 3, 1876. COLT & ENDICOTT, JJ., absent

The provision of the Gen. Sts. c. 97, § 28, that upon the death of one person indebted upon a joint contract, his estate shall be liable therefor as if the contract had been joint and several or as if the judgment had been against himself alone, relates only to the remedy, and, in an action upon such contract against the executor of a deceased party thereto, the plaintiff must still prove that the original liability was joint, and that both the survivor and the executor of the deceased are liable.

In an action on the Gen. Sts. c. 97, § 28, against the executor of a person alleged to be jointly liable with F. upon two contracts, the declaration contained two counts, one upon each contract, and it appeared that in former actions upon the same contracts in which F. was a defendant, he had been adjudged not liable. As to the first count of the declaration it was admitted that the original liability, if any, was joint; and, as to the second, it appeared that the plaintiff in the former action treated the liability as joint, and no facts appeared tending to show that it was several. *Held*, that the executor was not liable on the contracts.

CONTRACT against the executor of John W. Graves. The declaration contained two counts, the first of which was for money had and received to the plaintiff's use by the said Graves. The second count was for professional services and disbursements. The answer alleged, among other things, that if the testate was ever indebted to the plaintiff, as alleged, he was jointly indebted with one Henry H. Fuller, now living, and that the plaintiff had elected to prosecute his suits, for the indebtedness and identical subject-matter in each count contained, against Fuller to final judgments, which judgments had been against the plaintiff, and in favor of Fuller. The case was submitted to the Superior Court upon an agreed statement of facts in substance as follows:

Each count declares on a distinct and separate demand. The indebtedness in the second count, if any, (which the defendant does not admit,) was originally the joint indebtedness of the defendant's testate, John W. Graves, and Henry H. Fuller. A suit was formerly brought by the plaintiff, for this identical demand against Graves and Fuller, in the lifetime of Graves. Upon the death of Graves during the pendency of the suit in court, the plaintiff discontinued against Graves, and prosecuted his suit to final judgment against Fuller alone as the survivor of the joint debtors. On trial by jury, verdict and judgment were in favor

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of Fuller, the defendant, who obta
which have been paid on execution.

A suit for the identical demand sou
first count was formerly brought by the
Graves in his lifetime. After suit br
of Graves, the plaintiff by order of cou
Henry H. Fuller into court as a joint d
fendant, with Graves, alleging that he
summon him in. Fuller was thus join
defendant with Graves. Graves dying
the plaintiff discontinued as to Graves
to trial, verdict and judgment against
viving joint debtor. The ground of pl
through trial and up to final judgment
contractor and debtor with Graves, and
on that ground. Verdict and judgment
fendant, Fuller, who obtained a judgmen
plaintiff, which has been paid on executio

Upon these facts *Putnam*, J., ruled tha
be maintained, and ordered judgment fo
plaintiff appealed.

C. Cowley, pro se.

G. Stevens, for the defendant.

GRAY, C. J. In order to maintain an
tract, whether the action is brought agains
of the joint contractors, it is necessary to
both; for if one only is or ever was liable,
but only a several liability, and a varianc
action declared on. For example, if one joi
alone, and does not plead in abatement th
other, and judgment is rendered against the
the cause of action against him, and (unless
by statute) as the two are no longer jointly li
sequent recovery against the other joint co
Johnson, 13 Mass. 148. *King* v. *Hoare*, 13 M
v. *Eldred*, 6 Wall. 231. So if, in such an acti
for the defendant, upon the ground that there
it is a bar to a subsequent action against th
upon the joint contract. *Phillips* v. *Ward*, 2

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The same rule must be applied to this case. It is true that, by reason of the death of one joint contractor, and the provision of the Gen. Sts. *c.* 97, § 28, enabling an action to be maintained against his administrator as if the contract had been originally joint and several, the plaintiff might maintain one action against the survivor, and another against the administrator of the deceased. *Curtis* v. *Mansfield*, 11 Cush. 152. *New Haven & Northampton Co.* v. *Hayden*, 119 Mass. 361. But the severance is merely for purposes of remedy, and the plaintiff must still, in either action, prove that the original liability was joint, and that, so far as concerns that question, both the survivor and the administrator of the deceased are liable.

This action against the executor of Graves cannot be maintained upon the ground that Graves and Fuller were originally jointly liable, because such liability is disproved by the judgments in favor of Fuller in the former actions, one at least of which is shown by the statement of facts to have been prosecuted against Graves and Fuller in the lifetime of both, and both of which were prosecuted against Fuller, after the death of Graves, solely upon the ground of a joint liability.

It cannot be maintained upon the ground that Graves was originally the sole debtor, because, as to one count, it is admitted that the original liability, if any, was joint; and, as to the other count, the plaintiff in the former action treated the liability as joint, and there are no facts tending to show that it was several.

Judgment for the defendant.

WALTER M. LOVELAND & another *vs.* SAMUEL R. BURKE.

Middlesex. Jan. 11. — March 4, 1876. COLT & ENDICOTT, JJ., absent.

It is competent for a common carrier, in defence of an action for injury to goods, in their delivery, by the breaking of the requisite apparatus, to show a local usage that such apparatus is to be furnished by the consignee of the goods; and, if such usage is shown, the carrier is not liable for injury to the goods, occasioned by a latent defect in the apparatus furnished by the consignee.

A common carrier, having a hogshead of molasses to deliver, was furnished by the owner with skids wherewith to unload it from his wagon. The skids, owing to

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a latent defect, broke under the weight of the hogshead, and the contents were lost. *Held*, that the owner could not maintain an action against the for the loss.

CONTRACT against a common carrier between Boston Somerville, to recover the value of a hogshead of molasses

At the trial in the Superior Court, before *Rockwell*, J., peared that the plaintiffs employed the defendant to tra a hogshead of molasses from Boston to their grocery st Somerville; that the defendant did transport it in his wa Somerville at a point near their store; that the plaintiff directed him to unload it to and upon the piazza of the that he backed his wagon to within a few feet of the piaz skids or wooden supports were then placed from the pi the wagon; that then the parties undertook to roll the h from the wagon to the piazza, and, when it was upon tl between the wagon and piazza, one of the skids broke caused the hogshead to fall and its contents to be destro further appeared that the skids were furnished by the p and that the defendant requested the plaintiffs to furni and that the breaking was attributable to the fact tha had been sawed out of the under side of the skid, which

The defendant offered evidence tending to prove th the universal and well known custom and usage in S and the suburban cities and towns for grocers to kee nish skids, whereon to remove heavy articles from cor riers' wagons to their grocery stores, and for carrie furnish skids, and that it was the plaintiffs' duty in t furnish the skids; also that the skids so furnished a him to be suitable, and that the defect, which cause dent, was not apparent, and in fact was not seen by requested the judge to instruct the jury, "that if t find that it was the duty of the plaintiffs to furnish p upon which to receive the hogshead, and that they skids therefor, which appeared suitable to the de would not be required to make a critical examinati and would not be liable for an accident to said hogs by a defect in them, which he did not see, and wh ordinarily apparent."

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The judge declined to instruct the jury in this form, but did rule and instruct them as follows: "The duty of the defendant was to deliver the hogshead safely on the premises of the plaintiffs, using proper means and instruments. The mere fact (if it is a fact) that the usage is that grocers furnish the skids, does not alter the duty of the defendant to deliver the hogshead on the plaintiffs' premises. The carrier, by that fact, and the other fact that the plaintiffs did furnish the skids at the request of the defendant, was not relieved of further duty after the hogshead passed upon the ends of the skids. He was still bound to use proper care in the use of proper skids. He had no right to use insufficient skids, although the skids produced at his request were furnished according to usage by the plaintiffs. He, the defendant, was still bound to use proper skids. The plaintiffs were not warrantors that the skids were sufficient to carry the hogshead to the sidewalk on the plaintiffs' premises. If there was a latent defect in the skids, known to the plaintiffs and not known to the defendant, and not observable by ordinary skilful observation before using, the defendant would not be liable. The question as to usage, though of some importance, is not decisive of the case, but the previous considerations must also be regarded. The mere fact that the skids were furnished in compliance with usage by the plaintiffs does not alter the period when the delivery is completed. The period of completed delivery by the carrier is the same, whether the skids are to be furnished by the plaintiffs or by the defendant."

The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions to the rulings and refusals to rule as requested.

W. S. Stearns, for the defendant.

B. C. Moulton, for the plaintiffs.

AMES, J. The usage which the defendant attempted to prove was not unreasonable in itself, nor was it in contravention of any rule of law. It was not an attempt to establish, for the purposes of this case, any special or peculiar rule of interpretation of terms, conflicting with their recognized and ordinary legal meaning. It was offered merely to prove, as a matter of fact, that there was an established mode of doing a certain business in the locality where the parties reside, so well known to them as to

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justify the conclusion, that they both expected and that the business, which the defendant undertook t occasion, was to be done in that manner. The defe receiving the goods for transportation, must be u have contracted to deal with them according to known and ordinary course of his business. *St. Santvoord*, 25 Wend. 660. His liability to deliver owner in person could be modified by contract, by g or even by his own particular usage, if understood the other party. *Farmers' & Mechanics' Bank Transportation Co.* 18 Vt. 131. The parties ma agreement they please as to the time, place and n livery, and in the absence of any express contract, delivery may be determined by a local usage. *Ba* 5 Burr. 2711. Thus it has been held that a carr a usage to deliver at certain stopping places onl *Culver*, 17 Wend. 305. A usage, so long establi and notorious, as to justify the presumption that knew it, becomes a part of the contract, and n when the transit is over, and what is a sufficient d is to say, the extent of the transit may be matte gether in proof; and the course of business at the nation, and the usage of carriers at that place, may ingredients of the contract itself. *Farmers' & M* v. *Champlain Transportation Co.* 23 Vt. 186.

The ruling given by the court as to the effect usage, if proved, did not meet the exigencies of jury should have been instructed that, if they of the existence of a long continued, established usage for grocers, in that locality, to furnish wooden supports for unloading at their shops hea carriers' wagons, and if the damage in this inst sioned by defects in the appliances furnished fo by the plaintiffs, especially if those defects were that the defendant saw, or with reasonable attent seen them, the action could not be maintained. nish the skids must mean suitable and proper ski reasonable use of sustaining the weight of the were to rest upon them.

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But, independently of the question of usage, there is another difficulty in the plaintiffs' case which we find to be insurmountable. It may be conceded that the defendant's obligation to transport the goods to their place of destination included an obligation to unload and deliver them safely, and that ordinarily the transit is not at an end until such a delivery is accomplished. But the place and manner of delivery may always be varied with the assent of the owner of the property; and if he interferes to control or direct in the matter, he assumes the responsibility. *Lewis* v. *Western Railroad*, 11 Met. 509.

In the case at bar, it is expressly found that the plaintiffs, on the arrival of the goods, and at the request of the carrier, furnished the skids upon which he was to roll the hogshead into their warehouse. He certainly had a right to suppose that they knew whether the skids were sufficient to support its weight. His duty was to deliver the article as the plaintiffs should direct. If the plaintiffs themselves took part in the delivery, and furnished the skids to be used in the process of unloading, it was equivalent to a direction to him to unload in that manner, or at least to a consent that he should do so. He is entitled to say that he has delivered the goods to the plaintiffs and in accordance with their directions; and it is little short of a legal solecism to say that he can be held responsible for the latent insufficiency of the unloading apparatus which they voluntarily furnished for his use. *Exceptions sustained.*

MICHAEL O'BRIEN *vs.* PERLEY W. ANNIS & another.

Middlesex. Jan. 12. — March 4, 1876. COLT & ENDICOTT, JJ., absent.

The service of a writ of execution, duly commenced by a constable, may be completed by him after the expiration of his term of office.

A demand upon trustees of an execution debtor named in the writ of execution, and a search for goods and effects of the debtor, is such a commencement of service of the execution as will warrant a constable in completing the service, after the expiration of his term of office, by an arrest of the debtor.

TORT for an illegal arrest and imprisonment. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

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Kendall H. Blanchard, one of the defendants, recover
ment before a justice of the peace of Middlesex County,
the plaintiff, on January 12, 1874, and, upon an executio
upon the judgment, and an affidavit for arrest, made on F
28, 1874, the defendant Annis arrested the plaintiff or
11, 1874.

The execution, dated January 12, 1874, after reci
judgment and the award of execution against the goo
and credits of the defendant in the hands of Frank
Orin Hanscom, trustees of the defendant, commanded
"that of the goods and chattels of the said defendant i
hands and possession, and of the goods, effects and
the said defendant in the hands and possession of sai
jointly and severally, you cause to be paid and satisfie
said plaintiff, at the value thereof in money, the afor
being thirty-four dollars and twenty-one cents in the
gether with interest thereon from the said date, w
five cents more for this writ, and thereof also to sati
for your own fees; and for want of such goods and
the said defendant in his own hands and possession t
shown unto you, or found in your precinct, to the a
the said plaintiff; and for want of goods, effects a
the said defendant in the hands and possession of t
tees, to be by them discovered and exposed to you,
several sums aforesaid, together with interest then
said date, with your own fees, we command you to
of the said defendant, and him commit unto eith
in our county of Middlesex aforesaid, and detain in
within our said jail, until he pay the full sums abo
with your fees, or that he be discharged by the
creditor, or otherwise by order of the law."

The officer's return, under date of March 13, 1
lows: "By virtue hereof I made demand on t
January last past upon the within named Frank
Hanscom to expose and exhibit to me any goods
its in their hands or possession at the time of t
original writ in this action belonging to the wi
chael O'Brien, whereupon I might levy and s
tion, or any part thereof, and they then and the

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refused to exhibit or show me any. And I made diligent search after the goods and effects of the within named Michael O'Brien, but could find none in my precinct belonging to him, and afterwards, on the 11th day of March now current, by virtue of this execution and certificate hereto annexed, and for want of goods or estate of the said Michael O'Brien that I could find in my precinct, and for want of any goods, effects or credits of the said Michael O'Brien, in the hands or possession of the within named trustees, disclosed and exposed to me, I have arrested the body of the said Michael O'Brien, and carried him before Dexter Bucknam, Esq., a trial justice of said county of Middlesex, and the said defendant has given recognizance to appear within thirty days, according to the law in such case made and provided."

Annis was elected constable of the town of Stoneham on March 10, 1873, took the oath of office on the same day, and on March 13, 1873, gave bonds as such constable, filed in the office of the clerk of the town on the same day; he was also elected constable of the same town on March 9, 1874, took the oath of office on the same day, and gave bond to the town of Stoneham, as such constable, approved on March 12, 1874, and filed in the office of the clerk of the town of Stoneham on March 24, 1874.

Upon the foregoing facts, the judge ruled that the plaintiff could maintain this action, and ordered judgment for the plaintiff against both defendants, for the sum of $25 damages. The defendants alleged exceptions.

B. F. Briggs, for the defendants.

W. P. Harding, for the plaintiff.

DEVENS, J. Upon the facts in this case, it must be deemed that Annis had commenced the service of the writ of execution before March 9, when he was elected to and accepted the office of constable for the second year. The execution delivered to him was only to be served by arrest of the person for want of goods, effects or credits to be exhibited by the trustees, and for want of property of the principal defendant which he could find. On the 14th day of January (the execution having been committed to him on the 12th) he made demand on the alleged trustees, and also search for the property of O'Brien. No return of the execution was made by him, but on February 28,

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the necessary affidavit having been made, the c
magistrate authorizing an arrest of the person w
the writ, and the arrest was made on March 11
upon the trustees and the search for the prop
were acts which it was the duty of the officer t
making any arrest, even if the certificate autho
do had been appended to his process at the time
and his performance of them constituted a comm
service of it. Having thus commenced, even i
that his office as constable under his first electio
by his second election and acceptance, he had
virtue of the first election and the bond given
to the Gen. Sts. *c.* 18, § 61, to complete the serv
eral rule of the common law that when an offic
menced the service of a process, he is entitled
to proceed to its completion, although he m
moved from or gone out of office. *Clerk* v.
322. *Welsh* v. *Joy*, 13 Pick. 477. *Capen* v.
262, and cases cited.

Even if the explicit authority given by the
§ 68, to deputy sheriffs to serve all processes
the time of their removal from office is not i
upon constables in towns, yet, when in certa
authorized to serve writs, they are invested
service, with all the authority conferred on of
mon law. Annis was not therefore a trespas
the service of the writ in his hands by the arr

This view renders it unnecessary to consider
given by Annis at the time of his first electic
compliance with the Gen. Sts. *c.* 18, § 61, so a
to serve writs under his second election, eve
bond was filed. *Exce*

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J SIMPSON *vs.* WILLIAM F. TRIVETT & another.

Middlesex. Jan. 13. — March 4, 1876. COLT & ENDICOTT, JJ., absent.

A poor debtor, who has entered into a recognizance under the Gen. Sts. c. 124, § 10, to deliver himself up for examination, commits a breach thereof, if at the time and place appointed he appears, and objects to the commencement of the examination, until the execution upon which he was arrested is produced; and the refusal of the magistrate to order the examination to proceed is immaterial.

CONTRACT on a recognizance entered into under the Gen. Sts. c. 124, § 10, by the defendant William F. Trivett, as principal, and the defendant Alfred Cutler, as surety, and conditioned that Trivett, who had been arrested on an execution in favor of the plaintiff, should within thirty days from the day of his arrest deliver himself up for examination before some magistrate authorized to act and appear at the time and place fixed for his examination, and from time to time until the same was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination and abide the final order of the magistrate thereon. The declaration alleged as a breach that Trivett had not delivered himself up within the thirty days. Answer, a general denial.

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff offered evidence tending to show that on or about November 18, 1873, he, the plaintiff, obtained an execution against the defendant for the sum of $564.25 debt, and $14.58 costs of suit; that an affidavit for arresting the defendant Trivett was duly made thereon, and Trivett taken into custody; and after the arrest the defendant Trivett, as principal, and the defendant Cutler, as surety, entered into the recognizance declared on.

The plaintiff also offered evidence tending to show that on or about December 18, 1873, the defendant Trivett procured from Coleman S. Adams, a trial justice for the county of Middlesex, a notice in due form and caused the same to be duly served upon the plaintiff's counsel, and returned to the magistrate who issued the same, at the time and place therein stated, and that, at the time and place appointed in said notice, all the parties were there, the defendant Trivett with counsel, and the cred-

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and the magistrate was prese
vas agreed by the counsel of t
of the magistrate, that the in
be in writing; that, after ar
by the creditor's counsel, and
sworn, the debtor's counsel c
urpose of ascertaining if hi
erly arrested, but the execut
; and the counsel for the d
examination until the exec
e evidence from one or m
magistrate demanded the
duced, and the defendant
magistrate stated that he
proceed or do anything in
Trivett by his counsel c
sworn unless the executi
ies and magistrate rema
til the hour had expired
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nsel for the parties,
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he replied that he
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the part of the junior counsel for the plaintiff. The magistrate then said he did not feel justified in going on without the execution, for if it proved on examination that the debtor had property, he could not hold him without laying himself personally liable; that the defendant's counsel, desiring to see the execution, proposed to continue the hearing one week to enable him to do so; and the magistrate said he should decline to take any jurisdiction whatever.

There was also evidence tending to show that at or about fifteen minutes before four o'clock, P. M. the defendant's counsel said in the presence of the plaintiff's counsel and in the hearing and presence of the magistrate, "that he was there with his client, to obey any order the magistrate shall make in the premises;" that the magistrate answered that "he did not see that he had anything to do about it;" and that no request was made by the counsel for the creditor, of the magistrate, to have the debtor sworn.

Upon this evidence the defendants asked the judge to instruct the jury as follows:

"1. That a debtor, after due notice and service of the same returnable before a proper magistrate, and procuring the attendance of such magistrate, and attending himself at the time and place fixed by the notice, thereby submits himself to examination.

"2. That if the jury shall find that the debtor in this case procured a notice in due form of his intention to take the oath for the relief of poor debtors, therein fixing a time and place for examination, and had the same duly served, and also procured the attendance of a proper magistrate, and attended himself before such magistrate, at the time and place fixed for such examination: and that the magistrate erroneously refused or neglected, for any reason, to proceed with such examination, and informed the debtor that he should not proceed, and the debtor remained at the place, and more than an hour after the time fixed by said notice, and did not depart contrary to the order of said magistrate, the magistrate refusing to make any order in the premises, then the debtor might depart and the same would not be a breach of the recognizance.

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"3. That a magistrate, exercising the office of examini
poor debtor under the statute, is exercising a judicial office
is to determine all questions of law and fact heard and
before him at such examination.

"4. That at the examination of a poor debtor either p
the examination, or proceedings, has a right to raise obj
as to the law and fact involved in the case for the determ
of the magistrate, and such objections would not amo
refusal to proceed with and complete an examination
erroneous ruling or a refusal to rule or make an ord
objection would not in its consequent results work a
the recognizance.

"5. That if the jury shall find that the debtor w
place fixed for his examination after the time and
hour and was ready for examination, and the mag
there ready to examine the debtor, and that the c
there by himself or his attorney, and it was agreed
tween the counsel of the several parties, with the kno
consent of the magistrate, that the interrogatories s
writing and the answers also, then and thereby the
did acquire and take jurisdiction in the case. And
the magistrate had acquired jurisdiction of the case
was not longer responsible for the doings or errors o
trate, and all that the debtor was required to do was
comply with the orders and requirements of the ma
that if the magistrate made no order and did not
debtor, then he might depart after the expiration
and such departure would not be a breach of the r

"6. That if the jury shall find that the noti
form, and was duly served and returned to the m
issued it, and the debtor appeared before said m
time and place fixed for his examination the ma
have examined him, and if for any cause (except
of the debtor to obey some order or requiremen
trate) the magistrate did not examine the debtor
examination, and the debtor remained at said
whole of the hour, and the magistrate made
not examine the debtor, or continue or otherwi

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case, that then the debtor might depart and such departure would not be a breach of the recognizance.

"7. That upon the undisputed facts of this case the plaintiff cannot recover."

The judge declined to give these instructions, but among other things not objected to, instructed the jury as follows: "The uncontested facts are, that the defendant Trivett gave legal notice of the time and place of the hearing, and appeared at the said time and place, before Coleman S. Adams, Esquire, a magistrate authorized to act, and that the creditor's attorney was present, but the facts which took place, are in dispute, and must be ascertained by the jury. If the jury find that the debtor, delivered himself up for examination, at the time and place, and was not examined, on account of the neglect or refusal of the magistrate to proceed with the examination, then the debtor has committed no breach of the recognizance, and is entitled to a verdict. But if the jury find that the debtor did not deliver himself up for examination, then and there giving the magistrate to understand unequivocally that he was ready to be examined under oath, it is competent for the jury to find a breach of the recognizance, and a verdict for the plaintiff. If the creditor by his attorney requested the magistrate to proceed with the hearing, and offered a heading and interrogatory; and the debtor by his attorney objected that the execution was not present, and insisted upon his objection continually, without offering to submit to an examination during the hour, the jury are authorized to find that the debtor did not deliver himself up for examination, in the meaning of the recognizance. If the magistrate, after objection by the debtor by his attorney to proceeding, did not refuse to proceed in the examination, and merely said that he would pass no peremptory order upon the parties to proceed; and the debtor, by his attorney, did not offer in any way to be examined, the jury are authorized to find that the debtor did not deliver himself up for examination in the meaning of the recognizance."

The jury found for the plaintiff; and the defendants alleged exceptions.

L. H. Wakefield, for the defendants. The debtor had delivered himself up when the magistrate had acquired jurisdiction

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over him, and it was the duty of the magi
ined him. The magistrate then was, unde
ceed to examine the debtor, and, as a cou
determine all questions of law and fact, ra
debtor may raise a preliminary objection,
right to examine him, and may decline to
ground, for he has a right to have that q
his declining to be sworn after raising the
fusal to deliver himself up for examinati
Blatchf. C. C. 499.

The magistrate should declare his opinio
is made and should order the party to answ
so decides. *In re Reakirt*, 7 Bank. Reg. 82
of a bankrupt under the United States Bank
amination of a poor debtor under our law a
and purpose. U. S. Rev. Sts. § 5086. M
§§ 15–17, 21. Upon the evidence in this
in not instructing the jury as to what would
for examination." The learned judge only
and the instructions did not cover the poi
fendants in their several prayers for instructi
defendants contended that the defendant T
self up for examination when the magistra
tion. Upon this point there were no instru

T. H. Sweetser, (*G. C. Travis* with him,)

DEVENS, J. By the conditions of his rec
was bound to deliver himself up for examina
therein specified. According to the facts as
tions of the court, they must have been fo
has not done this, unless his appearance be
without offering to submit to an examin
thereto constitutes such a delivery. An a
magistrate for the purpose of objecting to an
however, a delivery of himself up for an
is it an answer that the magistrate made n
that the debtor should be sworn, submit to t
reply to the interrogatories. There was n
refusal by the magistrate to go on, in whic
been contended that the proceeding had fai

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fault. But when it was for the debtor to submit himself to examination, if he would perform the condition of his recognizance, there was no duty incumbent on the magistrate to order him so to do. He was not examined, simply because he declined to be examined.

The fact that the execution was not before the magistrate at the time the interrogatories were proposed was unimportant. In case the creditor desired to arrest the debtor, if the oath should be refused him, it was only necessary that he should have the execution there in time for the magistrate to indorse his certificate of refusal thereon. Gen. Sts. *c.* 124, § 26. *Fuller* v. *Meehan*, 118 Mass. 135.

The cases cited by the defendants, which hold that under the United States Bankrupt Act, (U. S. St. of 1867, *c.* 176,) a bankrupt, by declining to submit to an examination, previously to a decision upon the question whether he is legally bound so to do, is not in contempt, do not affect the present question. The examination which the debtor was to undergo was a voluntary one, after a notice issued at his own request and served upon the plaintiff. He could not interpose objections and yet claim that he had submitted to it. *Exceptions overruled.*

ELISHA P. UPTON, assignee, *vs.* NATIONAL BANK OF SOUTH READING.

Middlesex. Jan. 19. — March 4, 1876. COLT & ENDICOTT, JJ., absent.

Under the U. S. St. of 1864, *c.* 106, § 28, authorizing a banking corporation established under the statute to purchase, hold and convey such real estate "as it shall purchase at sales under judgments, decrees or mortgages held by such association, or shall purchase to secure debts due to said association," such corporation has authority to purchase such real estate as may be necessary in order to secure a debt due to it, although in excess thereof, if the security of the debt is the real object of the purchase.

Upon a bill in equity by an assignee in bankruptcy to redeem a mortgage upon the land of the bankrupt from the assignee thereof, oral evidence is admissible in behalf of the defendant that the bankrupt applied to him for a loan of a certain sum to enable him, together with his own funds, to take up the mortgage, that the defendant lent him the sum requested upon his verbal promise to assign the mortgage to him to secure the sum lent and certain notes then due to the defendant by the bankrupt.

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BILL IN EQUITY by the assignee in bankruptcy of I
Emerson, to redeem certain lands from a mortgage
Emerson to John Sawyer, to secure the payment of $4
assigned by several conveyances to the defendant.

The bill alleged that the debt for which the mort
given had been all paid, except the sum of $800 and
from August, 1873, and that before this suit was b
plaintiff was ready and offered to pay that sum to the

The defendant's answer admitted these allegations, a
that prior to February 21, 1871, the bank had three not
Emerson amounting to $911.21, and that by a parol a
which was set forth in the answer, between Emerso
bank, the latter agreed to lend $3000 on the mortga
take an assignment of the same to secure said $300
said three notes. A general replication was filed, ar
for the jury was framed and tried before *Wells*, J.
found that such an agreement was made.

The plaintiff objected to the proof of such an ag
oral evidence; and asked the judge to rule as follows

"1. That it was not competent for the defenda
and prove such an oral agreement for the purpose fo
evidence was offered under the answer.

"2. That the purchase of the mortgage by the de
the loan made thereon were contrary to the U. S.
c. 106, § 28, and the bank could not legally hold the
purposes set forth in the answer." The judge o
objections.

It appeared that on February 21, 1871, the mort
by Abbott & Thomas, and that the full amount of
note, $4500, was then due and unpaid. Emerson
negotiation with an officer of the defendant bank
an officer of the South Reading Agricultural & Me
ation, for an advance of $3000 to enable him, wi
which he expected to procure, to take up his
Abbott & Thomas. Some objection was suggest
under the act of Congress, against making the
rectly with the bank; and it was then propose
that the transaction should be had with the associ
Emerson thereupon procured an assignment of t

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the association to be made and executed by Abbott & Thomas, and procured Abbott to go with him to the counting-room of the bank and association. The officers of the association declined to take the assignment and to make the advance of $3000; whereupon Emerson arranged with the defendant to make the advance, and as a part of the arrangement and as inducement thereto made the oral agreement, above referred to, that the bank should hold said mortgage as security as well for the three notes amounting to $911.21 already held and due to said bank, as for the $3000 then to be advanced.

To carry this arrangement into effect, Thomas not being present, an assignment from the association to the bank was thereupon prepared and executed; the bank advanced $3000 to Emerson; he paid over the same sum, with $1500 more which he had procured elsewhere, to Abbott for Abbott & Thomas, adjusted the interest to that date, which last was indorsed upon the note, and the note, with no payments indorsed except of the interest, together with the mortgage thus assigned, were delivered to the defendant.

Upon the foregoing facts and the finding of the jury upon the issue submitted to them as above stated, the judge ruled and held that the defendant was entitled to hold the mortgage for security of the three notes aforesaid, as well as for the $3000 advanced; and ordered a decree to be entered for redemption upon payment of the amount now remaining due of said two sums, and costs for the defendant; and reported the case for the consideration of the full court. If the rulings were wrong, and the bank was entitled to hold only for what remains due of the $3000 so advanced, the decree was to be modified accordingly, with costs for the plaintiff, or such other disposition of the case was to be made as should to justice and equity appertain.

C. P. Judd, for the plaintiff.

C. W. Eaton & S. K. Hamilton, for the defendant.

DEVENS, J. While it is not lawful for banking associations, established under the U. S. St. of 1864, *c.* 106, to purchase, hold and convey real estate except in certain specified cases, among these exceptions are included such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted; such as shall be conveyed to it in satisfaction of

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debts previously contracted in the course
as it shall purchase at sales under judgm
gages held by such association, or shall pu
due to said association." Under the latte
deemed that the only authority given to
purchase only to the exact amount of the
owing to them, but they are entitled to pur
as may be necessary in order to secure the
long as the security of such debts is the re
chase.

Upon advancing $3000 for the purch
which had been assigned to the South Re
Mechanic Association, Emerson himself pa
of $4500 which the mortgage was origin
and consented that the bank should hold th
the sum of $3000 thus advanced, and also t
to about $911 then due from him to the ba
this was a loan of money upon real estate s
of real estate, is not maintained when it is
the inducement to this transaction was the
mortgage and the real estate upon which it
be held for the antecedent debt due to the b

The objection that such an oral agreemen
evidence cannot be maintained. While an
than that for which the mortgage was give
attached to such mortgage, yet it is comp
bill in equity to redeem a mortgage, for the
that it would be inequitable to allow the pl
payment of the amount apparently due ther
defendant had for valuable consideration o
should not thus be discharged, but should re
other debts. *Joslyn* v. *Wyman*, 5 Allen, 62.
Allen, 74. Had any question of title arisen
ant and a subsequent mortgagee, attaching
purchaser, or even if an action at law had
defendant to foreclose the mortgage, it must
that the defendant could enforce the mortgag
tion of the $3000 now actually due. But,
had been brought by Emerson, he could not

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to obtain a release or discharge of the mortgage from the defendant, to whom it has been assigned, except upon the performance of his oral agreement with the defendant in relation to his antecedent debt. *Joslyn* v. *Wyman*, *ubi supra*. *Stone* v. *Lane*, *ubi supra*.

By the assignment in bankruptcy, the assignee has succeeded to all the rights of Emerson, but his rights here are not superior to those of Emerson. He has come into a court of equity to seek its aid in obtaining those rights, and is, therefore, to do what Emerson would have been compelled to do. In order to obtain a decree for the redemption of the mortgage, he must perform the oral agreement that the debt of $911 due the bank should be paid, as well as pay the balance of the $3000 which is now due. *Decree accordingly.*

HARRIET A. LEAVITT & husband *vs.* CITY OF CAMBRIDGE & another.

Middlesex. Jan. 11. — March 6, 1876. COLT & ENDICOTT, JJ., absent.

Under the St. of 1869, *c.* 391, § 5, which provides that "any person" whose land has been filled up for the abatement of the nuisance contemplated by the statute, if "dissatisfied with the assessment of the expense of raising the grade of his said land, may give notice thereof to said mayor and aldermen, within sixty days after he shall receive notice of said assessment, and the city of Cambridge shall thereupon take said land," one who owns as tenant in common an undivided part of such a piece of land may surrender to and require the city of Cambridge to take such interest.

PETITION for a writ of mandamus, dated April 20, 1875, to compel the city of Cambridge to take under the St. of 1869, *c.* 391, certain lands, in which the female petitioner had a certain undivided interest in fee, as tenant in common, to compel the city to file a description thereof in the registry of deeds, and also to compel the mayor of said city to sign said description.

The case was reserved by *Wells*, J., upon the petition, answer and the agreed facts, for the consideration of the full court, in order that the questions raised by the respondents' answer on the construction of the St. of 1869, *c.* 391, might be first determined. The material facts appear in the opinion.

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J. W. Hummond, for the respondents.

C. T. Russell, for the petitioners, was not called u

MORTON, J. The statute under which this case
first three sections, provides that the mayor and alde
city of Cambridge may order the owner of the la
certain described district, to fill up the same, and, i
of any such land fail to comply with such order, th
aldermen may fill it up and collect the necessary ex
of such owner. St. 1869, *c.* 391.

The fourth section provides that "any person e
estate in any part of the land the grade of whic
raised by the said mayor and aldermen, who shall
with the assessment of the expense of raising th
land may, within six months after receiving notice
ment, make a complaint to the county commis
county of Middlesex," who shall "thereupon ord
shall have power to revise said assessment in th
as is provided in chapter forty-three of the Gene
cases where persons are aggrieved by the assessm
by selectmen."

The fifth section provides that "instead of
plaint to the county commissioners, as provided
section, any person, dissatisfied with the assess
pense of raising the grade of his said land,
thereof to said mayor and aldermen within si
shall receive notice of said assessment, and the
shall thereupon take said land," the title to w
the city upon its filing a certificate in the regi
also provides that any party whose land is so
cannot agree with the city as to the damage do
taking, apply to the county commissioners fo
mine the damage so done him.

The only question in this case is whether
tenant in common, an undivided part of a
up by the mayor and aldermen, can require
bridge to take his interest under the fifth sec

The fourth section is certainly broad eno
to include a tenant in common among those
remedy. It embraces all persons who have

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part of the land." It is difficult to see why this language was used unless it was intended to include persons who have an estate in the land as tenants in common.

The fifth section provides an alternative remedy, and was clearly intended to apply to the same persons to whom the other remedy is given. It gives to "any person dissatisfied with the assessment," the right to require the city to take his land, "instead of making a complaint to the county commissioners," as provided in the fourth section.

The language of the two sections naturally applies to and includes a tenant in common, and it must be presumed that this construction was intended by the Legislature, unless we find in other parts of the statute, or in its general scope, clear evidence of a different intention.

But the other parts of the statute do not seem to be inconsistent with this construction. The fact that the statute, in other parts, speaks of the "land," instead of the estate or interest of the owner, is not entitled to great weight in determining its true construction. In the construction of statutes the word "land" includes "lands, tenements, hereditaments, and all rights thereto, and interests therein," unless such interpretation "would be inconsistent with the manifest intent of the Legislature, or repugnant to the context of the same statute." Gen. Sts. *c.* 3, § 7.

But the respondents contend that this construction would lead to embarrassments and difficulties in carrying out other parts of the statute. It is undoubtedly true that, under any construction of the statute, there would be embarrassments and difficulties in its administration, where a part of the land filled is owned by several in undivided parts. But they would not be greater under this, than under the construction claimed by the respondents. To take a case which illustrates in the strongest light the difficulties of our construction, suppose a parcel of the land filled by the city to be owned by three tenants in common, in equal shares, one of whom applies for a jury to revise the assessment of damages under the fourth section, another surrenders his land to the city under the fifth section, and the third does nothing, but leaves the city to enforce its lien for the expenses of filling by a sale under the third section. If we construe the word land to mean the estate or interest in land which

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the person has with whom the city is dealing, there
tical difficulty in carrying out the statute. The ass
the expenses is made as a whole, but it is capable o
ment according to the interest of the part owners.
difficult to apportion the expenses of filling betwe
common than between adjoining owners. In the c
the city would collect of one tenant in common one
expense of filling the whole estate, would hold by
undivided third of the estate, and would collect one
expenses by a sale of the undivided third part of t
tenant in common.

The construction which leads to this result c
general purpose of the statute, which was that
land taken should have the right to elect, whether
the expenses of filling his land and retain his esta
his estate to the public for a fair compensation,
the rights of the city as well as of the owner.

It renders consistent all the parts of the sta
opposite construction would require us to disrega
which gives the right of surrender to "any p
any estate in any part of the land" taken.

We are of opinion that the Legislature, by t
tended to give any person who owned an undi
tenant in common in land filled by the city, th
der his estate to the city, and therefore that
to take the interest or estate of the petition
common in the land described in her petition.

Alternative ma

MARSHALL PARKS *vs.* INHABITANTS C

Middlesex. Jan. 12. — March 6, 1876. COLT & I

Fire ordinances, adopted by a town in 1844, provided that
ally to each member of the department such compensat
time to time determine." One article in the warrant fo
in May, 1874, was as follows: "To hear and act on t
to consider the matter of the pay of the fire departme
town voted that the board of engineers and clerk be p

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the previous year, which amounts are as follows: "Chief engineer, $100; clerk $75; assistants, each $50." In an action against the town by the chief engineer to recover for his services during the year ending April 30, 1874, it was admitted that the above vote had reference to the year for which the action was brought. *Held*, that the vote constituted a contract between the plaintiff and the town, and that the plaintiff could recover $100, and no more, for his services.

CONTRACT to recover $400 for services rendered the defendant town as chief engineer of the fire department, for the year ending April 30, 1874. Trial in the Superior Court, before *Brigham*, C. J., who ruled that the plaintiff could not maintain his action, and allowed a bill of exceptions, the substance of which appears in the opinion.

T. B. Eaton, for the plaintiff.

B. B. Johnson, for the defendant.

MORTON, J. This suit is brought by the plaintiff to recover compensation for his services as chief engineer of the fire department of the town of Waltham for the year ending April 30, 1874. It is admitted that he was duly appointed chief engineer, and performed services in that capacity during the said year, and the question is whether the evidence shows any contract by the town to pay for such services which the plaintiff can enforce.

It appeared at the trial that the defendant's fire department was organized in 1844, and that since then the defendant has paid the engineers for their services out of money annually appropriated for that purpose. The sixteenth section of the "fire ordinances" adopted by the town in 1844 provides that "there shall be paid annually to each member of the department such sums as the town may from time to time determine." One of the articles in the warrant for the town meeting called for May 24, 1874, was as follows: "To hear and act on the report of the committee to consider the matter of the pay of the fire department." Under this article the town "voted that the board of engineers and clerk be paid for 1873 the same as for the previous year, which amounts are as follows: "Chief engineer, $100; clerk, $75; assistants, each $50." It is conceded that this vote had reference to the year for which this suit is brought.

We are of opinion that this vote constituted a contract with the plaintiff by which the town is bound. He rendered services

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ander the fire ordinances, which must be presumed to
in the minds of both parties. It was understood by
these services were not gratuitous, but that the plain
be paid therefor such reasonable sum as the town sh
mine. On the one hand, the plaintiff cannot recov
than such sum as the town, acting in good faith, de
be a reasonable compensation. On the other han
having by its vote determined what is a reasonabl
tion, is bound by it; and, if it refuses to pay the sun
the plaintiff may maintain an action for it. Such
promise by the town to the plaintiff which is foun
consideration of services rendered by him for the
the request of the town. *Nelson* v. *Milford*, 7 Pi
croft v. *Lynnfield*, 18 Pick. 566.

It follows therefore that, upon the facts stated
exceptions, the plaintiff is entitled to recover one
lars, and that the ruling of the learned judge w
the trial, directing a verdict for the defendant, wa

Exceptio

ELIJAH F. TAINTER *vs.* ELIZABETH COLE.

Middlesex. Jan. 18, 19. — March 6, 1876. COLT &
absent.

A lease of land by some of several tenants in common owning
as to the others who do not join therein.

Upon a bill in equity to restrain the owners from taking down
fire, a part of which was leased to the plaintiff, and for gen
that the building was owned by five tenants in common, for
in a lease for life to A., who was the plaintiff's lessor. It c
plaintiff was not aware of the above facts when he brought
bill must be dismissed, and that it would not be retained fo
ing the plaintiff's damages against A.

BILL IN EQUITY, filed February 12, 1874,
Cole, and the heirs of Andrew Cole, to restrain
down a building owned by the said heirs, v
jured by fire, and a portion of which had be
beth Cole to the plaintiff.

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The bill set forth the leases, alterations and improvements of the plaintiff; alleged that the building had been partially destroyed, and that Elizabeth Cole the tenant for life of the estate and some of the other defendants, owners of the reversion, pretended and claimed that by the partial destruction of the building the leases of the plaintiff and his estates thereunder had been determined; that all of the defendants were engaged in tearing down the building to remove the plaintiff's property therefrom and intended to dispossess the plaintiff, and prayed for an injunction to restrain the defendants from so doing and for general relief.

The answer admitted the leases, averred that the building had been substantially destroyed by fire, that the plaintiff's leases and estates had been thereby determined, and alleged that the defendants had a right to enter, tear down the remains of said building and dispossess the plaintiff.

A supplemental bill was filed October 5, 1875, setting forth the tearing down of the building and the erection of a new building on the land, and prayed that portions of the new building might be assigned and set out to the plaintiff, for damages and other relief. The answer admitted the entry upon and taking possession of the premises described and the removal of the ruins and debris of the building, and set forth that the defendants had erected, upon the site of the old one and the yard or passageway, a new brick block, and that in so doing they had removed a structure over said yard or passage erected by the plaintiff without right; and alleging that, whereas the old building was a wooden structure of long standing, of two stories in height, valued at $8000, the new building cost $40,000, was of brick, three stories high above the cellars, and much higher in the walls and in the height of the rooms on each floor than the old building; that it covered much more ground and was very differently divided into separate tenements; and set forth a description of the new building and alleged that a considerable portion of it was leased to tenants, and denied that the plaintiff was entitled to any relief.

Hearing before *Wells*, J., who reported the case for the consideration of the full court. The material facts of the case appear in the opinion.

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C. Robinson, Jr., for the plaintiff.

R. D. Smith & W. W. Carruth, for the defendants.

MORTON, J. The plaintiff holds two leases execute beth Cole, by which she demised to him certain building owned by the heirs of Andrew Cole, decea term of ten years from April 1, 1872.

There are five heirs of Andrew Cole. Before the plaintiff four of the said heirs had executed a lease ing and land to Elizabeth Cole for her life. Her in she undertook to lease the plaintiff's rooms to him, tenant for life, in four undivided fifth parts of the land. Carrie E. Cole, one of the defendants, was these several leases were made, and did not exe them. The plaintiff therefore, at the time his bill stood in the position of a tenant who held a lea only of several tenants in common who owned the the other did not join.

Such a lease is not void as to those who exec voidable by the tenants in common, who have It is of the essence of a tenancy in common t have each and equally the right to occupy the pr by one tenant in common of a portion of the est in which the others do not join, violates the rig and as to them is invalid. *De Witt* v. *Harv Cunningham* v. *Pattee*, 99 Mass. 248.

It follows that the plaintiff's bill cannot be prayer is that the defendants shall be enjoin the ruins of the building, and from dispose rooms leased to him. Without considering v such a destruction of the rooms leased as to te as between him and Elizabeth Cole, his lessc the relief he seeks cannot be granted without of Carrie E. Cole, who is not in any way affe

And we are of opinion that the bill ough tained for the purpose of assessing any dan plaintiff may be entitled against Elizabeth been any breach of the covenants of his le adequate and complete remedy by an action

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In cases where a bill in equity is brought in good faith, and the specific relief sought is defeated by a disability of the defendant to comply with a decree for specific relief, caused after the suit or after the date of the agreement relied on, it is the rule in this country that the court will retain the bill and afford relief by way of compelling compensation to be made, provided the plaintiff brought his bill without knowledge of the disability, in good faith seeking equitable relief, supposing and having reason to suppose himself entitled to such equitable relief. And in *Milkman* v. *Ordway*, 106 Mass. 232, this court decided that the rule, with the same qualifications, extended to all cases where a defect of title, right or capacity in the defendant to fulfil his contract is developed by his answer, or in the course of the hearing.

But the case at bar does not fall within either of these rules. The specific relief which the plaintiff seeks is not defeated by reason of any disability of the defendants, or of either of them, caused since the suit or since the leases to him. He was never in a position in which he could be entitled to such relief. He is defeated by an original defect in his lease, arising from the want of capacity of his lessor to make a lease binding upon all the tenants in common who own the land. And it does not appear that he was not aware of all the facts when he brought his bill. If he was not, they could have been ascertained by reasonable diligence. He does not show that he brought his bill supposing, and having reasonable grounds to suppose, that he was entitled to the equitable relief he sought.

We are of opinion therefore, without considering the other questions in the case, that the plaintiff cannot maintain either his original or supplemental bill. *Bill dismissed.*

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JOHN WILEY *vs.* HENRY D. HOYT.

Jan. 28. — March 6, 1876. COLT & ENDICOTT,

' a single justice of this court sitting in equity, upon a c
on a master's report, in which no error in matter of law
e is unreported, cannot be revised by this court upon the f
natters of fact.

EQUITY, filed May 22, 1874, to settle a
tween the plaintiff and defendant. The
arties formed a copartnership February 1,
ntract and dissolved it by mutual consent F
set forth the articles of copartnership,
following agreement: "And said Wile
Hoyt on or before the first day of May n
undred dollars, which sum the said Ho
n paid towards the reduction of a certa
hundred dollars, this day given by s
, conveying said Wiley's interest in s
ege and machinery, and said Hoyt furth
of three hundred dollars, together wit
rs more to be furnished by said Hoyt, sh
payment, be invested in new machinery
n said saw-mill, and to be owned by s
id parties shall devote and give all his t
business, and to the care and superint

er, appointed by the court to settle this
n which no evidence was reported, but
y reason of sickness was unable to gi
to the business for a considerable tim
of $100 to the defendant therefor; th
of the concern in cash $232, and allowe
out, to make equal with Wiley," a lik
f $300 mentioned in the article of cop
both indorsed and credited to the plai
ged the defendant with that amount.
port of the master was accepted by th
filed the following objections thereto

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1. An allowance is made by the master of $100 to the defendant Hoyt, for the services of one man during the sickness of the plaintiff Wiley, and charges him one hundred dollars to firm's general indebtedness.

2. The master finds that the sum of $232 was drawn out from the capital stock of said firm by Wiley; and the master charges the sum of money to the individual account of Wiley, and also in the general account of indebtedness of the firm.

3. The master finds by the articles of copartnership, that the sum of $300 paid by Wiley to Hoyt should be indorsed on a certain mortgage note given by said Wiley to said Hoyt for $1500, and also credited the same sum of $300 to said Wiley.

4. The master allows the sum of $300 paid by Wiley to Hoyt to be indorsed on a mortgage note given by Wiley to Hoyt for $1500; also credits the said sum to Wiley as capital paid into the firm, and charges the same to Hoyt in his individual account with the firm.

The case was recommitted to the master to inquire whether the $300 paid by the plaintiff was expended in the purchase of new machinery, and he, in a supplemental report, found that it was, together with a like sum paid in by the defendant, so expended.

At the hearing before *Wells*, J., on the master's report, the objections thereto and the supplemental report, a decree was entered for the plaintiff, for the amount found due with interest, upon the master's report; and the defendant appealed.

C. W. Eaton & S. K. Hamilton, for the plaintiff.

E. A. Upton, for the defendant.

MORTON, J. The defendant's exceptions to the master's report do not show that the master committed any error in matter of law, and as the evidence before him is not reported, we cannot revise his findings upon matters of fact.

1. The partnership continued about a year, and during a part of that time the plaintiff was sick. One of the questions before the master was what it was equitable that the plaintiff should allow to the defendant on account of the loss of his services by reason of this sickness. The master made up his account between the parties upon the basis that, as a fair equivalent for his services, one hundred dollars should be allowed to the firm.

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The defendant contends that instead of allowing th to the firm, it should be allowed wholly to him. Bu purely a question of fact for the master to determine evidence, and we cannot revise his finding upon it.

2. No error is shown in regard to the item of $232 in the second exception. The master finds that Wile $232 "from the concern." In his statement of the allows Hoyt to retain from the partnership proper amount to make him "equal with Wiley." The s the exception that the master "charges this sum the individual account of said Wiley, and also in account of the indebtedness of the firm," is not supp facts. In the account, as stated by the master, H from the assets of the firm the same amount receiv

3. The only other exception argued is that to the master that the sum of three hundred dollars, p credited to Wiley as his share of the capital stoc be indorsed on the mortgage.

The articles of copartnership provide that Ho this sum of $300, when paid, towards the reductic gage, and that "said sum of three hundred d with three hundred dollars more to be furnishe shall forthwith after such payment be invested ery to be placed and used in said saw-mill, and said firm."

The mortgage was to be security for the thr lars until it was paid, but the contract of th provides that when paid it was to be the contr to the capital of the firm, and not a payment to benefit. The master rightly held that, as agre it was to be credited to Wiley as his contribut and indorsed on the mortgage.

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JOHN N. ROBERTS *vs.* GEORGE TAFT.

Middlesex. Jan. 11. — March 7, 1876. COLT & ENDICOTT, JJ., absent.

Notice of the dishonor of a promissory note was seasonably sent by mail, addressed to the indorser at Townsend, where was the principal post-office in the town in which he lived. There was evidence that the indorser usually received his letters at the West Townsend post-office, and that the plaintiff knew that he lived and that there was a post-office at West Townsend, and had visited and done business with the indorser there. *Held*, that the judge, sitting without a jury, was warranted in ruling that the notice was insufficient.

CONTRACT on two promissory notes, payable at any bank in Boston, made by N. H. White & Co., payable to George Taft or order, and indorsed by him to the plaintiff. At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the following facts were found:

The promissory notes declared on were made by N. H. White & Co. and indorsed by the defendant, as alleged in the declaration; and the plaintiff was the holder of the same, from the time when they were made and indorsed until they became payable, and neither of them was paid at maturity. On the several days when the said promissory notes became due, at two o'clock P. M., William W. Cole, notary public of Boston, presented them, — the note payable two months from date at the North National Bank, and the note payable three months from date at the Webster National Bank, — and demanded their payment, and the same was refused, the answer to the demand being "No funds," and thereupon Cole mailed to the defendant notices of the demand, non-payment and protest of said promissory notes (which notices, it was agreed, were sufficient in form) addressed to the defendant at Townsend, Massachusetts. There was no evidence at the trial that these notices were received by the defendant within three days of the time when they were mailed to him by Cole, or that he otherwise, within that time, had notice of such demand, non-payment and protest.

The defendant, when said notes were made, indorsed and became due, and for several years previously, was a resident of West Townsend, a village of the town of Townsend, which is a town of 2500 inhabitants, about one and a half miles distant from Townsend Centre, where the principal post-office of the

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town was. There was a post-office also
Townsend and at the village of Townsend
ant usually received his letters and othe
Townsend post-office. In West Townse
only place of business, and he was not i
Townsend Centre post-office for letters.
the defendant's residence was in West To
and transacted business with him there;
was a post-office there. Cole, the notary,
the defendant's post-office address or resid
a memorandum upon the back of each
"Townsend," under the name of the de
his residence and post-office address wer
word "Townsend" was written upon on
the plaintiff, upon information given him
notes, and there was no evidence that the
note was written by the defendant, or by

Upon the foregoing facts, the judge rul
had no notice, sufficient in law, of the non
at maturity, and ordered judgment for
plaintiff alleged exceptions.

J. T. Joslin, for the plaintiff.

F. A. Worcester, for the defendant.

GRAY, C. J. The holder of a promis
use reasonable diligence to give the indors
its dishonor. It is *primâ facie* sufficient
by mail at the town in which he resides,
eral post-offices in the town, and he rece
nearer his residence and place of busine
post-office, unless the holder knows, or wit
might have known, this fact. But in the
pears that the defendant usually received
Townsend post-office, and that the plaint
fendant resided in West Townsend, and
business with him there, and also knew
office in West Townsend, there was evid
rant, if not to require, a court or jury to
might, by the exercise of reasonable dilig
that the defendant was in the habit of r

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the post-office in West Townsend; and we cannot say that the judge erred in holding that a notice addressed to the principal post-office in Townsend, a mile and a half off, was insufficient. *Morton* v. *Westcott*, 8 Cush. 425. *Cabot Bank* v. *Russell*, 4 Gray, 167. *Exceptions overruled.*

AUSTIN BLACK *vs.* ABRAM BACHELDER & another.

Middlesex. Jan. 11. — March 13, 1876. COLT & ENDICOTT, JJ., absent.

The terms of a written contract containing no latent ambiguity cannot be varied by parol evidence of the meaning thereof, though put in by both parties without objection.

A written order for the performance of a service at a price named becomes, on its fulfilment, an acknowledgment of the existence of a debt to that amount.

The expression "payable as convenient" cannot, in a written contract providing for the payment of a certain sum, be construed to mean not payable at all, but only as an extension of credit.

CONTRACT against Abram Bachelder and Joseph C. Bachelder to recover $300 for work done by the plaintiff in advertising their business. At the trial in the Superior Court, before *Brigham*, C. J., without a jury, the following facts were found:

The plaintiff, in January, 1873, was the proprietor and publisher of a monthly magazine published in the city of New York, and one Nelson was his authorized agent to make contracts for advertisements in the magazine, and as such agent on January 24, 1873, made the following contract in writing, signed "A. Bachelder & Co.," with the defendant Joseph C. Bachelder, acting on behalf of both the defendants, for an advertisement of "bay windows" manufactured by the defendants:

"Insert an advertisement in Manufacturer & Publisher for one year, commencing Feb. No. 1873, to occupy 40 lines spaces. Payable as convenient, $300. This is to include illustration of cuts and sufficient editorial matter to describe satisfactorily, all to be submitted before inserted."

This contract was complied with by the plaintiff, as to time of advertisement, space of advertisement, in the magazine, illustration of cuts, editorial matter, &c., to the satisfaction of the defendants.

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The defendants, between January 24, June 19, 1874, were in a financial conditi conveniently to pay the $300 agreed upc advertisement, and never refused to pay tl that it was inconvenient to them to do so that, after repeated demands by the plai ants should pay this sum within a reas year's advertisement aforesaid, this action a reasonable time had elapsed after said ac lished for a year in the plaintiff's magazin

Both parties, without objection by eithe the trial as to the significance of the word ient" in the defendants' order for the pul tisement, and the plaintiff's acceptance of cation in conformity with it. The plaint matter tended to prove that "payable as meaning: that the plaintiff's usual terms o for yearly advertisements would not be i enable the defendants to remunerate thems bay windows, expected to be ordered by r tisement, for the cost of the advertisement paid by them at any time during the ye On the other hand, the defendants' evide and the preponderance of the whole evid was to that effect, that if it was made to a dows sold by them on orders, which could l uted to said advertisement, yielded profits sum should be paid as the price of said otherwise, the correspondence of the defen to the plaintiff's inspection for the purpose many of such orders were due to such advert found as a fact that the defendants recei number of orders and made no considerab dows, proved to be the direct result of said

Upon these facts the judge ruled that t could not be maintained, and ordered judgm ants. The plaintiff alleged exceptions.

F. T. Greenhalge, for the plaintiff.

W. H. Anderson, for the defendants.

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AMES, J. At the trial in the Superior Court, no question was raised as to the admissibility of the evidence, and each party was allowed to offer proof as to his understanding of the contract. But although this mode of trial must be considered as a waiver of all objection to the admissibility of the evidence, its legal effect, when so admitted, is still to be considered by the court. There is nothing in the report of the case to indicate that the parties intended to make the presiding judge a mere referee, or that he was to try the case, upon the evidence, otherwise than in accordance with established rules of law. Of these rules, none is more familiar and well settled than that which decides that the terms of a written contract, not presenting a case of latent ambiguity, are not to be varied by extrinsic and parol evidence. Whatever difficulty there may be in the interpretation of this contract arises from the obscurity of the terms in which it is expressed.

The service requested by the defendants has been performed, and the price agreed upon, as the compensation for that service, was three hundred dollars, yet remaining unpaid. The expression "payable as convenient" cannot reasonably be understood as intended to excuse the defendants, in any event, from making any payment at all. The written order, when it is fulfilled, has the effect of an acknowledgment of a debt; and the phrase "payable as convenient" can only mean that some indulgence as to the length of credit was to be allowed to the debtors. It was still "payable," and the case finds that the defendants at the close of the year were in a financial condition which enabled them to pay the debt without inconvenience. Indeed, the defence was on the ground, not of inconvenience, but of a construction of the contract in direct contradiction of its terms. And the defendants seek to import into it a condition or contingency of which the writing furnishes no intimation whatever.

Exceptions sustained.

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DAVID L. MARKS *vs.* CHARLES H.

Norfolk. Jan. 28. — March 3, 1876. COLT

A mortgage made by a tenant in common of an un
parcel of land is invalid as against his co-tenants.
Where a mortgage by a tenant in common of his undi
because his co-tenants do not join therein, the mortg
cree of a probate court affirming the report of com
partition, by which they set off, without regard to
gaged to the co-tenants, other than the mortgagor,
money to the mortgagor to make the partition just
that the sums so awarded be paid or secured to him.

APPEAL by David L. Marks from the
Court accepting the report of the comm
make partition of the real estate of Mos
and confirming and establishing the partit

At the hearing, before *Morton*, J., it a
Sewall died in March, 1872, seised of the
parcels of real estate: A lot of vacant
Boston, containing 4875 square feet, value
of land with buildings thereon on Monun
town, containing 3177 square feet, valued

Sewall left as his heirs four daughters,
of T. C. Wales, Annie L. Sewall, Linnie F
Sewall, and two sons, Charles H. Sewall a
Charlestown became a part of Boston, by
uary 1, 1874.

Charles H. Sewall, on February 1, 1873,
L. Marks an undivided sixth part of the e
Boston, the same being described by met
curity for the payment of his note for $1
years from date, with interest quarterly, at
cent. per annum, and on the same date M
strument recorded with the mortgage, wh
mortgage and declared that the note and m
him in trust that Charles H. Sewall shou
support and maintenance of Ellen M. Sewal
and daughter of said Marks, and for the sup
of the infant daughter of Charles H. and E
ing their lives or the life of either of them,

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annum in quarterly payments, and to secure to Mrs. Sewall the care and custody of their child.

On April 22, 1874, the Probate Court appointed commissioners to make partition of all the real estate of Moses B. Sewall, which any party interested should require to have included in the partition among the heirs aforesaid, and they reported as follows: "Whereas the said lot of land, situated on High Street in the city of Boston, is of greater value than the share of either party, and cannot in our judgment be divided without damage to the owners, and whereas George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall are willing to have said lot of land set off to them together, and to pay to Charles H. Sewall such sum of money as may be awarded: we have set off and assigned to the said George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, the said lot of land situated on High Street, in said city of Boston, to be held by them in common, but separate from the share of Charles H. Sewall, and we have awarded that they shall pay to the said Charles H. Sewall the sum of $5833.33 to make the partition just and equal. And we have set off and assigned to the said Charles H. Sewall said lot of land, situated in that part of said city of Boston which was recently the city of Charlestown, Charles H. Sewall to receive from the said George P. Sewall, Mary F. Wales, Annie L. Sewall, Linnie P. Sewall and Lilla M. Sewall, the sum of $5833.33, to make the partition just and equal." Their report was accepted, November 11, 1874, and the partition confirmed and established. From this decree David L. Marks appealed, and assigned the following reasons.

"Because the decree did not set off to said Marks his interest in the High Street estate, or award payment in money therefor; and because the money awarded by the commissioners had not been paid to said Marks, he being entitled thereto, or secured to his satisfaction, or to the satisfaction of the Probate Court."

It appeared that the heirs to whom the High Street estate was set off were able to pay the value of Charles H. Sewall's interest therein, in case partition of that estate by itself should be made, the entire estate set off to them, and it should be awarded that the value of Charles H. Sewall's interest should be paid in money. Further it appeared that Charles H. Sewall had re-

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fused and still refused to agree to the substitu
security on the note given by him to Marks.

Upon these facts the judge affirmed the decr
Court, and upon request of Marks, reported the
sideration of the full court.

R. M. Morse, Jr., for the appellant.

E. L. Barney, for Charles H. Sewall.

J. R. Bullard, for the other appellees.

DEVENS, J. It is conceded, as a general
a tenant in common, as against his co-tenant
his interest in a specified parcel of the lands
Adam v. *Briggs Iron Co.* 7 Cush. 361, and
It is, however, argued that, as when the conv
by Charles H. Sewall, it purported to convey
High Street estate, which was all the land
county of Suffolk, and that as it was then
the judge of probate to have issued a sepa
caused a separate partition to have been made
in that county, (Gen. Sts. *c.* 136, § 50,) the con
be treated as valid against the co-tenants.
power of the Probate Court then, by one co
made partition of all the real estate lying
(Gen. Sts. *c.* 136, § 48,) and at the time whe
was actually issued, both parcels which were
by the annexation of territory of Charlestow
of the county of Suffolk. The mere fact that
rence of this latter contingency, the Probate
divided the lands of the deceased by separate
not entitle the appellant to claim that he wo
or that he now has, a right to have the High
rately divided.

If, as against the co-tenants, the mortgage n
Sewall is invalid, the court should not refuse
cree for partition. While the court may, fo
set aside the return of the commissioners and
(Gen. Sts. *c.* 136, § 74,) yet the reason for s
because there is some objection to the retur
because one might be made which would facili
ings before another tribunal by the appellant

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treating the mortgage as invalid, the partition is a fair and just one, it should be confirmed.

Nor, if the partition is thus confirmed, is the appellant entitled to have the sum of $5833.33 (which is the amount in money to be paid to Charles H. Sewall) first paid or secured to him. It is a part indeed of the proceeds of that portion of his inheritance which Sewall assumed to convey to the appellant; but if the mortgage be invalid as to them, the co-tenants have the right here to have the partition confirmed without regard to any relations which may exist between Sewall and the appellant. *Decree affirmed.*

JAMES W. ATWILL *vs.* CHARLES G. MACKINTOSH.

Norfolk. Jan. 26. — March 31, 1876. ENDICOTT & DEVENS, JJ., absent.

A written communication is libellous which tends to expose a person to reproach and disgrace.

In an action for libel it appeared that the defendant was employed by the father of the plaintiff's wife to accompany her home on a visit to her parents, and that the defendant was directed to make inquiries concerning the general standing of the plaintiff. On the return of the defendant, he reported the result of his inquiries to the father, and wrote the letter, alleged to contain the libel, and to the same effect, to the mother of the plaintiff's wife. *Held*, that the trust which the defendant had assumed, and the relation in which he stood to the parents of the plaintiff's wife, created an occasion which made the communication privileged, if fairly made. *Held, also*, that it was for the jury to decide, on the question of express malice, whether the defendant had made an honest report justified by the relations in which he was placed, or whether it was made with a purpose wrongfully to defame the plaintiff.

TORT for libel. The declaration was as follows: "And the plaintiff says that the defendant falsely and maliciously slandered the plaintiff by writing to one Annette Richards, of West Roxbury, in the county of Norfolk, a letter of which the following is a true copy: 'West Roxbury, Feb. 14, 1871. My friend Mrs. Richards: When I came to your home on last Christmas morning, bringing as I did your Carrie, sick and helpless as she was, I could not but help feeling thankful that you had her safely once more in your happy home, truly made happy

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by having your child returned to you, of unparalleled experience of depravity, know the terrible ordeal that your siste in accomplishing this object; words of the day's experience in the city of S spent there was not one of sleep; th stantly brooding over me that somethi errand was wrong; still I tried not to loc fear some one might construe my being to criticise; still when I got up in the mo day's work, before hearing a word of ce was impressed with the thought that we us, and that we were to bear away a poo away to her own native home, where she be among her own true friends once m hope will never come to us again, for we and saying that if we could only get yc whether dead or alive, it mattered but litt case we felt sure she would be safe — we worst.

"'It seemed best, for a few days, that know of this wretched case of depravity sible, until Carrie should be able to ha broken to her. As soon as I learned that told her, or some of them, and of course y same time, I took the first opportunity to c rie, so that we might share in common this seemed to come upon us all and to your h that made me feel very anxious as to the r when you seemed to feel so thankful that once more, and to hear you express the de should never leave you again. Since the able to see you, although I have called a number of times. I have kept pretty qu stories, that have been flying about wherev this shocking affair, and all sorts of questio as I try to evade, they generally wind up by as bad as they are reported to be? Of cour ing upon the ground, seeing and hearing wh

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tempting to contradict even the worst one that I have ever heard; so time has worn on until a few days ago, about the time your last sewing society was held, I heard that a near neighbor of mine was advising Carrie's returning to this bad man, (meaning the plaintiff,) as it seems to me, and further it comes out that a near neighbor of yours told this same woman that it was all settled that Carrie was going back.

"'Can you imagine my feelings when I heard of this? You may depend that it struck me as strangely as it would had I heard that black could be made white; that a thief, a liar, a drunkard, a libertine, a seducer, a man black with crime, a ravisher of homes, could be pure and virtuous. Yes, my friend, when I think of one poor young woman, carted through the streets of St. Louis, bereft of reason, homeless, houseless, forsaken, ruined, how can I, how can you ever think of the perpetrator of such a deed, (meaning the plaintiff,) without exclaiming "*fiend, brute,*" (meaning the plaintiff.) Can it be that these women are concocting some plan to snatch away again your only daughter, your only child, and thrust her again into the gulf of ruin, that she has now been so safely rescued from? (Meaning that said only daughter, who is the plaintiff's wife, would be ruined if she went back to live with her husband, the plaintiff, and that the plaintiff is a fiend, a brute, a thief, a liar, a drunkard, a libertine, a seducer, a man black with crime, and a ravisher of homes.) It cannot be. It must be, I feel, that you will never allow one of them to bring their influence to bear upon her for such a purpose. Your friend, Charles G. Mackintosh.

"'Mrs. R. I think it will be well not to let Carrie, or Mrs. Rollins, or Aunt Hannah, see or know about this letter, for I have only written it for you, so that when people are trying to induce Carrie to leave you and her true and long tried friends, you will, as her mother, be able to frustrate all their plans. I hope and trust that all things will come and do for you and yours, so that you may be able to feel that this dark cloud may be wholly lifted from you. Chas. G. M.'

"And the plaintiff says that the defendant, in writing the letter above set forth, intended to accuse and did accuse the plaintiff of the crime of larceny, and of being a thief, a liar, a drunk

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ard, a libertine, a seducer, a man black w
homes, a fiend and a brute, and also of b
ruin his wife if she should live with him,
rarily away from her husband, the plain
free consent."

The answer admitted that the defendar
letter, but averred that it was written ir
honest belief in its truth, and under such
was a privileged communication.

Trial in this court, before *Ames*, J., who
the consideration of the full court in substa

No attempt was made to prove express m
ceded that there was no evidence of expr
far as the same is to be inferred from the
peared that the plaintiff and his wife reside
souri; that his wife became sick, and was a
cians to visit her parents in West Roxbury; a
wrote to her father, requesting him to send
receipt of this letter, the father employe
go to St. Louis, to accompany her on the j
accordingly went there, arriving at St. Loui
morning, and left the next day in the after
bringing with him the plaintiff's wife, who
feeble condition of health. After her arrival
gradually recovered; and, after the restoration
family were divided upon the question of her
band; she and her mother wishing that she
her father being greatly opposed to her so doi

It also appeared that when the father recei
letter informing him of the sickness, he said
"There is something in that letter that I do n
that at this juncture he cannot accompany he
make inquiries at St. Louis about his standing,
nection in business with Studley, and also a
standing." The defendant undertook to execute
Upon his examination as a witness, he was p
the plaintiff's objection, to tell what inquiries he
information he received in relation to the plaintiff
acter for integrity and moral worth. He accordi

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to the information received from Studley, denying that the plaintiff was his partner, denouncing him as extravagant in his habits, dishonest, guilty of great immorality, cruelty and villany towards a young woman whom he had seduced, and of causing an operation for an abortion to be performed upon her. He also testified as to information received from the physician who attended upon Mrs. Atwill, who, among other things, gave him a copy of the St. Louis Times, containing a particular account of the transactions with the young woman, and referring to the plaintiff by name as the guilty party, which account the physician, a Dr. Franklin, declared to be true. The foregoing extract from the newspaper was admitted and allowed to be read, against the plaintiff's objection, and the witness was allowed, also under objection, to testify that he obtained information of the like general character from another person at St. Louis.

It also appeared that, on his arrival at West Roxbury, the defendant reported all he heard to Edward Richards, the father of the plaintiff's wife, and placed a copy of the newspaper in his hands. Richards testified that he told his wife what he had heard from the defendant, in part, and that she did not appear to believe all was true that he told her. There was evidence tending to show that she avoided the defendant, and took pains not to have any conversation with him on the subject. The defendant was requested by Richards to give her the information, and he testified that he made several unsuccessful attempts to do so orally, and for that reason he saw fit to write the letter which is complained of in this action. Since the letter was written, the daughter has returned to the plaintiff, her husband, with the concurrence of her mother, but against the will and contrary to the advice of her father.

It was admitted by the defendant that the disreputable acts charged upon the plaintiff by the parties in St. Louis were charged to have been committed before the plaintiff's marriage with his present wife, the plaintiff having been married in September, and the defendant's visit to St. Louis being in December, 1870.

The defendant, upon these facts, contended that, no express malice being charged, the communication was made in pursuance of a trust and duty to a party interested and having a right to

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be informed, and also a duty to act; and good faith and with a belief that it was tru that the language of the letter was not libe tion was maintainable thereon.

The judge directed a verdict for the def be set aside and the case to stand for tria the plaintiff could maintain the action; ot the verdict.

G. A. Somerby & F. F. Heard, for the p *J. R. Bullard*, for the defendant.

AMES, J. The letter, as appears from t the argument of the defendant, was writter inquiries at St. Louis in relation to the plai for the apparent purpose of dissuading his consenting to his wife's returning to live wi whether the communication so made was lil actionable in its character, supposing it to b justified by the occasion, the entire letter a under which it was written are to be take It might be libellous, even though no crimi tinctly charged against the plaintiff. We conveys and was intended to convey the id was a depraved and unprincipled man; t man," and that his character was so bad t gerous and ruinous to his wife to again atter Under the rule applicable to written slander lous for the reason that it tended to expose proach and disgrace. 1 Saund. 248, note to *ler* v. *Butler*, 6 Cush. 71.

There can be no doubt that the trust whic assumed, and the relation in which he stood plaintiff's wife, created an occasion which w the excuse of "privilege" to any communic them upon his return from his mission. " by any reasonable occasion or exigency, and communications are protected for the comm welfare of society, and the law has not res make them within any narrow limits." B *good* v. *Spyring*, 4 Tyrw. 582. This privil

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by the mere fact that the communication is made in terms that were intemperate or excessive from over excitement. *Brow* v. *Hathaway*, 13 Allen, 239. *Harrison* v. *Bush*, 5 E. & B. 344. *Joannes* v. *Bennett*, 5 Allen, 169, 170.

It may happen, however, that an occasion which would justify such a communication may be abused in such a manner as to deprive the party making it of the excuse of privilege. Upon this question, the plaintiff would have a right to go to the jury, for the reason that a decision by the court that the occasion was privileged proceeds upon the assumption that the communication was honestly made, in the belief that it was true, and with no motive of malice, — an assumption which the plaintiff has the right to show to be untrue, if he can. The jury may draw the inference of malice, not only from extrinsic facts, — as, for instance, from proof that the defendant knew the charges to be false, or had no reason to believe them to be true, — but also from the terms in which the communication is made. If those terms are in manifest excess of the occasion; *Fryer* v. *Kinnersley*, 15 C. B. (N. S.) 422; if they contain strictures on motives and conduct not warranted by the facts; *Cooke* v. *Wildes*, 5 E. & B. 328; or if they go beyond what is reasonable in imputing crime: all these circumstances would tend to show malice. It was therefore a mistake to withdraw the case from the jury. It should have been submitted to them to decide whether it was an honest report, made in good faith, justified by the information which the defendant had obtained, and with a reasonable purpose of protecting the rights and interests of the party in whose behalf he had acted; or whether, on the other hand, it was made with a purpose wrongfully to defame the plaintiff.

Verdict set aside.

COMMONWEALTH *vs.* JAMES CUSICK.

Norfolk. Nov. 27, 1875. — March 1, 1876. COLT & LORD, JJ., absent.

It is no defence to a complaint under the Gen. Sts. *c.* 50, § 24, requiring the conspicuous posting of a pedler's name, residence and the number of his license upon his parcels or vehicle, that he has no vehicle and that the parcels which he sells are carried on his person.

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The omission of a pedler to comply with the Gen. Sts. c
spicuous posting of a pedler's name, residence and th
his parcels or vehicle, renders him liable to the pen
same chapter.

COMPLAINT on the Gen. Sts. *c.* 50, §
charging the defendant with exposing for s
other merchandise without posting his na
ber of his license in a conspicuous manne
vehicle.

At the trial in the Superior Court, on ap
C. J., it appeared that the defendant was a h
had a special state license as such; that he
goods for sale without having his name, re
ber of his license posted upon his parcels
The defendant asked that he might be di
foregoing facts constituted no offence to wh
law affixed. But the judge ruled that the
offence for which the statute provided a pe

The defendant then offered to prove tha
and merchandise which he, as a hawker or
exposing for sale, were carried by him in th
with the exception of two pieces of dress go
open and uncovered upon his shoulder; and
rule that the statute did not require the res
dence and the number of his license to be
goods, wares or merchandise so carried.
that the statute required the defendant's na
number of his license to be posted upon
merchandise so carried. The jury returned
and the defendant alleged exceptions.

E. Davis, for the defendant.

W. C. Loring, (*C. R. Train*, Attorney Ge
the Commonwealth.

AMES, J. There can be no doubt that t
secured by the Gen. Sts. *c.* 50, § 24, was
hawker and pedler should display in some
all persons with whom he should deal, his
the number of his license. The statute do
define in what precise manner this manifes

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If he uses a vehicle, the name, residence and number may be posted upon the vehicle. But if, as in the case of this defendant, he uses no vehicle, he is not thereby exempt from the duty imposed by the statute. The same reasons for public manifestation exist in one case as the other, and by the terms of the statute he is expressly required to post the required particulars either upon his parcels or upon his vehicle. The fact that some of his parcels are small in bulk is not an excuse. The Legislature has seen fit to regulate the occupation by fixed law. The defendant's neglect in this particular was a violation of law.

It may be, as is contended by the defendant, that the provision of § 24, "and if he neglects or refuses so to do, shall be subject to the same penalty as if he had no license," has reference only to the neglect or refusal to exhibit his license when demanded by one of the municipal officers named just before, and not to the omission to post his name, residence and the number of his license upon his parcels or vehicle, as required by the earlier part of the same section. But if that be so, the defendant is clearly liable to the penalty imposed by § 27 upon any person who goes about, carrying for sale or exposing to sale any goods, wares or merchandise, "except as hereinbefore provided."

Exceptions overruled.

COMMONWEALTH *vs.* THOMAS W. PIPER.

Suffolk. March 16. — 20, 1876. COLT & AMES, JJ., absent.

On the trial of an indictment for murder, it is within the discretion of the court, in the absence of statutory regulations, or a general rule of court, to determine the order in which the right to challenge a juror shall be exercised by the Commonwealth or by the defendant, and no exception lies to the exercise of that discretion.

On the trial of an indictment for murder, a witness testified that he saw the prisoner jump out of a window of a church at about the time the murder was committed, and that soon after he pointed out this window to an officer. *Held*, that it was competent for the Commonwealth to show by the officer what window the witness pointed out to him, for the purpose of identifying more clearly the window referred to by the witness.

On the trial of an indictment for murder, it is within the discretion of the court to determine the order in which testimony shall be introduced, and no exception lies to the exercise of that discretion.

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On the trial of an indictment for murder, a witness for the government testified the defendant, soon after the murder, "took no interest apparently in wha going on; that is, he took no interest in it to ask questions or answer quest *Held*, that the witness described the acts and appearance of the defendant, served by him, and did not testify as to his own opinion or judgment, and t evidence was admissible.

On the trial of an indictment for murder, a witness for the government test certain acts and declarations of the defendant, which were objected to a nature of a confession obtained by inducements held out to him by the offi had him in charge. The officer denied any intention to extort a confess the defendant. The jury were instructed that, if they were satisfied the d made any declaration under the influence of a promise of favor, to reject testimony. *Held*, that the rights of the defendant were carefully gua that he had no ground of exception.

On the trial of an indictment for murder, medical experts, who were pres autopsy and examined the head of the murdered person, testified tha opinion the injuries to the head could not have been produced at the sam by one blow. *Held*, that the subject was within the range of their ex experts, and that the evidence was admissible.

On the trial of an indictment for murder, a witness testified that he had n experiments upon a dynamometer, an instrument for the measuring of blows and the weight of falling bodies, by striking it with a bat of the same form and weight as that with which, as the government c murder was committed. *Held*, that the court might properly in its ject such evidence, as tending to mislead the jury, unless the expe shown to have been made under conditions the same as those existi on trial.

INDICTMENT for the murder of Mabel H. Young, a the county of Suffolk, on May 23, 1875. Trial and before *Colt* and *Lord*, JJ., who allowed a bill of exc substance of which appears in the opinion.

E. Avery & E. P. Brown, for the defendant.

C. R. Train, Attorney General, & *W. C. Lori* Attorney General, for the Commonwealth.

MORTON, J. 1. The statutes conferring and right of challenge in capital cases contain no pr the order of time in which the right shall be ex government or by the defendant. Gen. Sts. *c.* 1862, *c.* 84; 1873, *c.* 317, § 1; 1875, *c.* 167. Th eral rule of court upon the subject, and all d the time when and the mode in which either p lenge, except so far as regulated by the statutes. ters affecting the proper conduct and order c within the discretion of the court. The defer

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had no right of exception to the ruling of the court permitting the government to challenge Charles E. Whiting, one of the persons called to serve as jurors, after the defendant had apparently declined to challenge him.

2. The government produced one Glover as a witness, who testified that, about the time the murder was committed, he saw the defendant jump out of the window of the tower of the church on Warren Avenue, and that on the next day, having heard of the murder, he went with officer Savage and pointed out to him the window. The government was permitted to show by officer Savage what window Glover pointed out to him, to which the defendant excepted.

If the government had proposed, as the defendant contends was the case here, to corroborate the testimony of Glover by showing that he had made the same statements as those testified to by him, at other times, it would have been incompetent. *Commonwealth* v. *Jenkins*, 10 Gray, 485. Of this character was the evidence excluded in the case of *Commonwealth* v. *James*, 99 Mass. 488, upon which the defendant relies. But such was not the purpose of the evidence objected to. Its purpose and effect was to identify the window referred to by Glover, and to show with more certainty that it was the window of the tower in which the murder was committed. The principle is the same as in the common case where a witness testifies that he took certain property from the possession of a defendant charged with larceny and delivered it to an officer. The officer is permitted to testify what property was delivered to him, not for the purpose of corroborating the witness, but to trace and identify the property. So in this case, Glover described the window referred to by him as the one which he pointed out to officer Savage. We are of opinion that it was competent for the officer to testify what window was pointed out to him for the purpose of identifying it.

We have considered this question in the same manner as if the testimony of Glover had been introduced before that of Savage. In fact it was introduced after, but the legal effect is the same. By the subsequent introduction of the testimony of Glover, the testimony of Savage was made applicable and competent, and the order in which testimony shall be introduced is within the discretion of the presiding judge, whose ruling is not subject to exception.

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3. The exceptions to the testimony of the witness Martin cannot be sustained. It is not necessary to consider whether the question first put to him was unobjectionable in form, because it was withdrawn or modified before the witness answered, and his reply was competent and admissible. He testified that the defendant "took no interest apparently in what was going on; that is, he took no interest in it to ask questions or answer questions." It is enough to say that his testimony merely described the acts and appearance of the defendant as observed by him, soon after the murder, and did not state his judgment or opinion.

4. The next exception is to the testimony of Mr. Pentecost as to his conversation with the defendant. The defendant contends that the statements made by him in this conversation should have been excluded, because they were induced by threats promises of Ham, the officer who had him in custody.

The rule of law is well settled, and was recognized at the tr that confessions of a defendant, induced by fear of personal jury or hope of personal benefit held out by any one in aut ity, are not admissible in evidence.

When a confession is offered in a criminal case, and t fendant objects that he was induced to make it by thre promises, it necessarily devolves upon the court to det the preliminary question whether such inducements are And the finding of the court upon this question canno vised upon a bill of exceptions, unless it involves some natter of law, or the whole evidence is reported with submitting its sufficiency to the appellate court. If siding judge is satisfied that there were such induce confession is to be rejected; if he is not satisfied, the admitted. But if there is any conflict of testimony doubt, the court will submit this question to the j structions that if they are satisfied that there were ments, they shall disregard and reject the confe *monwealth* v. *Cuffee*, 108 Mass. 285. *Commonwe* 111 Mass. 435. *Commonwealth* v. *Smith*, 119 M the case at bar, these principles were adopted were applicable, and the rights of the defendan guarded. When the testimony of Mr. Pentec fered, it appeared to the presiding justices to

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testimony of officer Ham, on his cross-examination, that he had held out promises to the defendant to induce him to confess, and they thereupon ruled that confessions induced by such promises were inadmissible.

The attorney for the government then stated that he did not offer a confession of the defendant, but proposed to show his conduct and declarations as showing a consciousness of guilt. The court rightly held that such evidence was admissible. The fact that promises or threats are held out will exclude a confession influenced thereby, but it will not preclude the government from showing independent acts and declarations of the defendant not in the nature of a confession, which tend to prove his guilt.

The witness then detailed the interview with the defendant. The statements of the defendant were not, in form, a confession, but were a denial of his guilt. But we do not deem it necessary to inquire critically whether any part of it can be regarded as in the nature of a confession. If it can be so regarded, the bill of exceptions shows that the defendant is not aggrieved. After Mr. Pentecost left the stand, officer Ham was recalled, and testified that he had not intended to state that he held out any inducements to the defendant, as appeared by the report of the testimony, but had misapprehended the question put to him. He was examined at length upon the subject, and the result was that upon all the evidence the court found as a fact that no inducements were held out to the defendant. This being so, the court could not properly withdraw from the jury the statements made to the witness, Mr. Pentecost, by the defendant, even if they were in whole or in part in the nature of confessions. But the presiding justices did, in accordance with the rule we have stated above, and with a careful regard to the rights of the defendant, instruct the jury that, if they were satisfied that officer Ham held out inducements and the defendant made any statements under their influence, they should reject such statements. This was sufficiently favorable to the defendant, and we are of opinion that he has no ground of exception to the rulings upon this subject.

5. The testimony of Doctors Cotting, Cheever and Foye was properly admitted. All of these witnesses were present at the

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autopsy of the murdered child and examined her head, and no question was made as to their competency as medical experts. The only part of the testimony objected to at the trial was that to the effect that in their opinion the injuries to the head could not have been produced at the same time and by one blow. This subject was within the range of the experience of medical experts accustomed to observe the effect of blows upon the human head, and was one upon which their judgment would aid the jury. No exception lies to the admission of the testimony.

6. The only other exception relied upon by the defendant is that taken to the exclusion of the testimony of the witness, Hall, offered by him. This witness testified that he was a manufacturer of an instrument known as the dynamometer, for the measuring of the force of blows and the weight of falling bodies, and that he had experimented with a bat of substantially the same form and weight as that with which, as the government contended, the murder was committed. The defendant asked him the question, "With both hands striking upon the dynamometer, what is the greatest registry in pounds that you could get?" which the court excluded. Experiments of this character would tend to confuse and mislead rather than to assist the jury, unless they were shown to have been made under conditions the same as those existing in the case on trial. *Hawks* v. *Charlemont*, 110 Mass. 110. It was not shown in this case that there was a similarity in the conditions of the two events, and the court might properly in its discretion reject the testimony.

Exceptions overruled.

COMMONWEALTH *vs.* ELI W. REYNOLDS.

Norfolk. Nov. 27, 1875. — April 3, 1876. COLT & LORD, JJ., absent

An officer, who has a warrant for the arrest of a person charged with a misdemeanor, and who has reasonable cause to believe that such person is in the dwelling-house of another, after notifying him that he has a warrant against a person in the house, and, upon demanding entrance, is refused, has a right to enter the outer door of the house by force, for the purpose of serving the warrant; and he cannot be

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treated as a trespasser, although he has failed to notify the owner of the house who the person sought to be arrested is, no inquiry having been made in relation thereto and in fact the person sought for is not there.

On the trial of an indictment, charging the defendant with an assault with intent to kill, the judge instructed the jury that, if they should find that the assault was committed by wanton or reckless acts, the ordinary and natural consequence of which would be the killing of the person assaulted, they would be justified in finding the defendant guilty of an assault with intent to kill. *Held*, that the instruction did not assume that such acts constituted the intent, but that they furnished evidence from which it might be inferred by the jury.

INDICTMENT charging the defendant in the first count with an assault with a gun on Henry B. Woodman, with intent to kill; and in the second count, with a simple assault and battery.

At the trial in the Superior Court, before *Brigham*, C. J., it appeared in evidence on the part of the government, that on the morning of April 21, 1875, Woodman, who was then a constable of the town of Medway, made a complaint before one Deans, a trial justice, against one McKenna for drunkenness, and that Woodman went directly from the office of the magistrate to the house of the defendant, stopping on the way to take one Drake with him, not visiting the residence of McKenna, or looking elsewhere than at the defendant's house for him. Woodman at the trial testified that, on the morning of said April 21, the wife of McKenna requested him, Woodman, to make a complaint on the charge of drunkenness against McKenna, and informed him that McKenna was then at the house of Reynolds, the defendant. This was the only evidence upon which Woodman appears to have acted in going to the defendant's to arrest McKenna; and the government put in evidence tending to prove that, before breaking open the door of the defendant's house, Woodman first rapped on the front door of the defendant's house, but received no response; that he then went around to the back door of the house and also rapped there, whereupon the defendant appeared at the window; that Woodman informed the defendant that he held a warrant to arrest a man in his house, but that he did not want him, the defendant, and he did not state to the defendant, nor did the defendant inquire of him, who that person was against whom he held the warrant; neither did he name the party he wanted to arrest. The government also introduced evi

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dence to the effect that the defendant stated three times to Woodman that he should leave the premises, or he, *the defendant*, would kill said Woodman; that thereupon Woodman proceeded forcibly to enter the back door of the defendant's house, when the defendant shot at and hit Woodman.

There was no evidence introduced by the government tending to show that McKenna was in the house at this time, and the only evidence on this point came from the defendant and his witnesses, and was to the effect that McKenna was not in there at the time and had not been there on that day. And from all the evidence it appeared that he was not arrested there, but was arrested elsewhere on that day.

The defendant denied that Woodman gave him any information as to his business there, and he and his witnesses testified that they did not hear Woodman inform the defendant that he held a warrant, or that he wanted to arrest any person, but they all testified that Reynolds ordered Woodman to leave his premises, and did not fire until after so ordering Woodman, and until Woodman had broken open the door and was proceeding forcibly to enter the premises; the defendant also testified that he sighted his gun and aimed at the door and shot thereat, and that he had no intention to shoot or kill the defendant, but his purpose was only to intimidate Woodman; and the evidence introduced by the defendant was also to the effect that he had stated to his brother in law, who was in the room with him, that he had no intention of hitting Woodman. He also testified that he was accustomed to the use of the gun, and that the scattering of the shot was attributable to the firing through the window, as it did not usually scatter much at short distances.

During the trial, and before the judge instructed the jury, the defendant requested him to give the following instructions:

"1. Under this indictment the defendant cannot be convicted, if he could not be convicted had the assault been committed on a person not an officer, or on a person who had no legal right to forcibly enter the door.

"2. The officer could not forcibly enter the outer door of the defendant at all, for the purpose of arresting a stranger on a charge of drunkenness.

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"8. If the officer could, under any circumstances, forcibly enter the outer door of the defendant to arrest a stranger on a charge of drunkenness, he could only do so if the stranger was actually in the house at the time.

"4. The officer was not justified in breaking the outer door of the defendant's house, if justified at all, to arrest a stranger therefrom, unless he has first stated to the occupant the fact that he had a warrant for the arrest of a person supposed to be therein on a criminal charge, and stated the name of the person sought after, and had been refused admission by the occupant, and this only upon reasonable proof that would justify the presumption that the person sought to be arrested was in the house at the time.

"5. An ordinary supposition that McKenna was in the house of the defendant is not sufficient to warrant the officer in forcibly entering the defendant's house.

"6. If the officer was first seen by the defendant while in the act of breaking open the defendant's outer door, the defendant was not required to inquire his business, if he notified him to leave, before he could repel the invasion of the officer.

"7. If the jury believe that the defendant did not hear or understand that Woodman had a warrant to arrest any person in the house, but that he, the defendant, honestly believed Woodman was attempting an unjustified invasion of his premises, and acted upon that suggestion; then if he fired for the purpose of deterring Woodman from forcibly entering the defendant's house, he cannot be convicted.

"8. Even if the defendant exceeded his rightful powers, yet if he had no intention to kill Woodman, or was not actuated by a reckless or wanton disregard of whether he killed him or not, he cannot be convicted on the first count.

"9. Even if he had not the specific intent to kill, yet he must have had in his mind the probable fatal result of his act, otherwise an intent to kill cannot even be inferred.

"10. The government must satisfy the jury that Woodman made his business and authority known to the defendant, before he, Woodman, could justify a forcible entry by the officer; if there is doubt on this point, the defendant must have the benefit of it."

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The judge refused to give all but the 7th, 8th and 10th requests, but instructed the jury as follows:

"If the officer had a warrant directed to him as a constable of the town of Medway, authorizing and requiring the arrest of McKenna for the offence of drunkenness, and having an honest belief, induced by information which, reasonably considered, justified such belief, that McKenna was in the defendant's house, and, for the purpose of arresting McKenna, went to the house of the defendant, notified him that he had a warrant for the arrest of a person in his house, and requested or demanded of the defendant admission to his house for the purpose of serving such warrant, and, upon the defendant's refusal to admit him, proceeded to make a forcible entrance through an outer door of the defendant's house, he was not a trespasser upon the defendant's dwelling-house, whom the defendant might lawfully repel by force from his dwelling; and if under such circumstances the defendant committed an assault upon said Woodman, it was an unlawful and criminal assault and battery; and, if committed with an intent to kill said Woodman, or by wanton or reckless acts, the ordinary and natural consequence of which would be the killing of said Woodman, the jury would be justified in finding the defendant guilty of an assault with intent to kill, as alleged in the first count of the indictment; but if the jury should have reasonable doubt of such intent to kill, or of the wanton and reckless character or tendency to kill, of such acts, and at the same time should be satisfied beyond a reasonable doubt that the defendant's assault was unlawful and criminal, he might be found guilty of an assault and battery, as alleged in the second count of the indictment, committed without intent to kill, and either of these findings, according to the evidence applying to each, would be justified, notwithstanding said McKenna was not in fact then in the house of the defendant, and said Woodman did not notify the defendant that he had a warrant for the arrest of McKenna, the defendant not having inquired or sought to know whom the person was whom said Woodman was attempting to discover and arrest."

The jury returned a verdict of guilty on the first count; and the defendant alleged exceptions.

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M. Fischacher, for the defendant. 1. The officer had no right, under all the circumstances of the case, to break open the outer door of the defendant's house, McKenna not being in the house at the time. 2 Hale P. C. 103, 117.

2. The officer had broken open the door before the defendant fired, and the bill of exceptions does not show that there was any evidence that the defendant fired before the officer had broken open the door, nor does it appear that the evidence in behalf of the defendant, wherein it appeared that the officer had broken open the door before the defendant fired, was contradicted; the officer must act in a reasonable manner before he can justify a forcible entry into a stranger's house, to arrest a third person supposed to be therein. 2 Hale P. C. 117. *Commonwealth* v. *Irwin*, 1 Allen, 587.

3. After being ordered away, the officer was bound to inform the defendant who the person was that he wanted to arrest, before he could justify a forcible entry, and the defendant was not bound to inquire whom he wanted, before refusing the officer admission.

4. The court erred in ruling that Woodman had a right to proceed to make an entry through an outer door of the defendant's house before the defendant refused to admit him.

5. The 6th request for instructions should have been granted, because, if the facts presupposed thereby existed, the circumstances were such that the defendant had not an opportunity to make inquiries until after his rights had already been invaded, and therefore the officer clearly acted in an unreasonable manner; and, as there was evidence tending to show that the defendant did not see the officer until he had proceeded to make a forcible entry, the court could not legally refuse this prayer, and, in refusing it, must have encroached upon the province of the jury, and assumed the evidence on this point to be untrue. The facts assumed by the defendant in this prayer should have been submitted to the jury under this instruction.

6. The 9th instruction requested should have been given, in order to enlighten the jury as to the legal application of the preceding instruction.

W. C. Loring, (*C. R Train*, Attorney General, with him,) for the Commonwealth.

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DEVENS, J. The instructions of the presiding judge state substantially the propositions that an officer, who is provided with a warrant to arrest one charged with a misdemeanor, and who has information which leads him reasonably to believe that the person sought is within the dwelling-house of a third person, upon notice to such third person that he has a warrant against one who is in the house, and, upon demanding admission, such admission being refused, is entitled, for the purpose of serving his warrant, to make forcible entrance through the outer door of the house; and further, that the officer cannot be treated, when he has thus entered, by the owner of the house, as a trespasser therein, even if he has failed to notify the owner who the person sought to be arrested is, (no inquiry having been made in relation thereto,) and even if such person is not actually within the house.

The doctrine that a man's house is his castle, which cannot be invaded in the service of process, was always subject to the exception that the liberty or privilege of the house did not exist against the king. It had no application, therefore, to the criminal process. Even in case of a misdemeanor, while it has been held in some cases that, before breaking open the outer door, the officer should demand admission, it is fully recognized in all the cases, that, after such demand and its refusal, the officer may lawfully enter by force and serve his process, even if it be against the occupant of the house. *Launock* v. *Brown*, 2 B. & Ald. 592. *Burdett* v. *Abbot*, 14 East, 1, 163. *Curtis's case*, Fost. 135. *Semayne's case*, 5 Rep. 91. *Kneas* v. *Fitler*, 2 S. & R. 263. As this privilege of the house is intended for the benefit of the occupant thereof and his family, it would necessarily follow that when he could not be protected by it, no third person could. *Semayne's case*, *ubi supra*.

The rule cited by the defendant's counsel from 2 Hale P. C. 103, 117, that an officer who breaks into another's house to arrest a felon is justified if he is found therein, but otherwise not, does not apply to the case of an officer who, holding a warrant against an alleged offender, has reasonable cause to believe that he is within such house, and who, after demanding admittance and being refused, then forcibly enters. *Commonwealth* v. *Irwin*, 1 Allen, 587.

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Nor would the occupant of the house have any ground of complaint, even if he were not informed who the person thus sought actually was, when he made no inquiry in reference to it. Unless he endeavored to be further informed, it was sufficient for him to know that an officer, provided with a warrant against an alleged offender, who believed that he was within his house, was seeking to arrest him there.

The instructions given upon the hypothesis that the defendant did not hear or understand that the officer had a warrant, but acted upon the honest belief that he was attempting an unjustifiable invasion of his premises, were all that the defendant could justly claim. If the sixth instruction requested, which was that "if the officer was first seen by the defendant while in the act of breaking open the defendant's outer door, the defendant was not required to inquire his business, if he notified him to leave, before he could repel the invasion of the officer," meant only that if what the defendant thus saw was all that was then known to him, he was justified in repelling the invasion by force, it was fully covered by the instructions actually given upon this subject. If, however, it was intended to ask a ruling that, while the object of the officer, and the purpose for which he was seeking an entrance, were known to the defendant, yet, if the first that was actually seen by the defendant was the attempt to break open the outer door, he could thus repel the invasion, such ruling should not have been given.

The ninth instruction requested was that if the defendant "had not the specific intent to kill, yet he must have had in his mind the probable fatal result of his act, otherwise an intent to kill cannot be inferred," need not have been given. It was essential to a conviction of the charge of assault with intent to kill, that such intent should be proved. But the charge of the judge upon this point was all that the case required. The jury were instructed that if the assault was "committed with an intent to kill said Woodman," by which was obviously meant an intent shown by some direct evidence, or committed "by wanton or reckless acts, the ordinary and natural consequence of which would be the killing of said Woodman, the jury would be justified in finding the defendant guilty of an assault with intent to kill." These instructions do not assume that "reckless or wan-

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ton acts," as therein described, constitute in themselves the intent which was to be proved, but that they furnish evidence from which such intent may be inferred, and justify the jury in finding its existence. To have adopted the instruction requested might have led the jury to believe that it was necessary to find a specific intent, or the contemplation of a probable fatal result, by evidence other than that which might be afforded by proof of such acts.

The eighth instruction requested by the defendant, that "if he had no intention to kill Woodman, or was not actuated by a reckless or wanton disregard of whether he killed him or not, he cannot be convicted on the first count," was given. Having been given at his request, if liable to be construed by the jury as authorizing a conviction on the first count, even if an intent to kill was not shown, but something less than this, the defendant cannot object thereto. But in connection with the charge of the judge, which treats reckless and wanton acts, the natural result of which would be the killing of another, as evidence only which would justify the jury in finding this intent, such construction could hardly have been given to it. *Exceptions overruled.*

COMMONWEALTH *vs.* ISAAC COHEN.

Suffolk. April 3. — 6, 1876. COLT & LORD, JJ., absent.

An indictment against B. for receiving stolen goods contained three counts. Each count alleged the larceny by A. of certain goods of a value stated, and of the property of a person named, and contained the further charge that the defendant, at a time and place named, "the property, goods and chattels aforesaid, so as aforesaid stolen, taken and carried away," feloniously did receive, knowing them "to have been feloniously stolen as aforesaid." The goods described in the several counts were different goods, and the times on which they were alleged to have been stolen and received were different. The record, treating the counts as three counts for larceny and three for receiving stolen goods, stated that a *nolle prosequi* was entered as to the second and fourth counts. *Held*, that the form of the indictment was usual and sufficient, and that the validity of the last count was not affected by the *nolle prosequi* entered as to the others.

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INDICTMENT in three counts. The last count was as follows:

"And the jurors aforesaid, for the Commonwealth of Massachusetts, on their oath, aforesaid, do further present, that Lawrence Murphy and James Hyde, otherwise called Frank Hyde, of Boston, aforesaid, on the fifth day of May, in the year of our Lord one thousand eight hundred and seventy-five, at Boston, aforesaid, with force and arms, two thousand pairs of stockings, each pair of the value of one dollar, of the property, moneys, goods and chattels of one George F. Hall, in a certain building there situated, to wit, the warehouse of the said Hall and in his possession then and there being, did then and there in the said building, feloniously steal, take and carry away, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided.

"And the jurors aforesaid, for the Commonwealth of Massachusetts, on their oath aforesaid do further present, that Isaac Cohen, of Boston aforesaid, on the fifth day of May in the year of our Lord one thousand eight hundred and seventy-five, at Boston aforesaid, with force and arms, the property, goods and chattels aforesaid, so as aforesaid stolen, taken and carried away, feloniously did buy, have, receive and aid in the concealment of; he, the said Cohen, then and there well knowing the said property, goods and chattels to have been feloniously stolen as aforesaid; against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

The other counts were similar in form, and differed only in the time, and in the kind of articles stolen and received.

In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment, and assigned the following causes therefor:

"The words used in each of the counts, namely, 'the property, goods and chattels aforesaid, so as aforesaid stolen,' do not in sufficient legal terms set out the charge of buying, receiving and aiding in the concealment of property, allege the value or ownership thereof, plainly, formally or substantially in the manner required by law.

"No offence at law is set out in sufficient and proper legal terms; each and every count is defective, and the indictment lacks precision and certainty."

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The record then set forth that *Allen*, J., overruled the motion that the defendant excepted; that the attorney for the Commonwealth then "entered a *nolle prosequi* of the indictment as to the second and fourth counts thereof;" and that the defendant was tried and convicted "upon the sixth count."

The defendant moved in arrest of judgment for the reasons assigned in his motion to quash. The judge overruled the motion; and the defendant alleged exceptions.

J. W. Mahan, for the defendant. 1. The allegation in the sixth count of the indictment, namely, "the property, goods and chattels aforesaid, so as aforesaid stolen," did not set out in sufficient legal terms, and plainly, formally and substantially as required by the practice of this Commonwealth in criminal pleading, the offence of receiving stolen goods under the statute. A *nolle prosequi* having been entered before verdict on the second and fourth counts of the indictment, the reference in said sixth count thereby became vague, uncertain and informal. *Commonwealth* v. *Cain*, 102 Mass. 487. *Rex* v. *Graham*, 1 Leach C. C. (4th ed.) 87. *State* v. *Lyon*, 17 Wis. 237. The allegation should have been "of the value aforesaid, so as last aforesaid stolen," or its equivalent. *State* v. *Lyon*, *ubi supra*.

2. The verdict as rendered is a proper ground for the motion in arrest of a judgment. The court ought not to pronounce judgment on this verdict, because there is no sufficient averment in the sixth count either of the property received or its value when received, both of which must enter into the consideration of the court in awarding punishment. Gen. Sts. *c.* 116, § 14; *c.* 120, § 41.

C. R. Train, Attorney General, for the Commonwealth.

GRAY, C. J. This indictment is against the receiver only, and, though assumed on some parts of the record, and in the briefs of counsel, to contain six counts, really contains only three, each consisting of an allegation of the larceny, followed by a charge against the defendant as receiver of the goods alleged to have been stolen, and which clearly describes those goods by reference to the preceding allegation. The form is usual and sufficient. Stark. Crim. Pl. (2d ed.) 169, 170, 479. D. Davis's Justice, 451, 452. Davis's Prec. 87. *Commonwealth* v. *King*, 9 Cush. 284, 287. *Commonwealth* v. *Glover*, 111 Mass

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895. The validity of the last count is not affected by the *nolle prosequi* entered upon the other counts against the defendant. The motions to quash, and in arrest of judgment, for insufficiency in the indictment, were rightly overruled.

Exceptions overruled.

DAVID WIGGIN & another *vs.* BOSTON AND ALBANY RAILROAD COMPANY.

Hampden. Sept. 28, 1875. March 16. — April 4, 1876. COLT & LORD, JJ., did not sit.

A consignor sent by an association of railroad companies, of which the defendant was one, a car load of oats weighing 23,667 lbs. to be forwarded to a station beyond the line of the defendant road, and received from the transit company a bill of lading, which he sent to the consignee, in which the oats were stated to weigh 20,000 lbs.; the consignee paid the consignor for the full contents of the car. In an action by the consignee against the defendant for the conversion of that portion of the grain removed, the freight agent of the defendant testified that he removed on behalf of the defendant the excess of oats above 20,000 lbs. at the end of the defendant's road. *Held*, that the testimony was competent on the question of conversion. *Held, also*, that a request to the court to rule that if the consignor informed the transit company that the oats weighed 20,000 lbs., knowing that they weighed more, so that they might be carried as 20,000 lbs. only, and if the consignee knew that the oats were "under-billed," and suffered them to come on without notifying the defendant, intending to take them without paying freight on the excess, unless demanded, there was no delivery of the excess of oats and the plaintiff could not maintain his action, although the consignee bought the grain deliverable on the cars, was rightly refused.

A letter containing an admission of a party is admissible in evidence against him, although the letter was in reply to another which the party is not called on to produce.

It is no excuse, for the conversion by a carrier of the property of a consignee, that the consignor fraudulently misstated the weight of the goods, and that the consignee knew that the bill of lading stated the weight at less than it was, and did not notify the carrier thereof.

If a carrier by railroad refuses to deliver goods carried, for other reasons than the non-payment of freight, an action will lie, without previous demand or payment of freight.

TORT for the conversion of 114 bushels of oats. Answer, a general denial.

At the trial in the Superior Court, before *Brigham*, C. J., the plaintiffs called one Hamilton, who testified that he was the local

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freight agent of the defendant at Springfield; that car No. 3761 came over the road in January, 1871; that a way-bill came with it, which he identified, and which was put in evidence; that the price of carriage is made when the carriage begins; in this instance at Peoria, Illinois; that this was way-billed as 20,000 pounds, at seventy-five cents per hundred pounds. The way-bill was issued by the Red Line Transit Company, an association of railroads of which the defendant was one. The plaintiffs were named as consignees; the place of destination was Northampton; and the weight was stated to be 20,000 pounds. He testified further, under objection of the defendant, which was overruled by the court, that he delivered the freight to the Connecticut River Railroad; that, before delivering this car, he weighed it, and found that it contained 23,667 pounds of oats, and that he took out of the car — the oats being in bulk — 3667 pounds of oats, equal to about 114 bushels; that he did this under instructions of the defendant, to take out the excess when cars contained more than the bill stated; that he bagged the oats, kept them two months or six weeks at the freight-house, and then sent them to the barn of the defendant, and did not know what became of them afterwards; that he had no instructions whether to give the oats up or not, on payment of the freight; that the freight was collectable at Northampton, the point of destination; that he left 20,000 pounds of oats in the car; that so far as he knew there was nothing in the car billed to any one else than the plaintiffs, and that no one else ever claimed anything in the car to his knowledge; that it appeared from the way-bill that the oats named in it were transferred from car 530, at Toledo.

On cross-examination, he testified that the way-bill was the only means the defendant had of knowing what quantity of oats was to be delivered to the plaintiffs; that no demand was ever made on the defendant for the oats taken out of the car, nor any offer made to pay the freight on them.

One of the plaintiffs testified, and was asked, "Was your firm owners of a car load of oats in January, 1871?" The defendant objected to the question, but the court overruled the objection, and the witness answered "Yes," and testified, without objection, that the plaintiffs bought the oats of one D. J. Perry. He

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was asked how many oats he bought and paid for, the defendant objected to the question, but the court overruled the objection, and the witness answered, "24,330 pounds."

He testified further, without objection, that he paid for the oats by a draft made on the plaintiffs, accompanied by a bill of lading; and testified, on cross-examination, that the draft was for a considerably larger sum than would be the price of the quantity of oats named in the bill of lading; that the draft was for the price of 24,330 pounds, and the bill of lading named only 20,000 pounds; that the plaintiffs noticed the difference, but paid the draft; that they had previously received cars containing a larger quantity of grain than the bills of lading called for; that they never informed the railroads of the excess in cars and never paid freight on the excess, unless the roads discovered the fact that there was an excess, and charged them freight on it, and paid such bills as were presented; that the plaintiffs received the bill of lading and draft long before the oats arrived, but did not notify the defendant nor any of the roads of there being an excess of grain in this car above the quantity billed, and that they bought the oats delivered on the cars at Peoria. He further testified, on reëxamination, that the plaintiffs did not have any arrangement or understanding with Perry that the oats should be under-billed, and that no one ever made claim on them for any part of the contents of the car; that there was no arrangement with consignors to ship the grain under-billed, and that he had no knowledge that it was to be shipped otherwise than correctly.

The plaintiffs then, not having given previous notice to the defendant to produce any letters, offered in evidence the following letter, signed by Hamilton, dated January 23, 1871: "In reply to your letter of 20th inst., relative to excess weight taken from cars, grain from the West, would say, we have been taking grain, &c., from cars which we have received, when they have been way-billed under weight, and have taken some from cars 2823 and 3761, consigned to you." The defendant objected to the admission of the letter, but the court overruled the objection, and it was admitted and read to the jury. There was no other evidence in the case.

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The defendant asked the judge to instruct the jury as follows: "1. That if Perry, knowing that the oats weighed 24,330 pounds, gave their weight to the railroad company, or caused them to be billed as 20,000 pounds only, intending that they should be carried as only 20,000 pounds, and freight paid thereon as only 20,000 pounds, it was a fraud on the roads, and there was no such delivery of the excess of oats on the cars, as would pass the title to the plaintiffs.

"2. That if the plaintiffs, knowing that the oats were underbilled, suffered them to come on without notifying the road of this fact, intending to take them without paying freight on the excess, unless the railroad discovered the discrepancy between the weights billed and the actual weight, this was a fraud which would prevent their maintaining this action.

"3. That on the evidence, there being no other evidence that the plaintiffs made any demand for the excess of oats, nor any offer to pay the freight on the excess, and it appearing that the defendant took the oats and put them into bags and kept them so, and it not appearing that the defendant would not have forwarded them on an offer to pay freight being made, the plaintiffs cannot maintain this action."

The judge refused to give either of the instructions asked for, and instructed the jury to return a verdict for the plaintiffs; the defendant making no objections, other than those hereinbefore set forth, and consenting to such verdict saving the above exceptions. The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

The case was argued in September, 1875, and reargued in March, 1876.

A. L. Soule, for the defendant.

G. M. Stearns, for the plaintiffs.

ENDICOTT, J. The defendant, as one of the Red Line Transit Company, undertook to carry, according to the terms of a bill of lading, issued by the Transit Company, a car load of oats in bulk on board car No. 3761; the oats are stated in the bill of lading to weigh 20,000 pounds. The car arrived in Springfield on its way to the plaintiffs at Northampton, and while there and in the custody of the defendant, it was found to contain 23,667 pounds of oats. The excess over 20,000 pounds was taken from it by the

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defendant, and the car then forwarded to the plaintiffs. It appears by the bill of exceptions that the plaintiffs purchased the oats of one Perry to be delivered at Peoria, Illinois, on the cars; that no one other than the plaintiffs had any oats in the car; that the plaintiffs had paid for the full contents of the car, viz.: 23,667 pounds; and that 20,000 pounds, brought on the car, had been actually delivered to the plaintiffs by the defendant. Admitting these facts to be true, the plaintiffs had title to the whole contents of the car, as their property. *Peebles* v. *Boston & Albany Railroad*, 112 Mass. 498.

The defendant contends that the plaintiffs cannot maintain this action for conversion of the oats which it took from the car; and the case comes before us on exceptions to evidence, and to the refusal of the presiding judge to give certain instructions to the jury.

1. The testimony of Hamilton, the freight agent of the defendant at Springfield, that he removed, on behalf of the defendant, the oats from the car, was properly admitted. The question at the trial was not whether the defendant would be liable for the full contents of the car, or for 20,000 pounds only, if the car load of oats or the excess over 20,000 pounds had been destroyed; but whether it had taken the property of the plaintiffs and converted the same to its own use. For even if the defendant was only liable to deliver 20,000 pounds, if that was all that arrived, it is clear that the defendant did not gain any title to the property of the plaintiffs because more than 20,000 pounds did arrive. Whatever remedy the defendant had for having carried the excess over 20,000 pounds, it was not by appropriating to its own use the plaintiffs' property. The evidence was therefore competent upon the question of conversion.

2. The letter of Hamilton was also properly admitted. It contained a declaration, by an agent of the defendant, respecting a matter in his charge and within the scope of his agency; *Morse* v. *Connecticut River Railroad*, 6 Gray, 450; and was competent as offered, within the rule laid down in *Stone* v. *Sanborn*, 104 Mass. 319. As the letter stated only in general terms what Hamilton testified to in detail, the defendant could not have been injured by its admission.

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TORT against Charles R. Brown and John J. Hayes, for injuries sustained by the plaintiff in falling through an open, unguarded scuttle on the first floor of the defendants' store. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The plaintiff's evidence tended to show that at the time alleged he went to the defendants' store, where he had been accustomed to buy goods, to purchase some liquors; that upon entering the first floor of the store he met the defendant Hayes, and told him he wanted two barrels of whiskey and two of gin, and that he wanted to take one barrel of gin with him then to deliver to a customer, and that he would call for the other barrels later; that Hayes then told him the gin was in the back part of the store, and pointed in that direction, and told the delivery clerk, who was the gauger, to get it for him; that the clerk walked towards the back of the store to get the gin, the plaintiff following him to see it gauged and to assist in getting it, and, while thus following the clerk, the plaintiff fell through the open scuttle and received the alleged injuries; that the scuttle was situated on the first floor, forty feet back from the front door, and was in a manner shielded from the light from the front by a cigar office and gauger's office which intervened, and the store extended some eighty feet in the rear of the scuttle, in an oblique direction; that the day was cloudy and dark, and there was no gas light or other artificial light to disclose the scuttle, and no guard to protect it, and he received no warning from the defendants or their employees that it was open, and did not see it or know it until he fell to the cellar below. The plaintiff's testimony further tended to show that said first floor was used for the reception and delivery of goods, and the defendants sometimes sold and sampled goods there, though they usually sold by samples on the floor above, where they had their office and sample room; that ordinarily the elevator was kept on a level with the floor, thus filling the scuttle; and, when the elevator was in use, a gas light was kept burning in the scuttle to disclose it.

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The defendant Hayes denied meeting the plaintiff on the first floor of said store, and having the conversation testified to by the plaintiff and his witnesses, before the injury, and denied seeing the plaintiff on the day of the injury until after the fall; and the defendants offered testimony tending to show that the first floor was used for receiving and the delivery of goods only, and that all sales and sampling of goods were made in the sample office on the floor above, and that customers had no right to walk upon the first floor, back as far as the scuttle was situated; but the defendants' delivery clerk admitted, on cross-examination, that he had sometimes seen customers sampling liquors on said first floor, back of the scuttle, and that he had seen one customer with one of the defendants, on the morning of the accident, and before it happened, thus sampling liquors in the rear of the scuttle. The defendants contended that the plaintiff had no right to go where the scuttle was, and that he did not exercise due care.

The defendants were also permitted, against the objection and exception of the plaintiff, to offer evidence tending to show that the plaintiff was in poor credit with the defendants; that at the time of the injury he was indebted to them for liquors, and that after the injury, and before the action was brought, he made at the store various purchases of the defendants, the dates and amounts of which were given, one of which was on credit, and that the amount of his indebtedness at the time of the injury was about two thousand dollars; that they had dunned him repeatedly, and threatened suit for this amount, and had been unable to collect it. In this connection, the defendants were also permitted to put in evidence that during these transactions the plaintiff never made any claim such as he seeks to enforce in this action. All the foregoing evidence was denied by the plaintiff. The defendants' counsel argued to the jury that the plaintiff was ashamed to plead the liquor defence to the defendants' claim for liquors sold him, and that the sole object of this suit was to obtain a judgment which he could set off against his indebtedness to the defendants for liquors.

The jury found for the defendants; and the plaintiff alleged exceptions to the admission of the above testimony.

J. W. Keith, for the plaintiff.

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J. Fox, for the defendants, was not called upon.

BY THE COURT. The evidence of the relations and transactions between the parties was competent, as bearing upon the question whether the previous conduct of the plaintiff had been consistent with his present claim, and thus tending to show that he had no cause of action against the defendants.

Exceptions overruled.

JAMES W. REID *vs.* JOHN STEVENS.

Suffolk. March 7. — April 5, 1876. COLT & LORD, JJ., absent.

An allegation that the "defendant made a contract in writing" is not supported by evidence of a contract not signed by the defendant, and the objection of variance is open to the defendant, although he does not set up the statute of frauds in his answer.

CONTRACT for services rendered by the plaintiff to the defendant. The declaration alleged that the defendant made with the plaintiff "a certain contract in writing." Answer, a general denial.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff put in evidence, to prove the contract declared upon, a diary produced by the defendant on notice, in which was written in the defendant's handwriting, under date of February 17, 1872, "Made a bargain with James W. Reid to work in office as student for two years from the first day of February, 1872, to February 1, 1874, on the following terms, viz.: first three months without any pay whatever; next three months, five dollars a week; next three months, six dollars a week; and the next three months, eight dollars a week; and for the first three months in the second year, nine dollars and fifty cents a week; next three, eleven dollars a week; next three months, twelve dollars and fifty cents a week; and the last and eighth three months, fourteen dollars a week, payable once a week, at the above rates, until otherwise agreed upon. The above terms I fully agree to. J. W. Reid."

The signature of the defendant was not attached to the writing, and his name nowhere appeared in the book containing it.

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It was in evidence that the plaintiff worked until December 31, 1873, and did no work from that time until the end of his contract. There was conflicting evidence as to whether the plaintiff voluntarily terminated his employment on December 31, 1873, or by reason of the defendant's refusal to continue the same. The plaintiff claimed payment for the full time of the contract. The defendant offered him judgment for services rendered to December 31, 1873.

At the close of the evidence, the defendant asked the judge to rule that the plaintiff could not recover upon this declaration, he having alleged a contract within the statute of frauds, and the evidence not supporting his allegation of a contract in writing by the defendant; but the court ruled that this objection was not open to the defendant, under the answer.

The jury returned a verdict for the plaintiff, for the full amount claimed by him; and the defendant alleged exceptions.

F. S. Hesseltine, for the defendant.

M. A. Blaisdell, for the plaintiff.

GRAY, C. J. The allegation in the declaration, that the defendant made a contract in writing, was denied in the answer, and was not supported by evidence of a contract not signed by the defendant. The objection of variance was open to the defendant, although he had not set up the statute of frauds. The case is thus distinguished from *Middlesex Co.* v. *Osgood*, 4 Gray, 447. *Exceptions sustained.*

LAWRENCE CLEARY *vs.* WILLIAM SOHIER & another, trustees.

Suffolk. March 10. — April 5, 1876. COLT & LORD, JJ., absent.

A workman, who had contracted to lath and plaster a building for a certain sum, had lathed the building and put on the first coat of plaster, when, without his fault, it was destroyed by fire. *Held*, that he could recover for his work, under a count for work done and materials furnished.

CONTRACT on an account annexed to recover $474, with interest, for work done and materials furnished. The case was submitted to the Superior Court, and to this court on appeal, upon an agreed statement of facts in substance as follows:

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The plaintiff made an oral contract with Henry Farnum, of whose estate the defendants are trustees, to lath and plaster a certain building on Federal Street for the sum of forty cents per square yard. No agreement was made, and nothing was said, as to terms or times of payment, but only that the work was to be done for forty cents per yard. The plaintiff lathed and put on the first coat of plaster a few days before the great fire of November, 1872, and was ready and willing and in good faith intended to put on the second or skim coat, so called, and would have begun November 11, so to do, when the fire of November 9 and 10 wholly destroyed the building. There was no negligence, default or bad faith on the part of either of the parties, and the fire was an unavoidable casualty. The amount charged by the plaintiff, to wit, $474, is a reasonable and proper charge for the part of the work done; and, if the plaintiff is entitled to recover anything, as matter of law, under these facts, he is entitled to recover that sum and interest from November 10, 1872. The plaintiff did not demand said sum until after the fire, and not till some months thereafter, and did no more work under the contract. Farnum died soon after the fire, and the defendants represent him and his estate, and are liable if he was liable.

If the plaintiff was entitled to recover, either under his contract or under a count for work done and materials furnished, judgment was to be entered for the said sum of $474 and interest; otherwise, for the defendants.

The Superior Court ordered judgment for the defendants; and the plaiutiff appealed.

B. E. Perry, for the plaintiff.

C. P. Gorely, for the defendants.

By the Court. The building having been destroyed by fire without fault of the plaintiff, so that he could not complete his contract, he may recover under a count for work done and materials furnished. *Lord* v. *Wherler*, 1 Gray, 282. *Wells* v. *Calnan*, 107 Mass. 514, 517. *Judgment for the plaintiff.*

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TRUSTEES OF THE CHAPEL OF THE GOOD SHEPHERD vs. CITY OF BOSTON.

Suffolk. March 18. — April 5, 1876. COLT & LORD, JJ., absent.

A corporation for religious and charitable purposes, authorized by its charter "to hold, maintain and let lodging-houses, upon such terms and conditions as it may determine, subject to the laws of the Commonwealth," as well as to "erect, hold and establish churches or chapels for public religious worship," built upon its land a lodging-house in which rooms were let to tenants at the usual rates of rent, and the proceeds devoted to the charitable uses named in the charter. *Held*, that the rooms so let were not exempt from taxation under the Gen. Sts. c. 11, § 5, *cl.* 3.

CONTRACT to recover the amount of taxes paid under protest. The case was submitted to the judgment of the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, in substance as follows:

The plaintiff was incorporated under the St. of 1868, *c.* 114, and was authorized to hold real and personal estate to the amount of $200,000. The real estate upon which the taxes in controversy were assessed is situated on Cortes Street, in Boston, and lies immediately west of the chapel lot of the plaintiff, which is not taxable. The land in question here measures fifty-six feet on Cortes Street, and, with the chapel lot, forms the entire real estate owned by the plaintiff, and was used in connection with the chapel during the years 1871 and 1872.

In 1872, a lodging-house was built on the land in question, which has, since 1872, been occupied and used by the plaintiff as a lodging-house, which the plaintiff was authorized to "erect, hold, maintain and let," within said city, "upon such terms and conditions as it may determine, subject to the laws of the Commonwealth," and is still so occupied and used. This house has been let to families since its erection at the usual rate of rents for the rooms let, no inquiries being made as to the religious belief of the tenants, the only requisition being that the tenant should produce satisfactory references as to his character. The plaintiff has received rents amounting to about six per cent. on the cost of the lodging-house, above expenses.

This lodging-house is a distinct building known as Huntington House, but is connected with the chapel of the plaintiff, on the

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same lot, so that one can pass from one to the other. The first floor of the house is used for a reading room for all attending the chapel, and also for the Sunday-school connected with the chapel, as well as for a place of meeting of all the associations and societies, charitable and religious, connected with those attending the chapel. The defendant's assessors, in fixing the value of said land and lodging-house thereon for taxes, made a deduction therefrom for the room so occupied.

The plaintiff does not hold real and personal estate worth more than $200,000; and the whole income thereof is devoted to the uses named in the act.

The plaintiff paid, under protest, taxes on the real estate in controversy, amounting to $505.05, for the year 1873.

If, upon the foregoing statement of facts, the lot and lodging-house aforesaid were exempt from taxation, then judgment for the amount thus paid, with interest, was to be entered for the plaintiff; otherwise, for the defendant.

S. A. B. Abbott & C. T. Lovering, for the plaintiff.

J. L. Stackpole, for the defendant.

GRAY, C. J. The plaintiff, by its charter, is "made a body corporate for religious and charitable purposes," and is empowered to "erect, hold, maintain and let lodging-houses within the city of Boston, upon such terms and conditions as it may determine, subject to the laws of the Commonwealth," as well as to "erect, hold and establish churches or chapels in said city for public religious worship," and to hold real and personal estate to the amount of $200,000, "the whole income of which shall be devoted to religious and charitable uses." St. 1868, *c.* 114.

In order to exempt real estate belonging to a charitable institution from taxation, it is not enough that the income derived therefrom should (as all the income of the corporation, from whatever source derived, must) be applied to the purposes for which it was incorporated; but the real estate itself must be occupied by the corporation or its officers, for those purposes. Gen. Sts. *c.* 11, § 5, *cl.* 8.

The chapel erected and held by the plaintiff was doubtless occupied by the corporation for a charitable and religious purpose, and is admitted to have been exempt from taxation; and lodging-houses let to poor tenants, without compensation, might fall within the same rule.

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But the rooms let by the plaintiff to tenants, receiving the usual rate of rent, were clearly not occupied by the corporation or its officers for religious or charitable purposes, within the meaning of the tax act. *Lowell Meeting-house* v. *Lowell*, 1 Met. 538. *Pierce* v. *Cambridge*, 2 Cush. 611. The power conferred by the charter was broad enough to authorize the corporation to let rooms upon these terms. But it did not make the purpose of investment and profit, for which these rooms were improved and used, a charitable or religious purpose, in any legal aspect.

As part, at least, of the plaintiff's real estate was not exempt from taxation, this action cannot be maintained. *Bourne* v. *Boston*, 2 Gray, 494. And according to the terms of the case stated there must be *Judgment for the defendant.*

SAMUEL OAKMAN *vs.* ALVAN ROGERS & others.

Suffolk. March 28. — April 5, 1876. COLT & LORD, JJ., absent.

A. offered by letter to "help out" B. at a certain price with a kind of article of which A. had a full supply. B. promptly accepted the offer by letter, and named the quantity he would like, together with the manner of delivery. A. replied to B. by letter, on the same day, that by his offer he merely meant to substitute B. in his place in an offer made to him. *Held*, in an action by B. against A. on an alleged agreement of sale, that these letters did not show such an agreement, nor constitute a sufficient memorandum to take the case out of the statute of frauds.

CONTRACT for breach of an agreement to sell fruit jars to the plaintiff. The answer contained a general denial, and set up the statute of frauds. At the trial in the Superior Court, before *Rockwell*, J., the plaintiff put in evidence, to support the alleged agreement, the following letters, all dated July 2, 1874:

"To Samuel Oakman, Esq.: Will you please send by bearer 6 blank letter heads on which we can write copies of your letter of yesterday, to enable our travelling men to bull the price a little on porcelain and glass top jars. We now have full supply of both, and if any of your customers can't get enough, we will help you out at $16 qt. and $20 2 qt. Rogers & Co."

"Messrs. Rogers & Co.: Yours of this date received. I accept your kind offer for porcelain and glass top fruit jars at

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$16 qt. and $20 half gals. Please book me for 500 gross porcelain lined jars, say three hundred gross qts., two hundred gross half gals. Make deliveries, one hundred gross per week, commencing next week any time after fifth inst. I am very glad to be helped out of my dilemma. Samuel Oakman."

"To Samuel Oakman, Esq.: Our offer to you was based on a telegram from Consolidated Fruit Jar Co., and you can use this line for authority to take the offer in our place and so simplify the transaction, as we are willing to relinquish any benefit there may be in the trade, having, since writing you, concluded to accept a still better offer for another jar. Rogers & Co."

Upon this evidence, by the consent of parties, before verdict, the case was reported for the determination of this court upon the questions whether the letters created any contract between the parties, and whether the letters were a sufficient note or memorandum in writing of the contract within the statute of frauds. If the court were of opinion that the plaintiff could maintain his action, the case was to stand for trial; otherwise judgment for the defendants.

S. C. Darling, for the plaintiff.

D. C. Linscott, for the defendants.

By the Court. The letters relied on do not show that the parties ever agreed on the number of jars, the time or manner of delivery, or the other terms of the alleged contract of sale, and are not a sufficient memorandum to take the case out of the statute of frauds. *Judgment for the defendants.*

Benjamin B. Brown *vs.* Nathaniel M. Jewett & another.

Suffolk. March 28. — April 5, 1876. Colt & Lord, JJ., absent.

On the issue whether a signature, on a note in suit, is that of the defendant, the plaintiff may call the counsel of the defendant as a witness, if he is not required to disclose any matter of confidential communication, or to base his opinion upon any statement of the defendant to him as counsel.

On the issue whether a signature, on a note in suit, is that of the defendant, admissions contained in a bill in equity brought by the defendant against the present

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plaintiff are competent evidence, if the present defendant signed and made oath to the bill, or if it was signed by counsel authorized by him to bring the bill for a purpose which implied the admission of the signature to the note.

CONTRACT against the indorsers of a promissory note for $1500.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff offered evidence to prove that he purchased the note from the maker thereof, and proved the protest of the note and due notice to the defendants. The plaintiff then called the junior counsel of the defendants, then engaged in the trial of the case before the court, as a witness, for the purpose of proving by him the signatures of the defendants upon the note. The defendants objected to his being so called, on the ground that, being counsel for the defendants, and then engaged in the trial of the action, he was not a proper or competent witness for the plaintiff; but the judge overruled the objection. The witness was then asked if the signatures on the back of the note were the signatures of the defendants, to which the defendants objected; but the judge allowed the question, saying that the witness was not required to disclose any matters of confidential communication, or to base his opinion upon any statements of the defendants to him as counsel. The witness answered: "I do not know. I have a belief that it may be their signature. It has some points of resemblance; but I am not positive, not having seen them write the same." In answer to further inquiries from the plaintiff, under the defendants' objection, the witness testified that he had been counsel for the defendants for two years, and had seen them write their names four or five times. The witness, upon further examination, added: "I should rather doubt the second name." Upon cross-examination the witness said: "I have not seen them write often enough to have any opinion of their signatures, independently of facts communicated to me by the defendants, while counsel in the case."

To further prove the signatures of the defendants, the plaintiff offered in evidence a bill in equity, brought in the Supreme Judicial Court of this Commonwealth, in which the present plaintiff was defendant, and proved that the same was signed and sworn to by the defendant Pitcher, and signed by the other defendant by counsel, in which the defendants prayed that their

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names might be stricken off the note in question. The defendants objected, on the ground that such proof was incompetent for the purpose for which it was introduced; but the judge ruled that the statements contained in the bill in equity were competent evidence against the defendant Pitcher, who had signed and sworn to the bill, and would be competent evidence that the defendant Jewett had indorsed the note, if the jury believed that he had authorized the bill to be signed by counsel. The plaintiff again called the counsel for the defendants, and asked him if he had authority from the defendants to bring the bill in equity, to which the defendants objected; the witness answered, that he was so authorized by them. On cross-examination, he stated that he was authorized by the defendant Pitcher to bring the bill and to use the name of the defendant Jewett therein, and sign his name thereto, and that he now remembered that the defendant Jewett was at that time absent from the city. The plaintiff then called a witness, who testified that he was present at the hearing before this court upon the bill in equity, and that the defendants were both present and testified that they intended to pass only a title to the mortgage, which accompanied the note, and not to become liable upon the note; and that they did not deny that they signed the note. On cross-examination, the witness stated he was not positive that both defendants were present. The defendants objected to the witness being allowed to testify to statements heard by him at the hearing in the equity suit; but the judge admitted the evidence. The plaintiff testified that he did not know the defendants' signature; that he was present at the hearing on the bill in equity, and thought only one of the defendants was present, and that the defendant Jewett was not there.

The judge instructed the jury that the bill in equity was proper and competent evidence, to prove all material allegations contained therein, against the party who signed the same, so far as they bore upon this issue, and also against the person not signing, if he authorized the bringing of the bill for the purpose set forth in the bill, so far as such purpose implied an admission of the indorsement in question, and submitted the whole case to the jury, under instructions not otherwise excepted to.

The jury found for the plaintiff and the defendants alleged exceptions.

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E. C. Bumpus & E. M. Johnson, for the defendants.

B. C. Moulton, for the plaintiff.

BY THE COURT. The evidence was rightly admitted, and was submitted to the jury with well guarded instructions.

Exceptions overruled.

MARY C. AMES *vs.* THOMAS C. STEVENS.

Suffolk. April 3. — 5, 1876. COLT & LORD, JJ., absent.

A count for money had and received, with a specification that under it the plaintiff would claim money sent by him through the defendant to be tendered or paid to an insurance company and afterwards received back by the defendant, and alleging a demand upon the defendant and a refusal to pay, is a count in contract and not in tort.

The words "with count in tort" in a writ, no such count having been filed, are mere surplusage.

A submission to arbitration by rule of court is a waiver of all defects in the pleadings.

Double costs are not allowable under the Gen. Sts. c. 112, § 13, in cases coming up by appeal.

CONTRACT. The writ described the action as one of contract with a count in tort, and did not allege that they were for the same cause of action. The declaration contained two counts.

The first count was as follows: "And the plaintiff says the defendant owes her $45 according to the account annexed." The account annexed was for rent of a room and board.

The second count was as follows: "And the plaintiff further says that the defendant owes her $251, for money had and received by defendant to plaintiff's use, and $20 for interest on same." Annexed to this count was the following specification: "Under this count the plaintiff will claim two hundred and fifty-one dollars, money sent by her through the agency of the defendant, in sums of fifty dollars and twenty cents each, to New York, for the purpose of being tendered or paid to the Guardian and Orphan Life Insurance Company of New York, in the months of May, August and November, 1873, and February and May, 1874, and afterwards received back by defendant, and which defendant, though often requested, has refused to pay plaintiff."

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The case was referred by rule of court, and the referee returned his award in favor of the plaintiff with interest and costs. In the Superior Court the award was accepted and judgment ordered upon it for the plaintiff; and the defendant appealed.

J. Willard, for the defendant, contended that the second count was in tort, and that the award was therefore void.

J. S. Abbott, for the plaintiff, moved for double costs.

By the Court. Both counts are common counts in contract, the one upon an account annexed, and the other for money had and received. The words in the writ, "with count in tort," no such count having been filed, are mere surplusage. The submission to arbitration by rule of court was a waiver of all defects in the pleadings. The appeal is frivolous. But the plaintiff's motion for double costs cannot be granted, because the statute upon that subject is limited to exceptions, and does not extend to appeals. Gen. Sts. *c.* 112, § 13. *Delaney* v. *Towns*, 1 Allen, 407.

Judgment affirmed.

Alson Knight *vs.* Alexander Mann.

Suffolk. March 16. — April 6, 1876. Colt & Lord, JJ., absent.

By the terms of a contract of sale of goods, the purchaser was to send for the goods and take them away. The purchaser went to the store of the seller, took the bill of parcels of the goods, asked if they were ready, and was told that they were, and the goods were pointed out to him lying in the doorway of the store. He said he would send for them. *Held*, in an action for goods sold and delivered, that these facts did not necessarily show an acceptance and receipt of the goods within the statute of frauds.

Contract for rough calf skins, of the value of $1035, sold and delivered to the defendant. The answer contained a general denial, and set up the statute of frauds.

After the former decision, reported 118 Mass. 143, the case was tried in the Superior Court, without a jury, before *Pitman*, J. The facts proved were substantially the same as at the former trial, except that the judge further found that the defendant came into the plaintiff's store about noon on November 9, 1872, and took the bill of parcels of the calf skins, and asked if his

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skins were ready; was told by the plaintiff that they were ready, and they were then pointed out to him, lying in the door way of the store, near which the parties were standing, and the defendant then passed out of the door where the skins were lying, saying he would send his wagon for them. The plaintiff requested the judge to rule that this was a sufficient acceptance of the goods to take the case out of the statute of frauds; but the judge declined so to rule, and ruled "that there was not such an unequivocal act of acceptance on the part of the defendant as would take the case out of the statute, and found for the defendant;" and the plaintiff alleged exceptions.

H. L. Hazelton, for the plaintiff, cited *Hardy* v. *Potter*, 10 Gray, 89.

C. Robinson, Jr., for the defendant.

ENDICOTT, J. This case was before the court at a previous stage. 118 Mass. 143. The only additional fact proved at the second trial was, that after the defendant was told that the skins were lying in the doorway, they were pointed out to him, and he passed out of the door where they were lying, and said he would send for them. That there was sufficient evidence of delivery has been conceded throughout this controversy; the question being whether, on the facts reported, there was evidence of acceptance within the statute of frauds. It is enough to say that the additional fact does not necessarily show an acceptance, and the presiding judge could not properly have ruled as requested by the plaintiff; and, having found for the defendant, he must necessarily have found that there was "not such an unequivocal act of acceptance as would take the case out of the statute." The plaintiff therefore has no ground of exception. As it was part of the contract that the defendant should send for the skins, the fact that he said he would do so, when he left the store, does not add to the effect of the evidence.

Exceptions overruled.

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JOHN E. CASSIDY *vs.* MATTHEW HYLAND.

Suffolk. March 23. — April 6, 1876. COLT & LORD, JJ., absent.

In an action on an account annexed for goods sold and delivered, there was evidence of the sale and delivery, and that the plaintiff's bookkeeper showed a copy of the bill annexed to the writ to the defendant, who said he would settle it in a few days. *Held*, that this evidence was sufficient to warrant a verdict for the plaintiff; and that the defendant's exceptions were frivolous, and must be overruled, with double costs.

CONTRACT on an account annexed for goods sold and delivered. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff called his bookkeeper and asked him if he had shown the bill annexed to the writ to the defendant, and if so, what the defendant said. The question was objected to, but the judge admitted the question, and the witness testified that on one occasion, at the store of the plaintiff, he showed the defendant the bill annexed to the writ, and that the defendant said he would settle it in a few days. On cross-examination, the witness said this was not the bill, but a copy of it. He also gave evidence tending to show the sale and delivery of the items charged.

This was the only evidence introduced by the plaintiff; and the defendant asked the judge to rule, as matter of law, that it was insufficient to warrant a verdict for the plaintiff. The judge declined so to rule, and left the case to the jury on all the evidence, and they returned a verdict for the plaintiff. The defendant alleged exceptions.

S. R. Townsend, for the defendant.

I. W. Richardson, for the plaintiff, moved for double costs.

THE COURT *overruled the exceptions, with double costs.*

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ALPHONSO H. MELENDY & others vs. FREDERI another.

Suffolk. March 30. — April 6, 1876. COLT & LORI

The following instrument is a continuing guaranty: "I hereby the payment to A. for any goods which may be purchased of h ever binding myself to become responsible for a larger sum tha lars, except by another special agreement; the above guarant until it is withdrawn by me."

CONTRACT upon the following instrument, sig fendants: "In consideration of one dollar paid to Hixon & Co., of Boston, the receipt whereof is edged, we hereby agree to guaranty the payn Melendy, Hixon & Co. for any goods which m of them by Alvah Wentworth, of Lynn, not ourselves to become responsible for a larger su dred dollars, except by another special agreen guaranty to remain in force until it is withdrav

At the trial in the Superior Court, before *I* fendants contended that the guaranty was not and put in evidence tending to show an exti guaranty by the defendants' indorsing and p of Wentworth. On this point the evidence

The judge ruled that the guaranty was co burden of proof was on the defendants to s ment or discharge of the guaranty by substi and found that the defendants had not estal tinguishment or discharge, by consent of pa the law did not imply such from the transac fendants alleged exceptions.

E. Ames, for the defendants.

B. Dean, for the plaintiffs.

BY THE COURT. The contract sued on its face to have been intended to be a *Bent* v. *Hartshorn*, 1 Met. 24. *Hatch* v. *Boston & Sandwich Glass Co.* v. *Moore*, question of fact of extinguishment or disch by the court below in favor of the plaintif

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REUBEN W. HOPKINS *vs.* JOHN H. ALLEY.

Suffolk. March 28. — April 7, 1876. COLT & LORD, JJ., absent.

A submission was made to arbitration to determine the "demand which H. has against A. in the settlement of the affairs of the late firm of P. & A." The award thereunder determined "the claim of H. upon A. in the matter of settling the copartnership between H. and A. and P.," and that H. upon the receipt of a sum of money named should "furnish A. with a release in full from P. of any claim which the said P. might have upon the said A. in copartnership existing previous to May 31, 1871." In an action by H. against A. on the award, the declaration alleged that H. was a special partner in the firm of P. & A., of which firm P. & A. were the general partners, and that he was ready to perform on his part what the award required of him. The answer was a general denial, and that the award was not within the submission. *Held*, on exceptions to the refusal of the judge, who tried the case without a jury, to rule that the award was not within the submission, that it must be assumed to have been found as matter of fact, that the firm of P. & A. consisted of H. and A. and P., and that H. was ready to perform on his part what the award required of him.

CONTRACT on an award. The declaration alleged that the plaintiff was a special partner in the firm of Putnam & Alley, of which firm one George D. Putnam and the defendant were the general partners; that a controversy arose between the defendant and himself as to what amount was due to him from the defendant in the settlement of the affairs of the firm; and they, by a submission in writing, chose and appointed two persons named to hear and finally determine for them said controversy, and mutually promised to stand to and abide by the award thereupon, and that the plaintiff was ready on his part to perform what the award required of him. The answer contained a general denial, and alleged that the award was not within the submission.

The submission and award (copies of which were annexed to the declaration) were as follows:

"Know all men by these presents: That Reuben W. Hopkins, of Arlington, in the county of Middlesex and State of Massachusetts, and John H. Alley, of Lynn, in the county of Essex and State of Massachusetts, have agreed to submit the demand which the said Reuben W Hopkins has against the said John H. Alley, in the settlement of the affairs of the late firm of Putnam & Alley, to the determination of Benjamin F. Moore and William T. Foster, together with a third party if the said Moore and

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Foster cannot agree, the award of whom being m
ported within ten days from this day to the said H
Alley, the judgment thereon shall be final; and if
shall neglect to appear before the referees after due
them of the time and place appointed for hearing th
referees may proceed in his absence. John H. Al

"February 1, 1873. Reuben W.

"We, the undersigned, do hereby decide, in adjus
of Reuben W. Hopkins upon John H. Alley, in
settling the copartnership between said Hopkins
George D. Putnam; that the said John H. Alley
said Reuben W. Hopkins the sum of one thousan
and ninety-eight $\frac{22}{100}$ dollars, with interest at the
per cent. per annum from May 31, 1871, when th
ceased; upon receipt of which money or its
Hopkins shall furnish said Alley with release in
D. Putnam of any claim which the said Putnam
the said Alley in copartnership existing previo
1871. Benj. F. Moc

"February 5, 1873. Wm. T. Fos

At the trial in the Superior Court, before *Pi*
a jury, the defendant asked the judge to rule,
that the award was not within the submission;
tors had exceeded their authority thereunder a
matters not submitted to them; that the same
this action could not be maintained thereon.
clined so to rule, and ruled that the award w
submission, and (the plaintiff consenting to
to six per cent.) rendered judgment for t
amount of said award, and interest at the
defendant alleged exceptions.

E. L. Barney, for the defendant.

H. G. Parker, for the plaintiff.

By the Court. The defendant does
aggrieved by the ruling below. It is alleg
and must be assumed upon these exceptio
as matter of fact, that the firm of Putnam
Hopkins and Alley and Putnam, and that
to perform on his part what the award re

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JOHN MEDINA *vs.* BUILDERS' MUTUAL FIRE INSURANCE COMPANY.

Suffolk. March 30. — April 7, 1876. COLT & LORD, JJ., absent.

A policy of insurance described the property insured as "contained in three story granite building." *Held*, that the phrase might designate a building with a granite front only, and three stories high in the front and rear, though only one story high in the middle; and that, if such was the fact, all the property of the kind described in the policy, contained in the building, was covered by the insurance.

A policy of insurance upon "stock of hair, wrought, raw and in process, as retail hair store," does not extend to fancy goods, made of other materials, although such as are usually kept and sold in a retail hair store.

CONTRACT on a policy of insurance by which the defendant insured the plaintiff against loss or damage by fire to the amount of $2000 on his "stock of hair, wrought, raw and in process, as retail hair store, contained in three story granite building No. 315 Washington Street," in Boston. The answer contained a general denial, and alleged that the description of the building in the policy did not correspond to the building containing the lost or damaged goods.

The case was, by an agreement of the parties, and under a rule of court, referred to an arbitrator, whose findings on matters of fact were to be final.

The arbitrator found that the plaintiff's store, containing the property insured, was situated at No. 315 Washington Street, Boston, in the first story of a block of stores, the front of which block was granite, one end and the rear of brick, the other end granite, up one story, and brick above that, and the roof of slate; that the plaintiff's store ran through this three story block (the rear of the store having been removed for this one story, the wall above being supported by iron columns) and then through a one story building having a skylight in its tinned roof, and then into a three story brick building; the sides of the entire store were flush, and even the whole way from front to rear, one side and the rear of brick, the other side, for most of the way and perhaps all, of lathing and plaster, and the front of granite; that the store, as above described, might ordinarily and legally be described in an insurance policy as a "store contained in three

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story granite building;" that the defendant's agent e
person the premises, when the insurance was effecte
self wrote the policy and the description therein; t
the goods destroyed by fire, to an amount not exce
were in the rear of the iron columns; that there wei
goods, such as are usually kept and sold in such a st
the loss on them was $100; that the total loss by fi
and that the *pro rata* amount, for which the defen
ble, was $1620.

The Superior Court ordered judgment for the pl
award; and the defendant appealed.

S. B. Allen & J. D. Long, for the plaintiff.

W. F. Slocum & W. S. Slocum, for the defenda

GRAY, C. J. The "three story granite buildi
in the policy, might designate a building with
only, and three stories high in the front and re
one story high in the middle.

The arbitrator having found that such was
property of the kind described in the policy, a
store contained in the building, was covered b
without regard to any previous conversation bet
ant's agent and the plaintiff.

But the policy includes nothing but the
wrought, raw and in process," and does not
goods made of other materials, although such a
and sold in a retail hair store. As it does not
goods consisted exclusively of wrought hair, a
sum which the arbitrator finds to have been
loss upon fancy goods must be deducted fr
his award, and there must be

Judgment for the pla

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PATRICK O'CONNOR *vs.* O. P. ROBERTS & another.

Suffolk. March 30. — April 7, 1876. COLT & LORD, JJ., absent.

A laborer cannot recover against a firm of contractors for personal injuries resulting from the negligence of their foreman, who is his fellow-servant.

TORT for personal injuries sustained by the plaintiff, a laborer in the employ of the defendants, who were contractors, engaged in digging a trench. Trial in the Superior Court, before *Rockwell*, J., without a jury, who allowed the following bill of exceptions:

"One Roberts was the foreman of the defendants, and had charge of the gang of workmen to which the plaintiff belonged, and he had directions from the defendants and acted continually under these directions. The plaintiff testified that he was at work in the trench, which uncovered an old sewer, at a place where the trench had been dug, some seven feet deep; that the foreman directed him to leave that place, and go farther up along the trench, where it had not been dug so deep, and shovel some dirt out that had fallen in; that at the top of the ground a crust, about a foot in thickness, was harder and more compact than the dirt and sand below, which latter had caved in, leaving the crust hanging over; that he told the foreman the top ought to be broken in before shovelling the dirt and sand out, but the foreman said there was no fear; that he made some attempt to bring down the crust, but the foreman said he would risk it; that while in the act of throwing out a shovelful of the dirt, a portion of the crust fell upon his legs, and threw him down upon the old sewer, and pinned him there till he was released by others, and that he was injured. There was other testimony in the case, introduced by both sides, and some of it conflicted with the above testimony of the plaintiff, particularly in regard to the declarations and directions of the foreman at and before the time of the accident.

"Upon the whole evidence the judge found as matters of fact that the plaintiff was injured, that the injury was caused by the negligence of the defendants, and that the plaintiff was at the time in the exercise of due and ordinary care; and that these

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facts were proved affirmatively by the plaintiff by t
derance of evidence.

"The defendants asked the judge to rule that the
ing injured by his own negligence or the negligence o
servant, could not recover of his employers; that a
tiff noticed the danger, and the condition of the ba
and yet continued to work, and was injured in
thereof, he could not recover. But the judge d
rule, as the request for instructions assumed facts v
exist, and found for the plaintiff in the sum of $1
fendants alleged exceptions."

C H. Chellis, for the defendants.

L. M. Child, for the plaintiff.

By the Court. There is no evidence of any
the part of the defendants, other than the negli
foreman, and the foreman is a fellow-servant of th
whose negligence he cannot recover in this act
Agawam Canal, 6 Cush. 75. *Summersell* v. *Fish*,
Exceptio

RUTH A. DAVIS *vs.* JAMES R. STO

Suffolk. March 31. — April 10, 1876. COLT & L

An order of this court, that a case "must stand for trial," o
defendant failed to show a legal justification for his act, leave
and does not limit the trial to the question of damages only.

In an action by A. against an officer for attaching the plaintif
against B., there was evidence that the officer went to A.'
temporarily residing, and told A. that he was an officer a
B.'s furniture; that A. said she owned all the goods there,
to take them; that he asked her to point out her goods and
would not give him any information as to what were her go
that the officer thereupon attached all the furniture as the
which in fact belonged to A., and some to B. *Held*, that
a finding that A. had not unlawfully or fraudulently inte
those of B., and that she might recover for the taking of

An officer, after attaching furniture in a dwelling-house i
placing a keeper over it, neglected to remove it or to tak
removal for seven hours in the middle of the day. *He*
the officer delayed for an unreasonable time to remove
became a trespasser.

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TORT. The declaration contained two counts. The first was for the conversion of certain articles of furniture. The second count alleged that the defendant forcibly and against the will of the plaintiff entered into the house, lawfully in her possession and occupation, and caused one other person also to enter forcibly said house, and that the defendant and said other person remained, contrary to the will of the plaintiff, in said house for four hours; and kept her from the use and enjoyment thereof during that time, and seized and carried off various articles of furniture belonging to her, and created great riot and disturbance in and about said house, to her great injury. The answer contained a general denial, and alleged that the defendant took the goods as constable of the city of Boston, as the property of one Jenkins, by virtue of a writ in favor of one Teller against said Jenkins; that he lawfully entered the house occupied by the plaintiff, and, finding there some goods claimed by the plaintiff intermingled with those of Jenkins, requested the plaintiff to point out to him such articles as she claimed as her own, which she refused to do, and that thereupon he took them into his possession.

At the first trial of this case, the defendant offered no evidence to show that any of the goods attached were in fact the property of Jenkins, but only that he attached them as his property. The judge ruled that the defendant was not justified in taking the property, and reported the case for the consideration of this court, the case to stand for trial, if the defendant was not so justified. This court held that the defendant had failed to show any legal justification, and ordered the case to stand for trial. 117 Mass. 486.

When the case came on again for trial in the Superior Court, before *Putnam*, J., without a jury, the plaintiff contended that she was entitled to judgment without a further hearing, and that it was not competent for the defendant to show that any of the goods attached were the property of Jenkins. The judge ruled otherwise.

It was then agreed that the facts stated in the former report of the case were true. So far as they appear to be material they are as follows: "He [the defendant] testified that he went to the house, with a keeper, for the purpose of making the attach-

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ment; that the plaintiff at first refused him admittan
he finally gained it, as he alleged, in a peaceable man
entering he told her that he was an officer, showed h
and said he had come to attach the furniture of Jer
was there. The plaintiff replied that she owned a
there, and told him not to take them; if he did, he
for it; to which the defendant replied that he had
take her goods, that he did not come there for that
if she would be kind enough to tell him which we
he would not take them. She replied that she sho
him any information as to what were her goods ar
not. The defendant then said that he should use h
ment, as he was satisfied that there were goods the
to Jenkins. He thereupon attached them, and put
possession. The plaintiff, immediately after his fi
locked the door through which he entered, and ta
and refused to let him go out, and he left the hou
open window. This was not later than half pa
morning. In the afternoon, between four and fi
returned to the house with a horse and wagon to
goods, but was again refused admittance by the
thereupon he went and procured the services of a
picked the lock, and he entered and removed th
with him the goods in controversy.

"The goods which the defendant attached as t
kins were in the parlor on the first floor of the
were also some of the goods in controversy, al
taken away by the defendant. The defendant
the property of Jenkins, and took away other go
tiff, which he now concedes to be the property
which were in a chamber on the second floor
tially, everything in the chamber, the door o
locked by the locksmith whose services had b
the defendant. Before he removed said good
ber, he asked the plaintiff to tell him which we
were Jenkins's goods, but she refused to give
tion about it, except that he must proceed at
agreed that the plaintiff hired this house and w
of it; and that, at this time, Jenkins with h
the plaintiff, were temporarily residing with t

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The judge found, upon these facts and the other evidence offered, that a portion of the property attached (being all of it excepting what the plaintiff sued for as her own) was the property of Jenkins.

The defendant thereupon asked the judge to rule that the defendant was entitled to judgment upon both counts; but the judge ruled otherwise, and ordered judgment for the plaintiff upon the first count for $80.50.

Upon the second count the plaintiff asked the judge to find that the defendant kept the goods, attached by him in the plaintiff's house, an unreasonable length of time, and that the plaintiff was therefore entitled to damages upon the second count; but the judge ruled otherwise, and found for the defendant upon this count. Both parties alleged exceptions.

C. H. Drew, for the plaintiff.

P. Thacher, for the defendant.

GRAY, C. J. The order, made when this case was formerly before us, that it should stand for trial, left the whole case open, and did not limit the trial to the question of damages only. *Davis* v. *Stone*, 117 Mass. 486.

Upon the facts admitted or appearing upon the trial, the judge may rightfully have found that the plaintiff had not unlawfully or fraudulently intermingled her goods with those of Jenkins, and that she might therefore recover for the taking of her goods by the defendant. *Shumway* v. *Rutter*, 8 Pick. 443, 448. *Smith* v. *Sanborn*, 6 Gray, 134. His rulings in matter of fact are not open to revision here. *Whiton* v. *Nichols*, 3 Allen, 583. *Hoar* v. *Goulding*, 116 Mass. 132.

But the occupation of the plaintiff's house by the defendant with a keeper for seven hours in the middle of the day in the city of Boston, without making any attempt to begin to remove the goods, or, so far as appears by the bill of exceptions, taking any steps towards such removal, was, as matter of law, unreasonable and made the defendant a trespasser. *Williams* v. *Powell*, 101 Mass. 467.

The result is that the defendant's exceptions must be overruled, and the

Plaintiff's exceptions sustained as to the second count only.

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PETER WAINWRIGHT & another *vs.* S. SALISBURY MAN & others.

Suffolk. Nov. 17, 1875. March 18. — April 18, 1876. Co JJ., absent.

Where legacies are given to the same person by different instrume rule is that the second is to be treated as additional to the first, ir anything signifying a different intention; but the apparent intentio must govern.

A will contained a bequest of $5000 to A. in trust, to pay the incon and after his death to convey the principal in equal shares to his ter; a devise of a house in G. to C.'s wife for life, with remain a pecuniary legacy to a servant; and a residuary devise and beq sons. By a codicil the testator bequeathed $7000 to A. and B. i income to C., with no provision as to the remainder after his d the house in G. to him, and gave to the servant named in the tional, making in all $1000." *Held*, that the bequest of $500 wholly revoked by the codicil; that C. was entitled to the incon and that the residue of that sum, after his death, would go to the

BILL IN EQUITY by the executors of the will o to obtain the instructions of the court.

The will was dated July 25, 1867, and containe provisions not material to be stated, the followin

"16. I give and bequeath to John F. Tucker five thousand dollars, to hold to him, his execu tors and assigns, in trust that he and they sha invested in some safe manner likely to yield a and shall pay the net income thereof, as it accru S. Salisbury Tuckerman, during said Salisbu and after his death in trust that the said trus the time being shall pay and convey one half five thousand dollars, however invested, to I wife of said Salisbury, and the other half t becca Lee Tuckerman; I direct that the sai man be not required to give any surety to his the judge of probate.

"17. I give and devise the place in Gloue Lee Cottage, to said Laura Tuckerman, to her natural life; and after her death, I give ple to such children and the issue of any d

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dren of said Laura as may survive her, children, if more than one, taking equal shares, and the issue of any deceased child taking its parent's share by representation."

"19. I give my faithful domestics, Maria Elliot and Alice Comnisky, three hundred dollars each, and I give an additional hundred dollars to each one of them who may be living with me at the time of my decease."

"21. All the residue and remainder of the estate which I may leave at the time of my decease, of every description, real, personal and mixed, I give, devise and bequeath one half to my said niece Ellen Frances Lee, her heirs and assigns, and one quarter each to the said Jane F. King and Mary F. Tuckerman, their heirs and assigns."

On February 13, 1872, the testatrix made the following codicil: "I hereby give and bequeath to Alice Comnisky, in addition to the legacy mentioned in my will, in token of her faithful, kind and devoted services in my behalf, the sum of four hundred dollars."

On October 4, 1872, the testatrix made a second codicil as follows: "Circumstances in my family seem to render it necessary for me to add another codicil to my will. I wish seven thousand dollars ($7000) to be in the hands of J. F. Tuckerman, of Salem, and of G. Tuckerman, of New York, the interest of which to be paid to S. Salisbury Tuckerman semi-annually; the house in Gloucester, called Lee Cottage, also to S. S. Tuckerman; I also give to my faithful and kind nurse, Alice Comnisky, two hundred dollars additional, making in all one thousand dollars."

The will, with the two codicils, was admitted to probate on December 28, 1874. The question presented by the bill was whether the second codicil was intended to be cumulative and in addition to the provision made for S. Salisbury Tuckerman by the sixteenth clause of the will; or was a substitute for that clause, and operated an entire or partial revocation thereof; there being ample property of the testatrix in the plaintiff's hands to pay all the legacies, whatever construction might be put upon the clauses in question.

The defendants all appeared and filed answers admitting the facts alleged in the bill, and the truth of the copies annexed. The answer of J. F. Tuckerman and G. Tuckerman disclaimed

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all interest in the suit, and all intention of accepting of trustees, as given them in the will and codicil. T of S. Salisbury Tuckerman claimed that the gift to hi in trust, by the codicil, was in addition to, and not in of, the gift of $5000 in trust, made by the will, and sums should be placed in trust for his benefit. Th Laura Tuckerman also claimed that the gift of $7(in revocation of the gift of $5000, but that both an given in trust. The answer of the minor, Rebecca l man, by her guardian *ad litem*, duly appointed, subm rights to the court. The answer of Ellen F. Lee, J and Mary F. Tuckerman, the residuary legatees, the gift of $7000, made by the codicil, was in revo gift of $5000 made by the will, and that the said s was to be kept in trust only for the life of S. Salis man, and at his death should be paid to them as r tees.

The counsel for all the parties signed and filed the following statement of facts:

"Miss Rebecca Lee, the testatrix, was a singl eighty years of age, and at the time of her decea many years had been, a resident of Boston. H kin and heir at law was a niece, the defendant El has always resided in England. Her only relativ try were the defendants John F. Tuckerman, Gr man, S. Salisbury Tuckerman, Jane F. King and erman, together with Samuel Tuckerman, a leg party to this suit, who were all children of a and Rebecca Lee Tuckerman, minor daughter Tuckerman.

"John F. Tuckerman lived in Salem, Massa vus Tuckerman in New York; Samuel Tuck King and Mary F. Tuckerman lived in Bosto living with the testatrix for many years prior cease of the latter. At the date of the will Salisbury Tuckerman and his family were re ter, Massachusetts, living in the house owne and called Lee Cottage in the will and codi ued to be his residence up to January, 1872.

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wife, the defendant Mrs. Laura Tuckerman, sent word to one of his brothers that she had apprehensions that her husband was not sane, and that she was not safe while living with him, and requesting that steps be taken for his removal to a lunatic hospital. Such steps were taken, and he was in consequence so removed during the same month, after medical examination and due legal proceedings, on the petition of his wife, two of his brothers taking an active part with her in the same, and his other brother and both his sisters knowing of and not opposing it. Mr. Tuckerman submitted to the removal, but claimed then and since that there was no necessity therefor, and that his wife's apprehensions were pretended only, while she has constantly adhered to her first statements as to his insanity at that time, and as to the danger of her living with him. Mr. Tuckerman was confined at the hospital until August, 1872, when he was released at the request of certain of his brothers and sisters. During that confinement, and from the time of his release up to October 4, 1872, there was no communication, except once by letter and reply, between him and his wife, and since his release, up to said October 4, they have lived apart by the wish of both. That all of the above facts were known to the testatrix is agreed; and so far as competent, they and the fact of her knowledge of them may be considered as proved."

The cause was heard and reserved for the consideration of the full court by *Devens*, J., upon the bill, answers, general replication, and the foregoing statement of facts, to be considered by the court so far as might be competent and material in aid of the construction of the will and codicils.

The case was argued at the bar in November, 1875, and decided in January, 1876. The wife and child of S. Salisbury Tuckerman moved for a rehearing, and arguments upon that motion were submitted in writing in March, 1876.

J. Willard, for S. S. Tuckerman. It is held or conceded in every case on the subject that a legacy given *simpliciter* by a codicil is cumulative on that in the will. *Hurst* v. *Beach*, 5 Madd. 351. *Suisse* v. *Lowther*, 2 Hare, 424. *Lee* v. *Pain*, 4 Hare, 201. *Roch* v. *Callen*, 6 Hare, 531. *Tweedale* v. *Tweedale*, 10 Sim. 458. This is a rule of construction, not of mere presumption, and can only be controlled by intrinsic evidence of

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intent to substitute. *Lee* v. *Pain*, 4 Hare, 201, 216, *per* V. C. *Hall* v. *Hill*, 1 Dru. & War. 94, 113, 116, 124, Lord Chancellor Sugden.

The rule, so precisely defined in *Hurst* v. *Beach*, was first laid down in *Masters* v. *Masters*, 1 P. Wms lowed by *Ridges* v. *Morrison*, 1 Bro. Ch. 389, na legacies by distinct instruments are cumulative even w same amount. In *Hooley* v. *Hatton*, 1 Bro. Ch. 39 leading case, the rule was firmly settled by the opi Chancellor, aided by the judges of the King's Ben chequer. Thus legacies were held cumulative in *Cu* 2 Bro. Ch. 225, where the second legacy was lar given in the same instrument; in *Foy* v. *Foy*, 1 C *Lord* v. *Sutcliffe*, 2 Sim. 273; and *Tweedale* v. *T supra*, where a larger legacy was given by codicil; *lie* v. *Butterfield*, 1 Cox Ch. 392, where the second the same amount in the codicil as in the will. T was fully sustained in *Lee* v. *Pain*, and *Suisse* v. *supra*. In the latter case, no less than eight legacie person were held cumulative because by different containing the same, and others different amounts mer, a legacy in a codicil of the same amount as t was held cumulative, though the same codicil ex several other legacies.

The exceptions, or apparent exceptions, where evidence shows the second legacy to be substituti cible to a few well defined classes, in all of whic clearest intrinsic evidence of the identity of the t

1st. Where the same specific articles as are gi are again given in the codicil containing a secon same amount as the first, or the second legacy cause as well as amount and person as the first *Beauclerk*, 2 Atk. 636. *Jackson* v. *Jackson*, *Coote* v. *Boyd*, 2 Bro. Ch. 521. *Currie* v. *P Attorney General* v. *Harley*, 4 Madd. 263. *L rey*, 2 Sim. & Stu. 311. *Kidd* v. *North*, 14 force of the general expressions in *St. Albans supra*, are much shaken by *Hooley* v. *Hatton*, note, and *Le* v. *Pain*, 4 Hare, 240, 242.

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2d. Where the codicil, simply to define further gifts indefinitely specified in the will, repeats them, the same in amount, but in more express terms. *Moggridge* v. *Thackwell*, 3 Bro. Ch. 517. *Osborne* v. *Leeds*, 5 Ves. 369. *Fraser* v. *Byng*, 1 Russ. & Myl. 90. *Heming* v. *Clutterbuck*, 1 Bligh N. R. 479. *Tatham* v. *Drummond*, 33 L. J. (N. S.) 438. Or repeats them, omitting only those to persons deceased since the date of the will. *Barclay* v. *Wainwright*, 3 Ves. 462. *Gillespie* v. *Alexander*, 2 Sim. & Stu. 145.

3d. Where in the later instrument there are clear terms of revocation of the earlier gift. *Robley* v. *Robley*, 2 Beav. 95. *Russell* v. *Dickson*, 4 H. L. Cas. 293. The rule does not apply where the gifts are in the same instrument. *Garth* v. *Meyrick*, 1 Bro. Ch. 30. *Greenwood* v. *Greenwood*, 1 Bro. Ch. 30, note. *Holford* v. *Wood*, 4 Ves. 76. *Brine* v. *Ferrier*, 7 Sim. 549. *Yockney* v. *Hansard*, 3 Hare, 620, 622. *Heming* v. *Clutterbuck*, 1 Bligh N. S. 479. *Manning* v. *Thesiger*, 3 Myl. & K. 29. Or the second instrument is a mere contemporaneous duplicate of the first. *Whyte* v. *Whyte*, L. R. 17 Eq. 50. Or is itself a will superseding the first. *Robley* v. *Robley*, 2 Beav. 95. *Russell* v. *Dickson*, 4 H. L. Cas. 293.

Most of these exceptional cases are fully reviewed and commented on by Vice Chancellor Wigram in *Suisse* v. *Lowther* and *Lee* v. *Pain*, *ubi supra*, and by Sir Roundell Palmer, *arguendo*, in *Wilson* v. *O'Leary*, L. R. 7 Ch. 448. The construction of cumulation prevailed even where a second codicil gave "in addition to the will," omitting any reference to the first codicil; and gifts by all these instruments were held cumulative. *Spire* v. *Smith*, 1 Beav. 419. *Watson* v. *Reed*, 5 Sim. 431.

The general rule has been held unimpaired to the very latest English cases. *Lobley* v. *Stocks*, 19 Beav. 392. *Johnstone* v. *Harrowby*, 1 De G., F. & J. 183. *Wilson* v. *O'Leary*, L. R. 7 Ch. 448. The American cases are uniformly to the same effect. *Dewitt* v. *Yates*, 10 Johns. 156. *Quincy* v. *Rogers*, 9 Cush. 291, 296. *Cunningham* v. *Spickler*, 4 Gill, 280.

While such is the rule, if the two gifts are given *simpliciter*, all circumstances of difference between the two gifts strengthens the construction of cumulation. *Suisse* v. *Lowther*, 2 Hare, 424. *Lee* v. *Pain*, 4 Hare, 223. *Hodges* v. *Peacock*, 3 Ves. 735,

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Strong v. *Ingram*, 6 Sim. 197. *Wray*
Mackenzie v. *Mackenzie*, 2 Russ. 262.
462. *Attorney General* v. *George*, 8 Si
1 Myl. & K. 589. *Radburn* v. *Jervis*, 3

In the present case, the testatrix hersel
of circumstances," appoints two trustee
there was but one by the will, and mak
remainder, whereas that by the will wa
parol evidence is admissible and relevar
and a distinct intent to benefit the life te

L. S. Tuckerman, for the residuary leg

C. A. Welch, for Laura Tuckerman and
man.

GRAY, C. J. When legacies are giv
ments, the general rule is that the secc
additional to the first, in the absence of
different intention; but in this, as in all
struction of testamentary instruments, th
the testator must be the guide of the cou
rules are generally recognized. It is suffi
cases of the highest authority. *Hooley*
390, note; *S. C.* 2 Dick. 461; Lofft, 1
Bro. Ch. 521. *James* v. *Semmens*, 2 H. E
Thackwell, 1 Ves. Jr. 464. *Heming* v. *Clu*
479. *Fraser* v. *Byng*, 1 Russ. & Myl. 90
2 Dru. & War. 133; *S. C.* 4 Irish Eq. 33

It would serve no useful purpose to rev
titude of cases cited in the elaborate argu
of them, on examination, are quite disti
case before us; and many of them, as ju
Chancellor Sugden in *Russell* v. *Dickson*, ab
position to get rid of the difficulty of deter
ing of the testator, by holding legacies t
thus to cut the knot rather than to untie it

In the present case, the will contains a
John F. Tuckerman, in trust, to pay the i
Tuckerman for life, and after his death to
in equal shares to his wife and daughter;
in Gloucester to the wife for life, with rem

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and a residuary devise and bequest to other relations of the testatrix.

By the second codicil, the testatrix bequeaths $7000 to John F. Tuckerman and Gustavus Tuckerman, in trust, to pay the income to S. Salisbury Tuckerman, with no provision as to the remainder after his death; and devises the house in Gloucester to him.

The intention of the testatrix that the provisions of the second codicil should be a revocation of and substitute for the sixteenth and seventeenth clauses of the will is apparent, 1st, from the improbability that she would create for the benefit of S. Salisbury Tuckerman two distinct trusts of moderate sums, and differing only, so far as he is concerned, in adding a trustee in the second to the one named as sole trustee in the first; 2d, by the devise to S. Salisbury Tuckerman, in the codicil, of the house in Gloucester, which by the will had been devised to his wife and her issue, — thus necessarily, and without express words of revocation, superseding the devise in the will, because inconsistent therewith; 3d, by the fact, not of itself decisive, but entitled to some weight, that the legacy in the codicil to Alice Comnisky is most explicitly declared to be additional to the legacies previously given to her.

It is unnecessary to determine how far the facts agreed are to be taken into consideration; because, to say the least, there is nothing in them to weaken the conclusion required by the provisions of the instruments themselves.

It follows that the bequest of $5000 by the will must be held to have been wholly revoked by the second codicil; that S. Salisbury Tuckerman is entitled to the income of $7000 only; and that the residue of that sum after his death will go to the residuary legatees. *Decree accordingly.*

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HANNAH C. GODFREY *vs.* JAMES L. MUNYAN & others.

Hampshire. Sept. 21, 1875. — May 8, 1876. AMES, DEVENS & LORD JJ., absent.

A poor debtor duly presented himself for examination at the time and place to which a hearing, pursuant to a notice given under a recognizance entered into in accordance with the Gen. Sts. *c.* 124, § 17, had been adjourned at his request, but against the objection of the creditor. The magistrate who granted the continuance was present, but declined to act, having ceased to be a magistrate by reason of a change of domicil, and another magistrate assumed to order a continuance. *Held*, that he had no authority to do so; and that there was a breach of the recognizance, no magistrate competent to act being present, although this happened through no fault of the debtor.

CONTRACT on a recognizance entered into under the Gen. Sts. *c.* 124, § 17, by the defendant Robert H. Aldrich, as principal, and the defendants Munyan and Edwin D. Warfield, as sureties, and conditioned that Aldrich, who had been arrested on an execution in favor of the plaintiff, should, within thirty days from the day of his arrest, deliver himself up for examination before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the time fixed for his examination, and from time to time until the same was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon. The case was submitted to the Superior Court on an agreed statement of facts, in substance as follows:

The plaintiff was duly notified of the defendant's desire to take the oath for the relief of poor debtors before Oliver Pease, on February 27, 1874, at ten o'clock in the forenoon, at the office of S. T. Spaulding, Esquire, in Northampton, and on that day the parties appeared, and the case was thence continued to March 13, 1874, at the same place, when the creditor filed charges of fraud, and upon them issue was joined, the debtor pleading not guilty.

The examination of the defendant, which was taken wholly in writing, was thence continued to April 1, 1874, at the same hour and place, at which time sundry witnesses were examined orally on behalf of the creditor, and gave testimony which was compe-

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tent and tended to sustain the plaintiff's charges of fraud. The case was thence further continued at the request of the debtor, to enable him to secure the attendance of the defendant Warfield, a material witness on behalf of the debtor, as was alleged, to May 27, 1874, at the same hour and place, against the objection of the creditor, who desired to proceed from day to day with the examination and evidence. Before May 27, Oliver Pease, who was a resident of Amherst, removed his domicil thence to Belchertown, and, on May 27, at said time and place, he attended; but as he did not act, and declined to act for the reason that he had changed his residence and removed from Amherst, A. Perry Peck, another trial justice for said county, was requested by the debtor to attend, and did attend at that time and place, and ordered the examination on said application and charges of fraud to be continued to Wednesday, June 24, 1874, at said hour and place. The debtor and his counsel were present when said order for continuance to June 24, 1874, was made.

The creditor objected in writing to the jurisdiction of Pease, and also to that of Peck, who is a joint debtor in this judgment and execution, and in no way relieved from his liability thereon, and had been examined orally before Pease as a witness called by the plaintiff on the said application and charges of fraud. The creditor did not further appear at any subsequent time and place, claiming that the debtor had made default. On said June 24, neither Pease nor Peck attended, and one Dwight, another trial justice, at the request of Aldrich, attended at said time and place, and certified that he attended in the absence of A. Perry Peck, and at the time and place to which said cause had been continued by said Peck, and that Aldrich desired to take the benefit of the law for the relief of poor debtors.

Dwight was, upon an examination, satisfied of the truth of the facts set forth in the oath to be taken by the debtor, and in the certificate to be made by the magistrate. He there administered the oath, and made a proper record of his proceedings, if he had authority to act in the premises. No notice was given to the creditor of any hearing before, or of any application to, Dwight, except the knowledge of the continuance as before stated. No witnesses were heard by Dwight, and he was not

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made acquainted with the evidence before offered and heard by Pease.

After the expiration of the hour, and after the oath had been administered, but while Dwight, Aldrich and his counsel were there remaining, Mr. Hammond, of the plaintiff's counsel, entered the office, and was informed of what had been done, but made no request, and immediately retired, and did not appear for the purposes of that case.

If default was made in the condition of said recognizance, judgment was to be entered for the amount of the judgment debt and interest; and if there was no default, judgment was to be entered for the defendants.

Brigham, C. J., ordered judgment for the plaintiff; and the defendants appealed.

S. T. Spaulding, for the defendants.

J. C. Hammond, for the plaintiff.

ENDICOTT, J. Oliver Pease, a trial justice of Amherst, had jurisdiction of these proceedings. They were continued from time to time before him from February 27 to April 1, when they were still further continued to May 27. On that date Pease appeared, but declined to act because he was no longer a trial justice, having removed in the mean time from Amherst to Belchertown. Gen. Sts. *c.* 120, § 35. This change of domicil disqualified Pease from further proceeding with the hearing. Having had jurisdiction of the proceedings, there is no provision of the statutes which authorized another magistrate to assume jurisdiction on May 27. *Palmer* v. *Everett*, 7 Allen, 358. The statutes do not make any provision for the continuance of the proceedings when a magistrate is no longer competent to act.

When a magistrate fails to appear at the time and place appointed, another magistrate may continue the proceedings for a time, not exceeding thirty days. St. 1870, *c.* 77. But as a certificate of the continuance must be delivered to the magistrate before whom the process is pending, the statute cannot apply to this case, for Pease had ceased to be a magistrate.

The only question therefore is, whether there was a breach of the recognizance on the part of the debtor, no magistrate competent to act being present on May 27. The defendants contend

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there was not a breach, because the proceedings were brought to a close by no act or omission of the debtor, and several cases are cited to support that position. But those cases are not in point. In *Palmer* v. *Everett*, 7 Allen, 358, the magistrate was prohibited from proceeding by an injunction procured by the creditor. In the other cases, there were irregularities in the proceeding, or the magistrate exceeded his jurisdiction; but in all, the debtor appeared before a magistrate qualified to act. *Doane* v. *Bartlett*, 4 Allen, 74. *Russell* v. *Goodrich*, 8 Allen, 150. *Jacot* v. *Wyatt*, 10 Gray, 236. *Stone* v. *Russell*, 11 Gray, 226. *Skinner* v. *Frost*, 6 Allen, 285.

We are of opinion that this case cannot be distinguished from *Morrill* v. *Norton*, 116 Mass. 487. In that case, the magistrate was absent from the state on the day appointed by adjournment for the hearing; in this, the magistrate had removed from Amherst, and declined to act because he was no longer a trial justice. In both cases, the act of the magistrate rendered it impossible for the debtor to perform the condition of his recognizance, by having a proper magistrate in attendance on the day appointed, qualified by law to take the examination and grant a discharge. And no distinction can be made between the neglect of the magistrate to appear and conduct the proceedings, and his doing an act which rendered it impossible for him to proceed. In either case, the terms of the recognizance, which are absolute, are not complied with. The case was delayed to May 27 at the request of the debtor, and against the objection of the plaintiff; and the debtor was bound, at the peril of breach of his recognizance, to have Pease present on that day, and competent to act. He runs the risk of all such accidents, whether arising from the casual absence or the disability of the magistrate. See *Thacher* v. *Williams*, 14 Gray, 324; *Adams* v. *Stone*, 13 Gray, 396. As Pease was no longer a magistrate, no other magistrate could adjourn the proceedings under the St. of 1870, c. 77, for the reasons previously stated.

As there was a breach of the recognizance on May 27, it is not necessary to the decision to consider the other questions raised in regard to the subsequent proceedings. But we do not intend to intimate they were regular, or that A. Perry Peck, who was jointly liable with the debtor on the original judgment

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and execution which the plaintiff was seeking to enforce, and who had been examined as a witness before Pease on the charges of fraud, could act as a magistrate in any stage of the proceedings. *Judgment for the plaintiff.*

ATLANTA MILLS *vs.* JOHN N. MASON & others.

Worcester. October 5. — 6, 1874. COLT & MORTON, JJ., absent.
Oct. 6, 1874. — May 22, 1876. COLT, MORTON & LORD, JJ., absent.

A motion for a trial by jury on issues of fact in equity should ordinarily be made before the case is referred to a master; and will not be granted after the coming in of his report, if the issue was made by the pleadings, and the case referred to the master without objection, and heard before him at great length, and the evidence before him is not reported, and there is nothing to show that the master's conclusion is unsatisfactory or that the case can be better tried by a jury.

On a bill in equity by the owner of a mill privilege against the owner of another mill privilege, lower down the same stream, to restrain him from maintaining his dam at too great a height whereby the water was set back, the report of a master, to whom issues of fact were referred, found that the setting back of the water was directly attributable to the maintaining of the defendant's dam at a greater height than he was entitled to maintain it, and did not directly negative certain acts of the plaintiff which the defendant contended caused the water to set back. *Held*, that the report sufficiently passed upon the question at issue.

The owner of an estate on a stream, entitled to a share in the water power belonging to an upper privilege on the stream, cannot affect the rights of the other owners in that privilege by a grant to an owner of the lower privilege; nor by declarations *in pais*, made at the sale, as to what the rights of the upper privilege are.

On a bill in equity by the owner of a mill privilege against the owner of another mill privilege, lower down the same stream, to restrain him from maintaining his dam at a greater height than he is entitled to maintain it, the defendant may have alleged infringements by the plaintiff, of his rights in the use of the stream, determined by a cross bill.

If an easement is created by grant, it does not cease, although the necessity for it ceases.

The owner of an upper and a lower mill privilege conveyed the upper privilege, reserving, for the benefit of the lower privilege, all the water, which could be drawn through the waste gate, when the water ran over the rolling dam. *Held*, that the reservation was general, however the lower privilege might afterwards be used.

That unity of titles in the dominant and servient estates should operate to extinguish an easement, the ownership of the two estates should be coextensive; and if a person holds one estate in severalty, and only a fractional part of the other, the easement is not extinguished.

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The owner of an upper and lower mill privilege appropriated to the lower estate the water which would be conducted thither by the tail race of the upper estate, and conveyed the upper estate, but not the land between the tail race and the river, and the only way in which the water used on that portion of the upper estate could return to the river was through the lower estate. The purchasers of the upper estate afterwards opened a trench through the intervening land, against the objection of the owners of the lower estate, to whom the land belonged, by which the water of the tail race was discharged directly into the river. *Held*, that a subsequent purchaser of the lower estate had the right to object to this diversion of the water and to have the trench closed.

BILL IN EQUITY, filed October 27, 1871, against John N. Mason, Thomas J. Harrington, Benjamin Flagg and George A. Flagg, tenants in common of the estate known as the Millbury Cotton Mills. The bill alleged the following facts:

The plaintiff is and for six years past has been seised in fee of certain real estate situated in said Millbury, known as the Atlanta Mills estate. During this time it has had thereon a woollen mill and machinery carried by the water of the Blackstone River. The defendants own and occupy certain real estate in Millbury, situated below said premises on the same stream. The defendants have a right to maintain a dam on their said premises, and to flow back the water in the plaintiff's raceway so far as was flowed by the old dam in said raceway.

The defendants claim the right to maintain a dam across said river to a point much higher than their dam across said raceway, and have in fact, without right, so maintained a dam and set back the water of said stream upon the plaintiff's land, and thereby impeded its machinery and injured it in its business, and threaten to continue thereby to set back upon the plaintiff's land the waters of said stream, which will interrupt and destroy the plaintiff's business and cause it irreparable injury.

The bill prayed that the defendants be enjoined from setting back said waters upon the estate of the plaintiff, and that the court would ascertain and regulate the precise height, if any, to which the defendants might lawfully raise said waters, and cause an account to be taken of the damages hereby caused by the defendants, and for further relief.

The defendants in their answer set up a right to maintain their dam at its then height; and by a cross bill alleged certain injuries to the defendants by the diversion by the plaintiff of water to which the defendants were entitled.

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The case was, at April term 1873, referred to a master "to find the facts in issue." On the coming in of the master's report, the defendants moved, before *Devens*, J., that the case be sent to a jury to determine, upon an issue to be framed, the height at which the defendants were entitled to maintain their dam. The judge ruled that the defendants were not entitled to have this question submitted to a jury, and reserved the question of their right, and the questions arising on the report of the master, for the consideration of the full court.

By direction of the court, the case was first argued on the question of the right of the defendants to have the issue of fact submitted to a jury.

G. F. Verry, for the plaintiff.

W. W. Rice, (*G. A. Flagg* with him,) for the defendants.

GRAY, C. J. Issues of fact in equity may either be tried by a master, and, upon exceptions to his report, by the court; or be tried by a jury. If a party intends to demand a trial by jury, he should ordinarily do so before the case is referred to a master.

The court, in its discretion, may doubtless order an issue to a jury even after the coming in of the master's report, if the evidence produced before the master appears to be conflicting, or his finding thereon is unsatisfactory, or the hearing before him has developed new questions of fact, or if, for other reasons, the court deems it fit that any issue in the cause should be tried by a jury.

But in the present case the issue as to the height of the dam was made by the pleadings, the case was referred to a master without objection by either party, the hearing before the master occupied a month, and the evidence is not reported, so that there is nothing from which the court can see that the master's conclusion is unsatisfactory, or that the issue can be better tried by a jury. Under these circumstances, to supersede the master's report and order a trial by jury, merely because a party who has been fully heard before the master is dissatisfied with the result, would be to grant an unreasonable indulgence to him, and to do great injustice to the other party.

Motion refused.

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The case was then argued on the pleadings and the master's report, by the same counsel. The facts appear in the opinion.

DEVENS, J. The plaintiff and the defendants are owners of privileges upon the same stream, and the grievance complained of in the original bill is that the defendants, owning the lower privilege, maintain their dam at a greater height than they are properly entitled to do, thereby throwing water back upon the wheels of the plaintiff's mill. The parties each derive title from Asa Waters, who in 1833 owned both privileges.

The title of the plaintiff to the upper estate is derived, by mesne conveyances, from a deed of Asa Waters, of the date of 1837, of a portion thereof to Hale and Whipple, consisting of what were then known as the yellow, grinding and finishing shops, and the northwesterly part of the old forge shop. By this deed was conveyed "one half of the water power, and no more, belonging to what is called the Armory dam." The remainder of the upper estate, known as the Armory shop, with the other buildings used in connection therewith, which were operated by water from the Armory dam, was then owned by Asa and A. H. Waters, (one half thereof having been conveyed previously to A. H. Waters by Asa Waters,) and to this portion the plaintiff now has title derived from Asa and A. H. Waters.

At the time of making the deed to Hale and Whipple, Asa Waters owned the lower privilege, then known as the grist-mill privilege, and continued to be the owner thereof until his decease, after which, by authority of the Probate Court, the same was conveyed by A. H. Waters, as administrator of the estate of Asa Waters, in June, 1844, to Luke Harrington, and the title thus conveyed is now held by the defendants.

As it was contended that the defendants were entitled, as against the upper estate, to no greater rights than those which existed at the time of the making of the deed by Asa Waters to Hale and Whipple, it became, at the hearing before the master, a question of fact whether the cotton-mill dam as now maintained by them, which has been substituted for the grist-mill dam, was higher than the grist-mill dam then was, and whether it caused the water to set back upon the wheels of the upper estate more than the grist-mill dam formerly did, thereby impeding them. It was disputed whether the defendants were entitled to main-

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m to the height indicated by a certain bol
bolt, or only to that indicated by the Cun
was five inches lower. It was found by th
ver indicated the height to which the dam
and that as now maintained it was five inche
st-mill dam, thereby causing the water to
the action of the plaintiff's wheels, and t
et back and impeding the plaintiff's wheels,
ould, to the same extent and on the same o
k on and impeded the wheels as they form
e use of the original wheels continued.
ng is not open to the objections suggested
hat it does not clearly appear thereby tha
heels and tail-races had remained as they were
ill dam was built to its present height, it wou
k water upon the plaintiff's wheels; and furthe
aintiff has wrongfully deepened a tail-race d
eels into the river, it does not show that this t
contribute to the injury complained of. Bu
nctly attributes the setting back of the wate
thereby of the plaintiff's wheels, to the add
e dam as now maintained, which is the grie
he plaintiff, and this is sufficient without exp
ther causes which the defendants contend may

defendants purchased their estate, the dam w
eight, and it is contended further by them that,
own in reference to that purchase, the plain
y estopped from asserting that it is too high, e
might properly do so. The defendants purcha
n of D. Atwood, as receiver of A. H. Waters &
, 1868. At that time, Atwood, as such rec
wer privilege, also one half of the Armory shop
upper privilege, together with one half of the
belonging thereto. The other half of the Ar
he upper privilege was owned by Asa H. W
ng portion of the upper estate was that origina
the Hale and Whipple deed. Of this, Atwood ow
shop and one third of the half water power c

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veyed by the Hale and Whipple deed, together with the finishing shop and water belonging thereto. Ruggles & Co. owned the yellow shop, grinding shop, &c., included in the Hale and Whipple deed, together with two thirds of the one half water power conveyed by that deed, subject to the right of water belonging to the finishing shop.

The deed made by Atwood on April 22, 1868, as well as that made contemporaneously to him by A. H. Waters, professed to convey the right to maintain the dam as it then stood, to the height of the Aikin bolt. But as these parties owned but a portion of the upper privilege, such conveyance could not operate as a division of the upper and lower privileges as defined by the dam. It was not in the power of the owner of one estate, entitled to a share in the water power belonging to the upper privilege, to affect the rights of the owners of other estates in that privilege by a grant to the owner of a lower privilege. Holding those rights, the plaintiff is entitled by virtue of them to have the dam reduced to its proper height. In no other way can it enjoy the rights which properly belong to it. The estoppel asserted by the defendants does not affect the plaintiff's whole estate. There is no estoppel which affects the right which it has as grantee of that portion of the estate formerly held by Ruggles & Co.

Nor is the plaintiff estopped by reason of the declarations made by A. H. Waters and W. H. Harrington at the time of the sale to the defendants, substantially, as alleged, to the effect that the dam was then at its proper height. Even if all the facts necessary to constitute an estoppel as against Waters or W. H. Harrington personally existed, they could not affect the plaintiff's right, as grantee of the estate of Ruggles & Co., in the upper privilege. A purchaser without notice is not affected by an estoppel *in pais* which may bind his vendor. *Miller* v. *Washburn*, 117 Mass. 371. Bigelow on Estoppel, (2d ed.) 337, and cases cited. At the time the declarations were made, neither Waters nor W. H. Harrington appears to have been an officer of the plaintiff corporation; neither of them had any ownership in the Ruggles & Co. estate. The plaintiff owned nothing in any portion of these privileges, although it was lessee of part of them. The fact that W. H. Harrington afterwards bought the

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ggles & Co. estate, in 1869, and at a subsequent period, in
71, when he was a manufacturing agent for the plaintiff, con-
yed to the plaintiff, would not charge the estate, as against
e plaintiff, with any estoppel *in pais*.

The plaintiff is therefore entitled to a reduction of the dam
the point where the master finds the cotton-mill dam was
htfully maintained, namely, that indicated by the Cunning-
m bolt, and to the damages as found for its maintenance at a
eater height.

By their cross bill, the defendants allege that certain injuries
ve been done to them by the plaintiff in the occupation of
estate. As these alleged grievances relate to the subject
tter presented by the plaintiff's bill, namely, the rights of the
pective parties in the use of the stream which furnishes the
wer for each privilege, they are properly to be now considered
order that, if they exist, they may be redressed h
intiff, in seeking the aid of a court of equity, shoul
epared to do equity.

The defendants have been deprived by the plainti
ans of, and prevented from raising, the waste gate,
til September, 1871, the owners of the lower estate
ustomed to draw water whenever it flowed over th
n for the use of their privilege. By the deed, made
d Whipple by Asa Waters in 1837, the grantor re
nself the right of drawing water through the waste
e north flume of the old forge shop whenever the
er the rolling dam, and granted the right of shut
ste gate as soon as the water ceased so to run. This
n was for the benefit of the privilege below, and
44, the lower estate was conveyed, the grantee under th
vance was entitled to take the water as provided for
ervation of Asa Waters. Whether or not this right
olutely or reasonably necessary to the enjoyment of the
vilege, is unimportant as affecting the right. *It is i*
of value; it was not created by the fact that it was n
the enjoyment of the lower privilege, but arose from
ss grant made to the defendants, their grantor hav
ht so to grant by virtue of the reservation which he h
the conveyance of the property subjected by it to a ser

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Not arising from necessity, this right does not cease with the necessity, and the defendants are entitled to insist upon being restored by the plaintiff to such position as will enable them to exercise it.

It is argued that the reservation in the Hale and Whipple deed was for the benefit of the grist-mill for which the lower privilege was then used, and that no right could be conveyed to the use of the easement for the purpose of supplying water for the large cotton factory for which it is now used. But the extent of the grantor's right to use the water was in no way limited by the needs of the grist-mill below as it then existed or was then used. The reservation was a general one of all the water which could be drawn through the waste gate, when the water ran over the rolling dam, and was for the benefit of the lower privilege, however that might be used.

Nor has there been any unity of title such as would destroy the right of the owner of the lower estate to this waste water, so that the question whether, when the lower estate was again sold, this right, even if once merged, would be revived, need not be discussed. That unity of title in the dominant and servient estate should operate to extinguish an easement, the ownership of the two estates should be coextensive. When a person holds one estate in severalty and only a fractional part of the other, there is no extinguishment of an easement. Washburn on Easements, 518. In 1868, when the property of A. H. Waters & Co. (consisting of A. H. Waters, T. J. Harrington and Benjamin Flagg) passed into the hands of a receiver, they were the owners of the lower estate and also of the northwesterly part of the old forge shop which was a part of that which was conveyed to Hale and Whipple, and of one third of the one half water power conveyed by the same deed; but the other real estate conveyed to Hale and Whipple, together with two thirds of the one half water power, was owned by Ruggles & Co., and had never been the property of A. H. Waters & Co.

The right which the lower estate possessed was not merely the right to have and use the penstock and gate, but also the right to a certain supply of water from the Armory pond. It was not, therefore, extinguished by this partial unity of title; and when the lower estate was conveyed to Atwood, the receiver, and by

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Atwood to the defendants, with all its privileges and appurtenances, it continued to exist and passed by the conveyance.

Even if the waste gate was situated upon, and the water was drawn through, the portion of the Hale and Whipple estate owned and occupied by the owners of the lower estate, the servitude imposed by the right thus to draw it was upon the whole of the Hale and Whipple estate.

The defendants are, therefore, entitled to be restored to the use of the waste gate, and to such damages as the master finds they have sustained in being deprived of such use.

At the time when the Hale and Whipple deed was made, the water, after being used upon the premises thereby conveyed, was conducted into the mill pond of the lower estate by the tail-race, and the lower estate was accustomed thus to receive it, such water being at that time absolutely necessary for the enjoyment of the lower estate. This water has, since 1857, to some extent, and more largely, since 1871, been diverted from the tail-race and turned into the river. It is thus mingled with the other water, and, although, confined by the dam below, it reaches the defendants' mills, it does so more circuitously and affords them less benefit. Of this diversion the defendants complain; and while the water thus conducted is not necessary to the mill below, the right so to receive it is of value, and its diversion occasions a positive injury for which the master estimates the damages at a certain sum per month.

At the time when Asa Waters owned both estates, in the division, which he had a right to make, he had appropriated to the lower privilege the water which would be conducted thither by the tail-race of the upper estate, and when Asa Waters sold the Hale and Whipple estate, he had a right to receive at the lower estate the water as the flow of it had been arranged. By the Hale and Whipple deed, the land that lay between the tail-race and the river was not sold, and the only way in which the water used on that portion of the upper estate could return to the river was through the lower estate. It was one of the incidents to the proprietorship of the Hale and Whipple estate that its owner should permit the water to pass down the tail-race to the lower mill, and the right thus to receive the water was a part and parcel of the lower privilege. The right which the defend

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ants have was granted to them as part of their estate; it is still beneficial and of value, and is not terminated by their construction of a new dam by which the water in the bed of the river is more effectually confined.

Nor are the defendants deprived of this right by any acquiescence in the acts of the grantors of the plaintiff in the diversion of this water. In 1857, (the new dam having then been constructed,) Harrington, Heald & Co., who then had two thirds of the one half power, opened a trench through land not their own for the purpose of discharging the water directly into the river. At that time A. H. Waters & Co. owned the lower privilege, and also with A. H. Waters that portion of the upper estate upon which this was done by Harrington, Heald & Co., and objected thereto. As against the lower privilege nothing could be gained by this act, and when afterwards the receiver of A. H. Waters & Co. sold the lower privilege, his grantees had the right to object to it. Nor were they estopped to do so under such circumstances, even if, when they bought, the apparent use of this trench was to conduct the water directly into the river. They were not in the position in which they would be if A. H. Waters & Co. had done or consented to the doing of this, and had afterwards sold the lower privilege with this act done by their consent to its disadvantage.

As, when the defendants bought in 1868 of the receiver of A. H. Waters & Co., they had the right to object to the existence of this trench, it does not affect their rights that afterwards, in 1871, A. H. Waters, who then had title thereto, sold the land where this trench was cut to the plaintiff. It is found as a fact that since this purchase the plaintiff has deepened and widened the trench so that the water from the tail-race has been discharged for the most part into the river. To the use of the water thus diverted the defendants are entitled to be restored by closing the trench cut by the plaintiff, and also to the damages as found by the master for its diversion. *Decrees accordingly.*

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WILLIAM TAYLOR & another *vs.* ÆTNA INSURANCE COMPANY.

Plymouth Oct. 19 1875. Jan. 24. — May 5, 1876. GRAY, C. J., did not sit.

A policy of fire insurance contained, after the statement of the property insured and the amount of the insurance, the following clause: "Reference is had to application on file at this office, which is hereby made a part of this policy, and a warranty on the part of the assured." *Held*, that, by force of this clause, the statements in the application, from representations antecedent to the contract, became stipulations forming part of it, and as such, to have any binding force, should, under the provisions of the St. of 1864, *c.* 196, have been set forth in the body of the policy. *Held, also*, that a subsequent clause in the policy, that the insurers were not to be liable "if the insured, in the written or verbal application for insurance makes any erroneous representation materially affecting the risk," did not vary the construction to be given to the contract as to the statements in the written application.

A clause in a policy of fire insurance, that the insured shall, in case of loss, make affidavit stating "the whole value and ownership of the property insured," does not require the insured to make any statements with regard to incumbrances on the property.

CONTRACT upon two policies of fire insurance upon buildings and machinery at Plympton, in Plymouth County, issued by the defendant, a corporation under the laws of Connecticut. The policies each contained, after the statement of the property insured and the amounts of the insurance, the following clause: "Reference is had to application on file at this office, which is hereby made a part of this policy and a warranty on the part of the assured," and the further clauses that the company was not to be liable for loss or damage "if the assured, in the written or verbal application for insurance, makes any erroneous representation materially affecting the risk," and "all persons having a claim under this policy shall give immediate notice and render a particular account thereof, with an affidavit stating the time and circumstances of the fire, the whole value and ownership of the property insured," &c. The applications, which were dated May 16, 1873, and signed "W. & C. K. Taylor, by B. S. Kingman," contained the following questions, against each of which the word "No" was written: "5. Is the property mortgaged; if so, to what amount? 6. Is there any other party interested in this property."

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The property insured was totally destroyed by fire on May 23, 1873. The notices to the company and claim stated that the whole value of the property at the time of the fire was forty-five hundred dollars or more, and that the property belonged to the plaintiffs, and no other person or party had any interest therein.

At the trial in this court, before *Morton*, J., it appeared that the policies were issued by an agent of the defendant in this Commonwealth; and that at the time of the insurance there was a mortgage on the property, duly recorded, for $2500, on which $1800 only had been paid. There was also other evidence bearing upon the question whether Kingman had authority to sign the applications for the plaintiffs, which need not be stated.

The judge reported the case for the consideration of the full court, judgment to be entered for the plaintiffs for $3050, with interest, if the plaintiffs were entitled to maintain their action; otherwise, for the defendant.

The case was argued in October, 1875, and reargued in January, 1876.

B. W. Harris & P. E. Tucker, for the plaintiffs.

C. G. Davis, for the defendant.

COLT, J. This case depends upon the provisions of the St. of 1864, *c.* 196, which regulate the form to be used in all fire policies issued by companies chartered or doing business in this Commonwealth. The statute requires that "the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company shall be considered as a warranty, or a part of the contract, except so far as they are incorporated in full into the policy, and so appear on its face, before the signatures of the officers of the company."

The policies upon which this action is brought were issued upon the plaintiffs' applications filed in the office of the company. The defence is that these applications contained false representations of existing facts, made material by specific inquiries. It is contended that such representations, on general principles, without regard to the forms of the policies or the requirements of the statute, are sufficient to avoid the contract, because as mere representations they form no part of it, but only furnish the basis on the faith of which it is made. If materially false,

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no contract takes effect, and the minds of the parties never meet. *Towne* v. *Fitchburg Ins. Co.* 7 Allen, 51. *Campbell* v. *New England Ins. Co.* 98 Mass. 381, 393. The St. of 1864, it is said, is not applicable, because its provisions expressly relate only to those conditions and stipulations which necessarily make part of the contract, leaving all representations, verbal or written, uncontrolled in their effect upon it.

The point thus taken would deserve attention if the false statements relied on in these applications were, by the true construction of these policies, to be treated as the representations and not the written warranties of the assured. If they are the latter, then it is plain they come within the provisions of the statute; and, if not incorporated into the policy, must be disregarded in determining the rights of the plaintiffs. *Barre Boot Co.* v. *Milford Ins. Co.* 7 Allen, 42. *Kimball* v. *Ætna Ins. Co.* 9 Allen, 540, 551. *Eastern Railroad* v. *Relief Ins. Co.* 98 Mass. 420. *Luce* v. *Dorchester Ins. Co.* 105 Mass. 297. *Mullaney* v. *National Ins. Co.* 118 Mass. 393.

In the written part of each policy, reference is made by number to the plaintiffs' application on file in the office of the company, which is declared to be "part of this policy and is made a warranty on the part of the assured." The statements contained in the application are in no other way incorporated into or made part of it, but the parties have thus agreed to change their character from representations which precede, to stipulations which form part of the contract. The policy is the evidence of the obligations assumed by each, and it is competent for the insurer, by a contract assented to, thus to give a different and increased effect to the application of the assured. *Burritt* v. *Saratoga County Ins. Co.* 5 Hill, 188. *Egan* v. *Mutual Ins. Co.* 5 Denio, 326.

It would be a manifest evasion of the statute, if the defendant were now permitted, in the face of this stipulation, to defeat the plaintiffs' recovery by treating these applications as representations which need not be set out in the contract, instead of warranties which must appear on the face of it, if they are to have binding force.

There is indeed a subsequent clause, in the printed part of the policy, which provides that the company shall not be liable if the

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assured, in the written or verbal application for insurance, makes any erroneous representations materially affecting the risk. But this does not vary the construction to be given to the policy in the respects indicated. The printed clause is broader than the written clause first named; it covers all verbal or written representations outside the formal application numbered and filed in the office. The character of that application and the use to be made of it is alone determined by the written clause first named, and full effect is thus given to both clauses without conflict.

The defendant further contends that the loss upon these policies has not become payable, because, in the proofs of loss, the plaintiffs have incorrectly stated the ownership of the property insured. The policies require them to state "the whole value and ownership of the property insured." This they have done within the meaning of the requirement. They were not required to make any statement in regard to incumbrances. In adopting the defendant's printed form for proof of loss, the plaintiffs have indeed stated that no other person was interested in the property, when it was in fact under mortgage, but there is nothing which makes a misstatement in this respect, contained in the proofs of loss, fatal to the plaintiffs' right of recovery.

In the result to which we come, it is unnecessary to consider whether Kingman, who filled out these applications, is to be regarded as an authorized agent of the plaintiffs in that act.

Judgment for the plaintiffs.

SETH HINCKLEY, administrator, *vs.* CAPE COD RAILROAD COMPANY.

Bristol. Oct. 28, 1873. Oct. 26, 1875. — May 22, 1876. LORD, J., absent.

In an action against a railroad corporation, by the administrator of a person so injured by being struck by a car, while crossing the railroad, that he died almost immediately, there was evidence that the railroad, running north and south, crossed a highway at grade near the railroad station; that, a short distance north of the highway, a side track branched off and crossed the highway a little easterly of the main track, and led into but not through the station; that the station was south of the highway; that the pathway, used by persons going to the station from the highway on the east side, crossed the side track obliquely, the distance to the plat-

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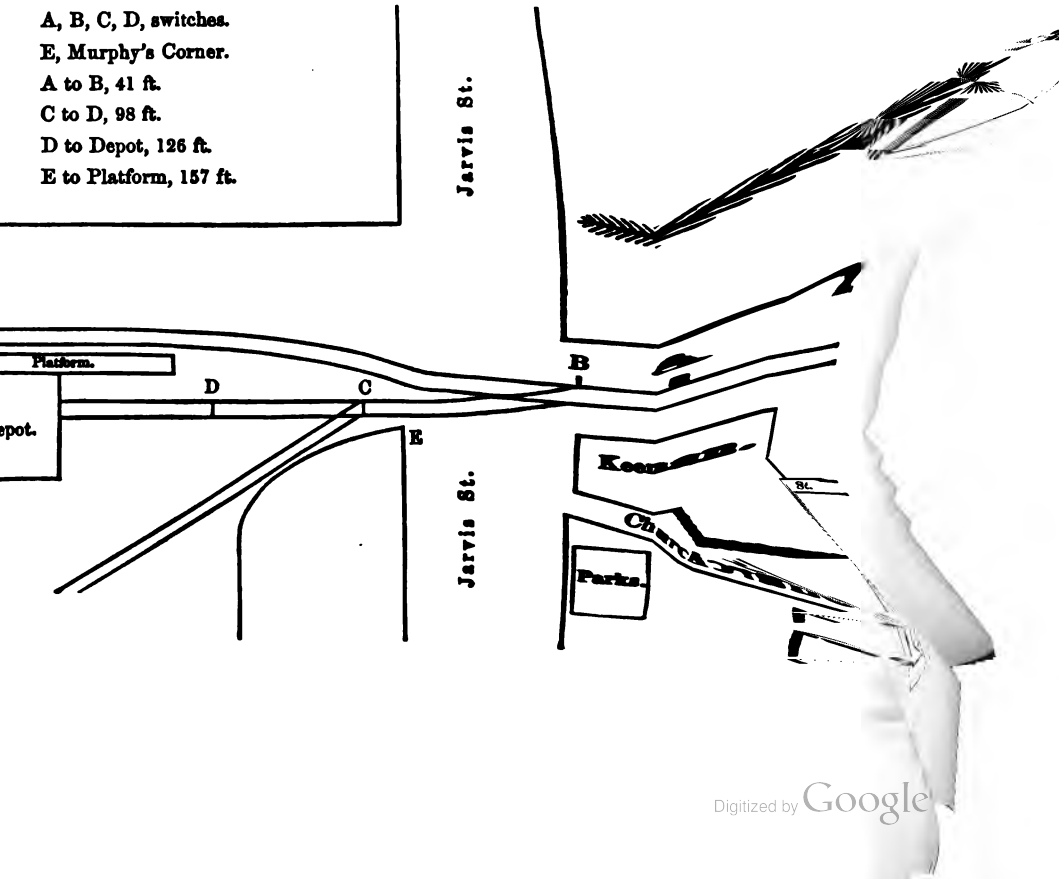
n being one hundred and fifty-seven feet; that at the point where the path left highway one could see up the track to the north for about one hundred and y feet, and from the track itself for half a mile; that the person injured was ng to the station to see his daughter off by a train which w... ground was frozen and slippery; that, as he approached the ..., a freight train was coming from the north, which kept upo... ept a single car, which was switched upon the side track; tha... the side track by the usual path, he was struck by the detach... ving rapidly, and without any signal or warning. *Held*, that ... jury would not be warranted in finding that the plaintiff's in... rcise of due care. GRAY, C. J., and MORTON, J., dissenting.

ORT for an injury occasioned to Philip Hinckl... intestate, by being struck by a car of the defe... rial in this court, before *Colt*, J., who, at the close of the ntiff's evidence, reported the case to the full court upon the tion whether it would be competent for the jury to find that intestate was in the exercise of due care. If s... to stand for trial; otherwise, the plaintiff to beco... nnexed to the report was a plan, a copy of so mu... material appears in the margin.*

A, B, C, D, switches.
E, Murphy's Corner.
A to B, 41 ft.
C to D, 98 ft.
D to Depot, 126 ft.
E to Platform, 157 ft.



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The evidence reported was in substance as follows:

Seth Hinckley testified: "Philip Hinckley, my father, was sixty-eight years old, and was a watchman for the Boston & Sandwich Glass Co. I have lived in Sandwich nearly thirty years, and was born there; am familiar with the premises round the depot there ever since it was built, ten to twenty years ago. For many years the Church Street and East Jarvis Street travel has turned round Murphy's Corner; passed a few paces between the fence and the nearest track by a worn pathway, and then crossed over diagonally, varying a little to the depot platform, crossing the sidings; never knew much change in travel before the accident, except that occasionally people would cross Jarvis Street planking. Most of Sandwich lies west of the track. Father went every day to the passenger trains, had business with the passenger trains, but had no business with the freight trains. From Murphy's Corner we can see north up the track one hundred and fifty feet; a slight curve comes there; can't see to Town Neck, except by going to the track; when there, you can see up to Town Neck, which is half a mile off northerly. There is quite a village east of the railroad, which uses Jarvis Street and Church Street thus; also, five hundred people there employed in the Glass Works; there was never any fence across the regular path of which I have spoken."

James Parks testified: "I live on the north side of Jarvis Street, thirty-five feet from the railroad, and knew Philip Hinckley forty-two years. I was with him fifteen minutes before the event at Hobson's store. I saw him and his daughter go by my house to the railroad; she was about two rods ahead of him then; people that go by my place to go to the platform go in the same direction Mr. Hinckley did; all that part of the town go that way. I next saw him dead. I was in my house, and heard no bell, and couldn't see train; heard rumbling. Have known the premises since the railroad was built; the travel goes there between the switches. When I got there, I saw one of his eyes open, and that he was alive. No flagman was ever at that crossing. I can't say whether the up passenger train from Barnstable was in or not. The siding north of Keenan's is within a few feet of the Cape Cod Glass Works. It was a pretty cold day, and the ground frozen and slippery. It rained the night before.

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day after Thanksgiving. The wind was northwest. Hinckley passed my house, he was heading straight road. When he passed my house, I got up and e him run, him and his daughter. The freight about 3 o'clock, but is not regular, and arrives from

Chase testified: "Philip Hinckley was my father; I o Boston on the day of his death, on the 3 o'clock d my child with me, seven months old, and father anying me to see me safe off in the train. It was r Thanksgiving, and very slippery, some snow y hard. As I was going to the station, bab ar Murphy's Corner; I turned to pick it u d again and saw my father killed; did n't see t y to a man and went to him; I heard no be saw no engine or cars, just before my child at any time that afternoon. It was about 3 o g down Jarvis Street to the platform go just d; you come down Jarvis Street and go acr witches across the same place where my father was little girl aged twelve was with me. I saw father p and then fall over on his side, and try to pick up his left hand. There was no flagman. My father en we started that the train had come. I had not track when he was killed; he had got ahea when I was picking up baby's hat. The y me, but I did not see it. Father had not and turned to go home."

Montague testified: "I have lived in Sandwi years. I was in the base-ball club-room a thought that it was the 3 o'clock train that was ran out and saw Basset throw up his hands, and saw ng; the car was then half way between the switch He tried to speak, but I couldn't make out the en I heard the whistle I thought it was the 3 o'clock is no way in which a carriage can come to the depot hout crossing a track. The base-ball club-room is buildings from the main track on the north side of ."

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John B. Basset testified: "Have lived in Sandwich twenty years. I saw Philip Hinckley in Hobson's store; I came out of it and started to go to the depot, to see the 3 o'clock train from the Cape. I went through Jarvis Street; went between the tracks. The engine went down on the main track south; I saw the box car coming; saw Hinckley crossing the track; called to him, but the wind was blowing, and I don't think he heard me. I stooped down and saw the car go over him. I was fifteen or twenty feet from him; wind northwest, pretty hard, blowing down the railroad. Hobson's store is one hundred yards from Keenan's. I stopped five minutes at Murphy's Corner, when the engine passed, I can't say if with or without cars; I saw the car coming; a clear view up to Town Neck; Mr. Hinckley was ahead of Mrs. Chase, and when he started to cross the tracks I was between the siding and the main track that runs into the depot; the car was between us; he was between the switches, north of the second switch from Jarvis Street; when it struck him it threw him forward. I heard the brakeman in the car hallooing, and turned round; saw the car hit him in the back."

Thomas Bower testified: "I was on the west side of the railroad, between Jarvis Street and the platform; saw Mr. Hinckley as he was crossing; the car was going very fast, and the wind fresh from the north; the brakeman was on the north end of the car; I don't remember any engine passing down; I was watching the car coming in; it was coming quite fast; it went into the depot without stopping; no engine was with it."

There was other evidence tending to show that no bell or whistle was heard, and that Philip Hinckley lived some minutes after he was struck by the car.

The case was argued in October, 1873, and reargued in October, 1875.

T. M. Stetson, for the plaintiff.

G. Marston & C. W. Clifford, for the defendant.

DEVENS, J. Upon the evidence it might fairly have been found by the jury that the defendant was guilty of negligence in permitting its car, by collision with which the injury was occasioned, to traverse the track at a high rate of speed and without proper warning, but mere proof that the negligence of the defendant was a cause adequate to have produced the injury will

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not enable a plaintiff to recover, as it does not necessarily give rise to the inference of due care upon his part, proof of which is essential to his case. It may still be that he was not exercising it, and the injury thus have resulted from the concurring negligence of both parties. *Murphy* v. *Deane*, 101 Mass. 455, 463. While one may, in the exercise of reasonable care, rely to a certain extent upon the performance of his duty by the other, no negligence of such other can be so dominant as to relieve him from his own obligation, and, if a performance of such obligation might have prevented the injury, his failure so to perform must be considered as contributing thereto.

While, however, the plaintiff is to show that he was in the exercise of due care and that no negligence of his contributed to the injury, this may be shown by proving facts and circumstances from which it may fairly be inferred, and, if all the circumstances under which an accident took place are put in evidence, and upon an examination of them nothing is found in the conduct of the plaintiff to which negligence can fairly be imputed, the mere absence of fault may justify the jury in finding due care on his part. *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137. But, if there is only a partial disclosure of the facts, and no evidence is offered showing the conduct of the party injured in regard to matters specially requiring care on his part, the data for such an inference are not sufficient. It can only be warranted when circumstances are shown which fairly indicate care or exclude the idea of negligence on his part. *Crafts* v. *Boston*, 109 Mass. 519.

If there were no evidence that Hinckley had been seen by any one from the time he started from his house until he was found lying on the ground, having been knocked down by the car, it could hardly be contended that there was any evidence of due care on his part. Yet such a case does not differ substantially from that presented by the plaintiff. It was shown that Hinckley, as he approached Murphy's Corner, was in a position to command a view of the railway track for about one hundred and fifty feet, and that as he reached the track it could have been seen for the distance of a half mile to the Town Neck; that Basset, who preceded him, and who crossed the track some fifteen or twenty feet before him, stopped at Murphy's Corner, and

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when there saw the engine and saw the car coming which was detached from the train drawn by it, which car subsequently struck Hinckley. It does not appear, however, that Hinckley, either at Murphy's Corner, at any intermediate point, or when near the track and about to cross, exercised the precaution of looking to see whether anything was approaching, nor were any circumstances shown which would justify him in neglecting the usual and necessary precautions of those who are about to cross a railroad track upon which a train might be approaching. There is an utter absence of evidence as to what Hinckley did from the time his conduct became a matter of importance until his injury, and it is impossible to infer from that offered that he exercised the care and circumspection properly to be demanded from one in his situation.

The cases most relied on by the plaintiff may, we think, be distinguished from this. In *Craig* v. *New York & New Haven Railroad*, 118 Mass. 431, there was evidence that the buildings on either side of the highway prevented the person injured from seeing any engine which might be approaching until he had actually driven upon the railroad track. It had been usual to shut the gates across the highway, or to place a flag or lantern at the crossing, when an engine or train was approaching, and neither of these things had been done. The plaintiff's intestate, who necessarily relied upon the signals made by the defendant, had, therefore, neglected no precaution in entering upon the railroad track. When thus upon it, it was properly held a question of fact for the jury whether he was negligent in proceeding in the manner that he did instead of stopping or turning back. In *French* v. *Taunton Branch Railroad*, 116 Mass. 537, the circumstances under which the plaintiff crossed the track were fully developed. While she could have seen the track at two points a short distance from the crossing, she did not there look; but it was in evidence that she was driving carefully, that she saw a train of cars pass just before reaching the crossing, but saw no flagman and received no warning not to cross, and that she was induced to cross by her belief that one train would not follow another so closely. Having been struck by a car which had been separated from the train for the purpose of making a running switch it was a question of fact for the jury whether a sufficient

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inducement to cross had been given to her by the previous passage of the train and the absence of any warning not to cross, and thus whether she was in the exercise of due care or whether she was careless in having failed to look up the track at the points near the crossing where it was visible. In *Williams* v. *Grealy*, 112 Mass. 79, it was held that it could not be determined that there was error in refusing to rule that a foot passenger, who was injured by a runaway horse at a street crossing, was not in the exercise of due care from the mere fact that she did not look, as she crossed, to see if anything was coming, when it appeared that at the trial there was other evidence, which bore upon the question of due care, which was not reported.

Here the whole of the plaintiff's case is before us. It presents but a partial disclosure of the facts attending the injury. It is shown that Hinckley was struck by the car of the defendant, but the circumstances under which he was thus struck or under which he entered upon the defendant's track are not developed, and there is nothing in the evidence which tends to show due care or the want of it on his part. That there should be some evidence of such care is essential to the plaintiff's case.

For these reasons, a majority of the court is of opinion that the plaintiff cannot maintain his action.

GRAY, C. J. With the greatest deference to the opinion of our brethren, Mr. Justice Morton and myself are unable to escape the conclusion that their judgment is inconsistent with previous decisions of this court and invades the province of the jury, and we therefore feel bound to state, as briefly as may be, the reasons of our dissent.

The only question reserved by the report is whether the jury would be warranted in finding for the plaintiff upon the question of due care on the part of his intestate.

It appears to us that the evidence introduced at the trial would warrant a jury in finding that the intestate was walking on a level path across the defendant's station grounds, by which he and other passengers had been accustomed daily for a long time, with the defendant's knowledge, to approach the station, and which had been left open by the defendant to enable and invite passengers and persons reasonably accompanying them to do so that the defendant had provided no way of access to its station

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in any direction without crossing one or more tracks; that the intestate was accompanying his daughter "to see her safe off on the train," which was then due; that the ground was frozen and slippery, and the wind blowing hard; that he was struck by a car of the defendant, detached from the engine (which passed down the main track) and coming, without any warning, upon a side track (which led into, but not through, the station) at a rate of speed, which one of the witnesses described as "very fast," and which the intestate had no reason to anticipate upon such a track, and at a time and place at which the defendant would be bound to contemplate that passengers and those lawfully accompanying them would probably be approaching the station in accordance with the defendant's implied invitation; and that the intestate was walking towards the platform in a direct line, and so quickly that the approaching car would not strike him, and would not, if he saw it, be supposed by him to be in danger of striking him, if it had not been moving at an improper rate of speed.

In our judgment, the case is not distinguishable in its facts, or in the rule which should govern it, from those of *French* v. *Taunton Branch Railroad*, 116 Mass. 537, and *Craig* v. *New York & New Haven Railroad*, 118 Mass. 431; and nothing was shown, in either of those cases, which a jury might not properly infer from the evidence in this case, applying to it their knowledge of the habits of thought and mind and the natural instincts of men.

The case appears to us to fall within the general rule stated in *Gaynor* v. *Old Colony & Newport Railway*, 100 Mass. 208, 212, that "ordinarily" the question whether the plaintiff has proved due care on his own part "is to be settled as a question of fact in each case, as it arises upon a consideration of all the circumstances disclosed, in connection with the ordinary conduct and motives of men, applying as the measure of ordinary care the rule that it must be such care as men of common prudence usually exercise in positions of like exposure and danger. When the circumstances under which the plaintiff acts are complicated, and the general knowledge and experience of men do not at once condemn his conduct as careless, it is plainly to be submitted to the jury. What is ordinary care in such cases, even though the

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facts are undisputed, is peculiarly a question of fact to be determined by the jury under proper instructions. It is the judgment and experience of the jury, and not of the judge, which is to be appealed to."

The degree of care required of a passenger, or a person lawfully accompanying him, approaching or leaving the station of a railroad corporation by the usual course, is not always the same as at a common crossing of a highway by a railroad. In the case just referred to, it was said by the court that "without doubt, if the situation and aspect of the place were such that, in connection with the actual use, the jury would be justified in regarding them as holding it out to the plaintiff as a suitable place for him, on leaving the cars, to cross, and he was thereby induced to attempt it, the measure of care required of him would be satisfied with far less vigilance and caution." 100 Mass. 214. See also *Chaffee* v. *Boston & Lowell Railroad*, 104 Mass. 108, 115; *Mayo* v. *Boston & Maine Railroad*, 104 Mass. 137, 142; *Wheelock* v. *Boston & Albany Railroad*, 105 Mass. 203; *Prentiss* v. *Boston*, 112 Mass. 43, 47; *Williams* v. *Grealy*, 112 Mass. 79, 82.

For these reasons, we are of opinion that the case should stand for trial; but as a majority of the court is of a different opinion, there must be a *Nonsuit.*

GEORGE GARDNER *vs.* CITY OF BOSTON.

Suffolk. March 9. — May 4, 1876. GRAY, C. J., did not sit. AMES & MORTON, JJ., absent.

An award under an agreement of parties and rule of court cannot be impeached for error in the application of the rules of law, unless the terms of the submission or award expressly or impliedly subject the latter to the revision of the court. The statement of the grounds of the award, or of the conclusions of law adopted by the referees as applicable to the facts found by them, is insufficient.

COLT, J. A case pending in the Superior Court against the city of Boston, upon a petition for a jury to revise an assessment of benefits caused to the petitioner's estate by the extension of a street, was referred to arbitrators, by agreement of the parties

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under a rule of court. They awarded a certain sum as the value of the benefit, and also that the city recover that sum with interest from a given date, making a sum total named in the award.

A motion in the Superior Court to recommit the award with an order to strike out the allowance of interest was denied, and judgment ordered upon the award for the whole amount.

It is contended that, in the absence of statute provisions, or an order of the city fixing a time for the payment of taxes, the arbitrators could not legally award the payment of interest on the amount found by them to be the value of the benefit. Sts. 1862, *c.* 146; 1865, *c.* 159; 1866, *c.* 174; 1868, *c.* 75. *Harvard College* v. *Boston*, 104 Mass. 470. *Boston Seamen's Friend Society* v. *Boston*, 116 Mass. 181.

But the question is not what rule of law would govern if the case had remained and been tried in court. The claim was submitted without restriction or condition to a tribunal selected by the parties. The judgment of that tribunal cannot be impeached for error in the application of the rules of law, unless there is something in the terms of the submission or in the award which expressly or impliedly subjects it to the revision of the court. There is nothing here to show an intention to refer to the court any question whatever. It is not enough that the grounds of the award are stated or the conclusions of law adopted by the arbitrators as applicable to the facts found. *Ellicott* v. *Coffin*, 106 Mass. 365. *Judgment affirmed.*

E. D. Sohier & J. E. Hudson, for the petitioner.

J. P. Healy, for the respondent.

ROBERT SOPER & another *vs.* ATLANTIC MUTUAL FIRE AND MARINE INSURANCE COMPANY.

Suffolk. Nov. 12, 1875.—May 5, 1876. ENDICOTT & LORD, JJ., absent.

A settlement was made by the parties to a policy of marine insurance of their mutual demands, including items for partial losses and premiums earned under the

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policy, with an agreement that it should be cancelled that day. The vessel insured had then been totally lost, of which fact both parties were ignorant. *Held*, that this settlement was a bar to a claim for the total loss.

CONTRACT upon a policy of marine insurance. The case was submitted to the judgment of the Superior Court, and to this court on appeal, upon an agreed statement of the facts, in substance as follows:

The policy issued by the defendant to the plaintiffs was for an insurance of $3000 on the schooner Thriver and her outfits, for a whaling voyage, the risk commencing on November 21, 1870, and to terminate upon her discharge at her port of discharge in the United States. The Thriver, while on the voyage insured, in 1871 and 1872, met with two partial losses amounting to $827, as made up by the adjuster; and on February 3, 1873, the vessel and the outfits insured were wrecked and totally lost by the perils insured against. The plaintiffs were first informed of the loss about twenty days afterward, and thereupon duly notified the defendant, and, after sixty days from the notice, requested of it payment of the amount of the insurance. This the defendant refused, upon the ground that the policy had been cancelled on February 4, 1873. On that day the parties, the president of the defendant company representing it, and both being ignorant of the loss of the Thriver, had met and made the following arrangement: the defendant claimed that the plaintiffs owed it then $1196 for money collected on premium notes as its agents in procuring marine risks in Boston; the defendant also claimed $360, being two years' earned premium on said policy, made up to two years from the date of the policy, or thereabouts, that being about the time when the parties began to consider this settlement and specify their respective claims and make their figures, but which settlement was not consummated till February 4, 1873, and the amount of said earned premium was not changed from what it was put down in the beginning; the defendant also claimed $255 earned premium on a terminated policy on the brig F. H. Moore. The plaintiffs claimed said partial losses on the schooner Thriver, namely, $827. Neither the policy declared upon nor said premium notes were then present; but it was then agreed that said policy should, when found, be cancelled, as set forth in the receipt here

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inafter mentioned, and the cancellation bear date February 4, 1873, and be sent to the defendant. The premium notes were to be given up and sent to the plaintiffs, and the plaintiffs were to pay, and did pay, the defendant $400 cash at that time, and transferred to the defendant what insurance stock they then had in said company, which the defendant shortly after sold at auction for $430, or thereabouts; and the plaintiffs also, at the same time, discharged the defendant from all claims on account of said partial losses, and the parties passed the following receipts:

"Boston, February 4, 1873. Received of the Atlantic Fire & Marine Ins. Co. one dollar and other considerations, in full of all demand for losses claimed on schooner Thriver, and said Soper's stock is hereby transferred to said insurance office as part consideration, and policy on Thriver is to be cancelled this day. R. Soper & Son."

"Boston, Feb. 4, 1873. Rec'd of R. Soper & Son four hundred dollars and other valuable considerations, in full of all claims for moneys collected on premium notes to date, and for notes for premiums on notes on brig F. H. Moore, and for premium notes on schooner Thriver on policy this day cancelled, and all scrip issued to said Soper is to be transferred to said company, and the notes on brig F. H. Moore and on schooner Thriver are to be sent to said Soper on my return to Provincetown. Joshua Paine, President Atlantic Mutual Fire & M. Ins. Co."

About a week afterward the plaintiffs sent the policy to the defendant, having made upon it the following indorsement signed by them: "Boston, Feb. 4, 1873. Cancelled to date."

L. W. Howes, for the plaintiffs.

H. C. Hutchins, for the defendant.

AMES, J. The settlement which was had between these parties February 4, 1873, has the appearance of being intended as a termination of their dealings with each other, and a final adjustment of their mutual demands. The natural and most obvious inference from the mutual surrender and cancellation of papers would be that, on the one hand, the plaintiffs were released from all liability for any premium on the vessel after the period charged in the settlement, and that on the other hand no

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further claim was to be made by them upon the defendant under that policy. *Primâ facie*, the surrender of the policy would signify the surrender of all contingent and unknown claims under it.

It is true that at the date of this settlement neither party knew that the vessel had been lost on the preceding day. But both parties knew that the vessel was on a distant voyage, and was exposed to the perils of the seas. All that they could know was that when she was last heard from she had not been lost. They did not know that she had not been lost since that time. The plaintiffs knew that they were paying for insurance only up to the latter part of the previous November; and they were content to surrender their policy, without making any reservation of any claim under it for any possible or then unknown loss that might have occurred. They knew also that the defendant only gave up all claim for any premium after the c[illegible] second year of the policy, but also gave up $154 whi[illegible] fendant had a perfect right to retain as a partial set-[illegible] any further claim which the plaintiffs could in any e[illegible] against the defendant. There can be no doubt that [illegible] tiffs could release contingent and unknown claims, [illegible] those which had been ascertained, The settlement [illegible] called to their attention the question as to the cont[illegible] the insurance; and though they did not know the f[illegible] loss, they at least knew the continuance of the risk. [illegible] the time for them to insist that they should claim inde[illegible] any loss that might have occurred, not then known; [illegible] tify the defendant that, in surrendering the policy, the[illegible] surrender, but intended to reserve, all contingent and[illegible] claims up to that date. Not having done so, they mu[illegible] sidered as surrendering not only the policy, but all c[illegible] demands arising therefrom. *Judgment for the de[illegible]*

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WILLIAM SCOLLANS *vs.* JAMES J. FLYNN & another.

Suffolk. Nov. 22, 1875. — May 5, 1876. COLT & LORD, JJ., absent.

A guarantor and indorser of a check given with his knowledge in payment of a gambling debt, who pays the check to the holder, upon non-payment by the drawee and protest, cannot recover therefor from the drawer, or a prior indorser.

The payment by A. of B.'s gambling debt, A. knowing it to be such, gives him no ground of action for the money against B.

CONTRACT against James J. Flynn and Mortimer T. Downing on a check drawn by Flynn, for the sum of $400, upon the Freeman's National Bank, payable to the order of Downing and by him indorsed. The check was also indorsed by the plaintiff. The declaration contained three counts. The first count was against Flynn as maker; the second against Downing as indorser; and the third against Downing for money paid to him at his request by the plaintiff. Trial in the Superior Court, before *Allen*, J., who allowed the following bill of exceptions:

"The plaintiff testified that in August, 1874, he went to the races at Springfield, and while there on the field, and in sight of the pool box and the judge's stand, Downing came to him with the check set out in the declaration, and asked him to cash it, saying he owed one Barker; but he said in reply that he had no money. He further stated that he never agreed to indorse the check, but agreed to make it good; that a little while afterwards he went with Downing to Barker, a seller of pools on the field, and stated to him that the check was good, and he would make it good; and that on the morning of the next day, in pursuance of his promise to make good, he indorsed it; and after protest paid $260.26, the amount due Barker on it, and took it up, and never claimed more than the amount so paid; that he did not know what Downing owed Barker for. It appeared that Downing lost by his pools to the value of $260; that Downing put his name on back of the check, and passed it to Barker, but he refused to either give him his pools, the change, or the check. It further appeared that the next morning, without any further conferences with Downing, and none at any time with Flynn, Barker came to the plaintiff and told him to put his name on the back, and he did so. The plaintiff also called one Carson,

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who testified that the defendant Downing came to him to get him to cash the check, which it was not convenient for him to do, but told Downing that Scollans would fix it.

"At the close of the plaintiff's case, the defendants moved for a nonsuit and to take the case from the jury, on the ground that no case had been made, and that there was no consideration at all for the indorsement; that if it was not so, it was a gaming transaction, and void in law. The judge declined so to rule, and ruled against the defendants.

"The defendant Downing then took the stand, and testified that he bought pools, as then stated; that he went to the plaintiff and asked him to indorse the check, and he refused to do so; that the plaintiff refused to cash the check or indorse it, and he never knew of his having indorsed it until some months afterwards, and then repudiated the act.

"The defendants again requested the judge to rule as above stated, and that if the jury believed the transaction was as stated either by the plaintiff or by the defendant Downing, the plaintiff could not recover. But the judge declined so to rule, and instead thereof instructed the jury in substance as follows:

"That if, before Barker took the check, the plaintiff, in the presence and at the request of Downing, said to Barker that he would make it good, and did accordingly indorse the check after Barker had taken it, and afterwards paid the money upon it, he could recover the amount so paid, unless the transaction was tainted with illegality. That the purchase of pools was a gaming transaction, and illegal, and if the check was used for such purchase, and the plaintiff, when he indorsed it, knew or believed that it had been or was to be so used, he could not recover; but if he believed that the check was passed to Barker in payment of a debt due to him from Downing, which had been contracted before the plaintiff took any part in the transaction, he might maintain an action, although it should appear that the debt had in fact been contracted in the purchase of pools, and the plaintiff knew, or had reason to believe, that it had been so contracted."

The jury found for the plaintiff; and the defendants alleged exceptions.

G. W. Searle, for the defendants.

S. J. Thomas, for the plaintiff.

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AMES, J. By the terms of the Gen. Sts. c. 85, § 4, it is provided that "all notes, bills, bonds, mortgages or other securities or conveyances in which the whole or part of the consideration is money or goods won by gaming, or by betting on the sides or hands of persons gaming, or for reimbursing or repaying money knowingly lent or advanced for gaming or betting, or lent and advanced at the time and place of such gaming or betting to a person so gaming or betting, shall be void and of no effect as between the parties to the same, and as to all persons, except such as hold or claim under them in good faith and without notice of the illegality of the consideration." Upon the facts stated in the bill of exceptions, it is manifest that Barker, if he had been the plaintiff, would come within the condemnation of the statute and could maintain no action upon the check declared upon in the first and second counts of the declaration. The selling of pools is admitted to be an illegal and gaming transaction, and the defendant Downing was indebted to him only for pools illegally sold. It appears from the bill of exceptions that the check was delivered to Barker, upon the plaintiff's promise to make it good; but the pools were not delivered, and the transaction was not closed, until Barker had presented the check to the plaintiff, and requested and obtained his indorsement of it. The check, therefore, must be considered as negotiated to Barker by the plaintiff, and Barker received and held it as security for a gaming debt due from Downing to himself.

The question then arises whether the plaintiff stands in any better position. He sues in the first and second counts of his declaration in the capacity of indorsee and holder of the check. As the check considerably exceeded the amount due to Barker, we must infer that the latter accepted it as security for that amount, and that, upon receiving that security, he advanced money of his own, or did whatever was necessary to put the "pool" in the same condition as if Downing had paid for his pools in cash. As the jury were instructed, they were required to find for the plaintiff, if the check was passed to Barker in payment of a debt due to him from Downing which had been contracted before the plaintiff took any part in the transaction, "although it should appear that the debt had in fact been contracted in the purchase of pools, and the plaintiff knew or had

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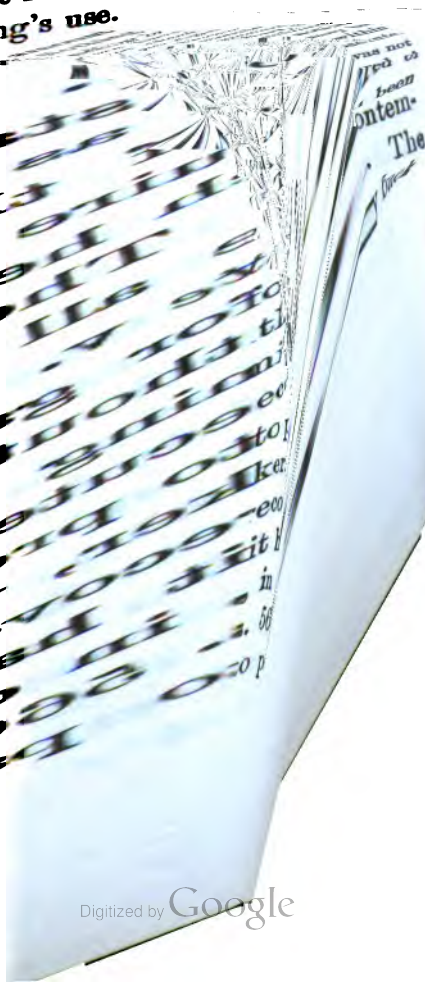
o believe that it had been so contracted." But this in-
n, in our judgment, cannot be sustained. If the purpose
transfer and indorsement of the check was to pay to
money which he had won by gaming or betting, or to
to him the reimbursement of money lent or advanced
son gaming or betting, or lent and advanced at the time
ce of such gaming or betting to a person so gaming or
the check comes within the prohibition of the statute.
material whether the debt which it was intended to se-
l been previously contracted or not. The question as to
dity of the security which the plaintiff seeks to enforce
upon the nature of the debt which it was intended to
and the plaintiff's knowledge of its illegal nature. If he
h knowledge, he was not a *bonâ fide* holder of the check
he meaning of the statute.

e third count of the declaration the plaintiff claims not
as indorsee of the check, but on the ground that he has
sum of two hundred and sixty dollars to Downing's use.
m appears from the bill of exceptions to be the
ning's losses upon his pools, payable to Barker.
clearer than that Barker would have had no sta
enforce the payment of these losses, and, as
seen, he had no right of action as holder of th
any person whatever. The plaintiff can acquire
n against Downing by paying money which he
under no legal obligation whatever to pay. The
ited (Gen. Sts. *c.* 85) was intended to make all
Babcock v. *Thompson*, 3 Pick. 446. *White* v.
48. It not only provides that all securities for g
hall be void, except as to *bonâ fide* holders without
the first section all money, &c., lost at gaming
ed back by the loser; or, if he does not prosecute
nonths, by any other person who may see fit to pr
oney, therefore, paid by the plaintiff to Barker,
oney which he, Barker, could not have recov
g, but which he could not even hold, after it ha
He acquires no such title to it as to make it, in
of law, his money. *Mason* v. *Waite*, 17 Mass. 560
in a gaming transaction can be compelled to p
nings, with the addition of a heavy penalty.



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The defect in the instructions given by the learned judge appears to be that he treated the case as if the transaction had been merely a loan of money by the plaintiff to the defendant. If that had been the real transaction, the fact that the defendant intended to use the money in paying a debt previously contracted, which he was not bound to pay, might be immaterial. But upon the facts reported in the bill of exceptions, we cannot fail to see that whatever indorsement the plaintiff furnished and whatever money he paid were furnished and paid to Barker, and not to the defendant, and that for that reason the plaintiff's knowledge as to the nature of the debt so secured or paid was the turning point in the case. *Exceptions sustained.*

SAMUEL M. PENNOCK & another *vs.* JOHN McCORMICK.

Suffolk. March 8. — May 5, 1876. COLT & LORD, JJ., absent.

A bill of exceptions stated that the plaintiff offered in evidence letters between himself and his agent in the transaction with the defendant which was the subject matter of the action, the agent's representation to the plaintiff concerning it, and the agent's conversation with a third person, and that this evidence was admitted by the court against the defendant's objection, but without any statement of its substance. *Held*, that this court could not infer that the evidence so admitted was in any way unfavorable to the defendant, or tended to prejudice his case; and that he had no ground of exception.

A bill of sale of merchandise, absolute in its terms, given to protect the vendee against his liability as surety for the vendor, and to secure a debt of the vendor to the vendee, with a verbal agreement that when the vendee should be relieved from his liability and the debt paid, his interest in the property should cease, but with no condition of defeasance in writing, is not a mortgage.

TORT for the conversion of 84 barrels of porter. Trial in the Superior Court, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The plaintiffs claimed under a bill of sale, absolute in terms, for one dollar and other considerations, from one William H. Nichols, in the name of the Lawrence Brewing Company. There was evidence tending to show that Nichols, the owner of a brewery, and doing business under the name of the Lawrence Brewing Co., gave the bill of sale to secure the plaintiffs against loss

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by reason of bonds signed by Pennock to dissolve certain attachments upon suits brought against Nichols, and also as security for the debt due or that might become due from Nichols to the plaintiffs, with the understanding and agreement that, when Pennock should be relieved from liability upon the bonds and the debt be paid, the plaintiffs' interest in the property should cease. There was no evidence, nor was it contended by the defendant, that this agreement was in writing. It further appeared that the porter mentioned in the bill, of which the 84 barrels were a part, was sent by Pennock's direction from Lawrence to Boston, and put into Nichols's possession, by whom it was sold from time to time with the plaintiffs' consent, the bills, with one exception, being made in the name of the Lawrence Brewing Co.; and that the barrels in question were sold either by Nichols himself or through one Grunberg, and delivered to the defendant by Nichols, who received the money for them; that Pennock afterward called upon the defendant, and told him that the sale had not been authorized by the plaintiffs, upon the terms upon which the defendant had purchased, and that they would not be bound by it, but should demand a return of the merchandise; and that later in the day a formal demand for it was made, and the defendant refused to give it up. The plaintiffs then offered in evidence the letters of William H. Nichols to the plaintiffs, and the plaintiffs' reply to them, to which the defendant objected, but the judge admitted them. The plaintiffs then offered in evidence what the offer of this defendant was as it was represented to them by Nichols. To this the defendant objected, but the judge admitted it. Nichols was asked this question: "After you had communicated the offer to the plaintiffs, and heard from the plaintiffs in reply, what then did you say to Grunberg?" To this the defendant objected, but the judge permitted the witness to answer.

The judge ruled as a matter of law that the conveyance of the property from Nichols to the plaintiffs was not a mortgage, for the reason that there was no condition of defeasance in writing; and refused to give to the jury certain instructions requested by the defendant, based upon its being held to be a mortgage, which it is not necessary to state. The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

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J. Bennett, for the defendant.

H. J. Boardman & C. Blodgett, for the plaintiff, submitted the case without argument,

DEVENS, J. What the evidence was which was admitted by the court, from the letters of Nichols and the reply to them, and the declaration of Nichols to the plaintiff and to Grunberg, against the objection of the defendant, does not appear by the bill of exceptions. We cannot infer that anything was thus admitted which was in any way unfavorable to the defendant, or which tended to prejudice his case. *Kershaw* v. *Wright*, 115 Mass. 361, and cases cited.

As between the parties to the absolute, formal bill of sale, it could not be shown, by proof of a parol defeasance, that the conveyance was a mortgage, and the court correctly so ruled. *Harper* v. *Ross*, 10 Allen, 332. Evidence of a secret agreement between the parties, and conduct by them inconsistent with such a sale, was competent for the purpose of showing that the bill of sale was pretence and a fraud, intended merely to deceive creditors, or those who might deal with the parties, as to the goods, and not to express a real transaction. Such evidence was admitted by the court, it may be presumed, for this purpose; but this would not alter the transaction between the parties, which, whether real, pretended or fraudulent, was still in its character an absolute sale, and not a conveyance in mortgage only.

Exceptions overruled.

ANNA NEWELL vs. CHARLES HOMER & others.

Suffolk. March 11. — May 5, 1876. GRAY, C. J., did not sit. DEVENS, J., absent.

The burden of proof is on a party, seeking to establish a lost will by parol evidence of its contents, to prove the contents by evidence strong, positive and free from doubt.

If a will, once known to exist, is not found at the death of the testator, it is presumed to have been revoked.

On an appeal from a decree of the judge of probate refusing to approve and allow an instrument alleged to be a copy of a will, the original being alleged to be lost, suppressed or destroyed since the death of the testator, issues were framed for the

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ry, covering these questions. *Held*, that an issue proposed by the appellant, and hich the judge who tried the case refused to submit to the jury, as to specific rts of the alleged will, was immaterial.

is court has power, on a probate appeal, to revise the discretion of the judge esiding at the trial of issues of fact before a jury, in refusing to grant a delay in e trial on account of the absence of a witness, no affidavit of the testimony ex- cted nor any statement of the grounds of such expectation having been made, it ll only do so where the circumstances connected with the absence of the witness, d his alleged relation to the case, are so peculiar as to require that the ordinary le should be dispensed with.

stablish by copy a will alleged to have been destroyed or suppre ving an adverse interest thereto, evidence of a conspiracy by such ess the will is immaterial, unless accompanied with evidence suf jury in finding the execution and contents of the will, and its lo tor's death.

arty cannot, under the St. of 1869, *c.* 425, contradict his own witn at he has made at other times statements inconsistent with his t first calling his attention to the circumstances and occasion o tements.

APPEAL from a decree of the Judge of Probate, refusing to prove and allow certain instruments alleged to be copies of last will, and of three codicils thereto, of William H. Bord- n, the original will and codicils being alleged to have been , suppressed or destroyed since the death of the testator.

n this court, the following issues of fact were framed for the y:

1. Whereas the said appellant affirms and said respondents y that the said Bordman deceased leaving a will duly exe- ed, of which the paper annexed to or embodied in the appel t's petition is a true copy:

2. And whereas the said appellant affirms and said s deny that said will was concealed, suppressed or the respondents, or by some of the heirs at law of sed, or by Frederic O. Prince, or some one else actin alf:

3. And whereas said appellant affirms and said re y that said Bordman deceased leaving a codicil duly him, of which the paper marked B, annexed to said true copy:

4. And whereas the said appellant affirms and sai s deny that said codicil was concealed, suppress oyed by the respondents, or by some of the heirs

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said Bordman, deceased, or by Frederic O. Prince, or by some one else acting in their behalf:

"5. And whereas said appellant affirms and said respondents deny that said Bordman deceased leaving a codicil duly executed by him, of which the paper marked C, annexed to or embodied in the appellant's petition, is a true copy:

"6. And whereas the said appellant affirms and said respondents deny that the said codicil was concealed, suppressed or destroyed by the respondents, or by some of the heirs at law of said deceased, or by Frederic O. Prince, or by some one else acting in their behalf:

"7. And whereas the said appellant affirms and said respondents deny that the said Bordman deceased leaving a codicil duly executed by him, of which the paper marked D, annexed to or embodied in the appellant's petition, is a true copy:

"8. And whereas the said appellant affirms and said respondents deny that the said codicil was concealed, suppressed or destroyed by the respondents, or by some of the heirs at law of said Bordman, deceased, or by Frederic O. Prince, or by some one else acting in their behalf:

"And whereas the said respondents affirm and the said appellant denies that if the said Bordman did decease leaving any such codicil as is alleged in the appellant's petition, he, at the time of executing the same, was not of sound mind:

"Now, therefore, it is ordered that a jury be empanelled to try said issues."

The appellant requested that further issues be framed, so much of which as were not substantially the same as those submitted to the jury were as follows:

"Did the will of William H. Bordman, executed in the presence of Stedman, Mills and Thayer, contain a bequest to Anna Tilton, now Anna Newell, this petitioner, of an annuity of eighteen hundred dollars a year during her lifetime, the same to be paid to her by his executors?

"Did William H. Bordman, by a codicil made to his last will and testament, executed in the presence of Cushing, Brooks and Prince, on or about the thirteenth day of March, 1872, give and devise to Anna Newell, this petitioner, the house on Mount Vernon Street in the city of Boston, then owned by said Bordman,

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old the same to her sole and separate use, free
of her husband, and to her heirs and assigns

H. Bordman, by a codicil made to his last will
xecuted in the presence of Cushing, Brooks and
ut the thirteenth day of March, 1872, give and
f five hundred thousand dollars, to be applied
ent and support of an institution in the form
e benefit of the working women of Boston, and
well, this petitioner, with the trust and duty of
same in her sole judgment and discretion, rec-
to seek the advice of Henry C. Brooks in re-
?

rdman, by a codicil to his last will and testa-
n the presence of Cushing, Brooks and Prince,
thirteenth day of March, 1872, give and be-
ainder of his estate, both real and personal, to
is petitioner, and to her heirs and assigns for
he control of her husband?
and every one of the legacies, bequests, gifts,
es which you find to have been made
will and testament made and left by
codicils thereto."
used to submit these questions to the jury to
xcepted. The case was then tried, and
ellant's evidence the judge directed the jury to
for the appellees. The issues submitted were
negative; and the appellant alleged exceptions
which appear in the opinion.
g, for the appellant.
C. A. Welch, for the appellees.
s is an appeal from the refusal of the Probate
he probate of a lost will and three codicils
are annexed to the original petition, and
ve been lost, suppressed or destroyed, since
ator.
on the appellant to prove the execution
ers, and to establish their contents by
nd free from doubt. *Davis* v. *Sigourney*

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487. *Durfee* v. *Durfee*, 8 Met. 490, note. It must appear also, upon the allegations made in this petition, that the instruments were in existence uncancelled and unrevoked, at the time of the death of the testator, in order to control the presumption of revocation, which always arises when a will once known to exist is not found at the death. *Davis* v. *Sigourney*, *ubi supra*. 3 Redfield on Wills, 15. *Brown* v. *Brown*, 8 El. & Bl. 876, 886. *Idley* v. *Bowen*, 11 Wend. 227. *Eckersley* v. *Platt*, L. R. 1 P. & D. 281. *Finch* v. *Finch*, L. R. 1 P. & D. 371.

In the present case, issues to the jury were framed in advance of the trial, under that provision of the statute which declares that this court, as the Supreme Court of Probate, may submit to a jury any question of fact proper for such trial, upon an issue framed under the direction of the court. Gen. Sts. *c.* 117, § 18. When the trial came on, the appellant requested a modification of and certain additions to the issues framed, and excepted to the refusal of the presiding judge to grant her request.

In the matter of framing issues, proceedings in probate appeals are conducted in accordance with the rules and practice in equity. The findings of the jury are availed of to inform the court in matters of controverted facts, which may become material in settling the final decree. They may be disregarded in whole or in part, if on the final hearing they are not deemed important, or new issues may be framed from time to time and submitted if the rights of the parties may seem to require it. *Shailer* v. *Bumstead*, 99 Mass. 112, 131. An appeal lies from an interlocutory order refusing to submit issues requested, and if it is apparent that the matter ought to be first determined by the full court, a stay of proceedings may be had for that purpose. Gen. Sts. *c.* 113, §§ 10, 12. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45. *Wright* v. *Wright*, 13 Allen, 207. If the exception here taken could be treated as in the nature of an appeal, to be disposed of before settling the final decree, we cannot see in the case presented that any injustice has been done, by submitting it upon the original issues. Those issues distinctly embrace the several propositions above stated, which the appellant must establish, and upon which the findings of the jury against ner are decisive. The amendments and additions requested contain other allegations and denials, but they cannot be material

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s the original issues are not maintained. Additional firming and denying what are alleged to be partial of the instruments in question, were properly refused, he contents of the whole instrument must be proved, can stand as a valid testamentary dis position. *John-*, 40 Conn. 587. *Huble* v. *Clark*, 1 Hagg. Eccl. 115. *Knapp*, 6 Seld. 276.

pellant excepts to the refusal of the judge to delay the ntinue the case on account of the absence of witnesses timony was said to be material. She did not attempt her application within the rule which requires an affi- the testimony expected from these witnesses, with a of the grounds of such expectation, but she claims circumstances connected with their absence, and their lation to the case, were so peculiar as to require that ry rule should be dispensed with. But there is noth- testimony, or in the facts developed at the trial, which s case exceptional, or requires us, if it was in our power s a matter of law, to revise the discretion exercised by in refusing further delay. The respondents ought not jected to further delay upon a mere suspi- at absent witnesses will testify to some im- act.

course of the trial, numerous exceptions we- sion of evidence offered by the appellant. sisted partly of written documents, and larg- rations of her own witnesses and others- ons taken in the Probate Court upon her- ed, not for the purpose of contradicting the- e purpose of proving, as alleged in the ope- there was a conspiracy on the part of some tered into with the respondents and others r counsel, to prevent her from proving th- nd that the examinations offered were false the interest of the respondents and containing lence of these facts.

minations referred to are annexed to the bill upon inspection do not appear to have any he alleged conspiracy; and if they had, the

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would be wholly useless, unless accompanied with evidence sufficient to justify the jury in finding the execution, contents and loss of the will and codicils, since the testator's death. These cannot be established as testamentary, by proving a conspiracy to suppress papers the contents of which cannot be shown.

To control the testimony of her own witness, the appellant offered a petition to the Probate Court signed by him, showing, as she contended, that the witness believed that a will had been left by the testator other than the one first presented for probate; but the statements in the petition, fairly construed, do not contradict his testimony; and if they did, they could only be admissible under the St. of 1869, *c.* 425, to contradict the witness, after a foundation is laid by calling his attention to the circumstances and occasion of the supposed statements. They can under no circumstances be used as substantive evidence to support her case.

It would be unprofitable to examine in detail all the remaining exceptions taken to the exclusion of evidence; many of them are but repetitions of the same objection raised by varying the form of the interrogatory. Most of the evidence offered was mere hearsay, for the purpose of proving the alleged conspiracy, and open to all the objections above stated to the admission of the written document; some of it was called for on cross-examination by leading questions to the appellant's own witnesses, much was wholly immaterial and remote with no tendency to support the real issues of the case; some called for the contents of written papers not produced or accounted for; or attempted to prove the handwriting of such papers by witnesses not qualified as experts and not acquainted with the particular handwriting in question. It is sufficient to say that we cannot see that any evidence was excluded, which was legally competent to maintain the case of the appellant upon the issues presented, and which should have been allowed to go to the jury.

Upon the whole case, we cannot doubt that the jury were rightly directed to return their verdict for the respondents upon all the issues. The only evidence of the execution of any testamentary document, except the original will of 1841 under which the respondents claim, is the testimony of one witness, who says that in 1857 or 1858 he with others witnessed an instrument

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which the testator either said was his will, or that it was a codicil to his will. No testimony was produced of the contents of this instrument, nor was any attempt made to otherwise identify it. The persons whose names appeared as witnesses upon the papers propounded as codicils were called by the appellant, and each testified that he never witnessed any testamentary paper whatever for the alleged testator. There was no testimony whatever that such papers were in existence uncancelled and unrevoked at the time of the testator's death, and of course there was no evidence of their subsequent suppression by any one. Under these circumstances, to permit the copies here presented to be established as the lawful testamentary dispositions of the alleged testator, would be largely to destroy the security which is afforded to the exercise of the right to control the succession to one's property by will. *Exceptions overruled.*

JAMES W. BARTLETT & wife *vs.* A. W. FARRINGTON.

Suffolk. March 16. — May 5, 1876. COLT & LORD, JJ., absent.

Repeated entries by the lessor upon leased premises, and carrying away of crops, cutting down a fruit tree, and removing a cooking stove from the house, though acts of trespass, do not amount in law to an eviction of the tenant.

Damages suffered by a lessee by the lessor's trespasses upon the leased premises cannot be set up by way of recoupment, in an action by the lessor for the rent reserved.

MORTON, J. To constitute an eviction which will operate as a suspension of rent, there must either be an actual expulsion of the tenant, or some act of a permanent character, done by the landlord with the intention and effect of depriving the tenant of the enjoyment of the demised premises or some part of it, to which he yields, abandoning the possession within a reasonable time. *Royce* v. *Guggenheim*, 106 Mass. 201. *De Witt* v. *Pierson*, 112 Mass. 8. *Mirick* v. *Hoppin*, 118 Mass. 582.

In the case at bar, the defendant occupied the demised premises under a lease for three years, commencing July 1, 1874, until September 26, 1874, when he left the premises. This suit is for the quarter's rent due October 1, 1874. The defendant's evi-

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dence tended to show that the plaintiffs from time to time entered upon the premises and gathered the flowers and the annual crops, cut down a partly decayed apple tree, and, on the day when the defendant vacated the house, removed a cooking stove from the kitchen. These were not acts done by the landlord with the purpose and effect of permanently depriving the tenant of the enjoyment of the premises. If they were not justifiable under some agreement with the tenant, they were trespasses for which he has an action at law, but they did not amount to an eviction which excuses him from payment of the rent. The rulings at the trial upon this point were correct.

Treating these acts of the plaintiffs as trespasses, the court rightly ruled that the defendant could not in this action recoup the damages he sustained by reason of them. As stated by Bigelow, C. J., in *Sawyer* v. *Wiswell*, 9 Allen, 39, one of the essential elements upon which the right to recoup depends is "that the damages which the defendant seeks to set off shall have arisen from the same subject matter, or sprung out of the same contract or transaction as that on which the plaintiff relies to maintain his action." In this case the plaintiffs' claim is for rent under the covenants of a lease; the defendant seeks to set off damages sustained by a trespass or trespasses. The two causes of action are independent, and do not arise out of the same contract or cause of action, within the principle which allows a recoupment.

Exceptions overruled.

I. W. Richardson, for the defendant.

N. B. Bryant, for the plaintiffs.

JOSIAH DUNHAM *vs.* HERBERT W. PRESBY & others.

Suffolk. March 26, 1874. March 28. — May 6, 1876. DEVENS & LORD, JJ., absent.

A bill in equity cannot be sustained by one member of a partnership against his copartners, for an account of profits resulting from an illegal trading with inhabitants of states declared in insurrection against the United States.

The court will not entertain jurisdiction of a bill in equity for an account of profits resulting from an illegal trading with inhabitants of states declared in insurrection

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against the United States, if the illegal character of the transaction appears in evidence, although it does not appear on the face of the bill, and is not set up in the answer.

BILL IN EQUITY for a settlement of the affairs of a partnership. An argument was had upon the questions made by the pleadings in March 1874, by *G. F. Homer*, for the plaintiff; *W. Colburn*, for the defendant Presby; and *W. Gaston*, for F. W. Bird, another defendant; and in March 1876, upon the suggestion of the court, upon the question of the legality of the transactions between the partners, as appearing upon the master's report, by the same counsel, except that *E. C. Bumpus* appeared in the place of *W. Colburn* for the defendant Presby. The case is stated in the opinion.

ENDICOTT, J. It appears from the bill, answers and report of the master that in April 1864 the plaintiff with the three defendants entered into a partnership to hire a store at Norfolk, Virginia, and carry on a wholesale and retail trade in such goods as would command a ready sale. Each partner was to contribute fifteen hundred dollars to the capital stock, and share equally in the profits and losses of the business. The defendant Presby was to have the control and management of the business at Norfolk, the others continuing to reside in Massachusetts, and it is to be presumed, from a settlement afterwards made between the parties, that Presby was also to be allowed for his services and expenses at Norfolk as the managing partner. There is nothing in the papers before us to show, or from which it is to be implied, that the business thus entered upon was not perfectly legitimate and legal.

In the month of May following, and while Presby was at Norfolk, one Johnston, then acting as adjutant to the general in command, suggested to Presby that he could make money by sending goods into that part of North Carolina known as the "neutral territory," and exchange them for cotton, provided the the assistance of one Harney could be obtained, who was acquainted with that part of North Carolina and competent to conduct the business. In pursuance of this suggestion, met Johnston and Harney. Johnston then proposed that should furnish the capital for the enterprise, that he, Jo should procure from the general in command the permit

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sary to legitimate the traffic, and should receive for that service one third of the net profits; that Harney should superintend the purchase of the cotton and its transportation to Norfolk, and for so doing should also receive one third the net profits; and that Presby should be entitled to the remaining third. It is to be presumed from the character of this transaction, and the fact that permits of some kind were necessary to carry on this trade, that the cotton was to be obtained outside the military lines of the United States forces. Presby thought the terms unreasonable, but entered into the arrangement with Johnston and Harney. On his return to Boston during the same month, he reported to his three associates in the original partnership the enterprise in which he was to engage with Johnston and Harney, but at Johnston's request he did not mention his name. His associates, understanding fully all the terms and conditions under which the enterprise was to be conducted, authorized him to embark in it on joint account, each agreeing to furnish his share of the necessary capital.

We cannot but regard this as a separate and distinct undertaking, wholly apart from the purposes of the original partnership, requiring not only a new advance of capital, but, from the nature of the arrangement and the division of profits to Harney and Johnston, requiring separate accounts to be kept, not necessarily connected with the original partnership accounts.

In June following the parties again met in Boston, and it was agreed that Presby should take an account of the stock of goods in the store on July 1, and purchase them at cost prices, that the company should be dissolved on that day, the undertaking abandoned, and that Presby should forward and sell all cotton then on hand. The account of stock in the store was taken by Presby, and he also had on hand forty-six bales of cotton purchased by Harney in the neutral territory under the agreement. The cotton was shipped by Presby for New York, and the ship sailed from Fortress Monroe on July 10. On July 11 it was reported in Norfolk that a cruiser of the enemy was off the capes, and Johnston and Harney, being alarmed, proposed to sell their interest in the profits to Presby, saying they should sell to some one. Presby paid Johnston $3000, and Harney $2500, for any interest they might have in the profits of the enterprise. This purchase

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he made, as he supposed, on his own account, thinking he had no right to make the purchase for his associates. The cotton was sold in Boston and a profit obtained of $17,202.05, and Presby having notified his associates that he was ready to settle, they all met in Boston on July 30. The accounts of the goods in store July 1, of sales of the cotton and of cost and expenses were exhibited, but no books or vouchers were produced. Some expenses, incurred by individual partners for the common benefit, and payment for Presby's services were deducted. The net profits in the cotton having been ascertained by the sale, one third thereof was divided into four equal parts, and to each part was added the money contributed by each party, and one fourth of the profits of the sale of goods at Norfolk. For this sum total so obtained, Presby gave his check, and took a receipt in full from his associates. He did not then disclose to them, nor had he before, his settlement with Johnston and Harney, regarding that as a matter which did not concern them.

This bill, filed by Dunham against Presby and his two other partners, alleges the general partnership, and also that there had been a partial settlement, but that Presby had not accounted for all the partnership property in his hands, and prays for a full account and disclosure in regard to the partnership business. The several defendants answer that there has been a full settlement, relying on the settlement of July 30, 1864. Neither bill nor answers disclose the character of the transactions in regard to the cotton: that appears for the first time in the master's report. It is not now contended that any account connected with the original partnership in relation to the store is outstanding; the only matter at issue relates to the profits which accrued to Presby upon sale of the cotton in Boston, through his purchase or settlement with Johnston and Harney of their interest. All other matters were adjusted July 30. As the case stands, the bill seeks only to compel a distribution among the partners of the profits in the hands of Presby, arising out of the distinct and separate agreement under which the cotton was procured.

The question at once arises upon this statement, whether this is not an attempt to enforce an illegal agreement to carry on trade and commercial intercourse within localities beyond the

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lines of military occupation by the United States, and to divide the proceeds of that trade between the parties engaged in the unlawful undertaking. It sufficiently appears that, by means of the permit obtained by Johnston, and through the agency of Harney, this cotton was obtained beyond the lines of the military forces of the United States. Such a transaction was strictly prohibited by the laws of the United States, and the regulations of the treasury made in pursuance thereof, which were in force at the time. U. S. St. 1861, *c.* 3, § 5. Regulations of Treasury, September 11, 1863, rule VII. No public officer had authority to legitimate such a traffic; and the permit of a military commander, while it might enable the parties to carry it on, could not render it lawful. *McKee* v. *United States*, 8 Wall. 163. The cotton so obtained could have been seized by the United States, and the parties engaged in the enterprise were violating the law in trading with the enemy. As this question was fully considered in *Snell* v. *Dwight*, *ante*, 9, it is unnecessary to enter into a further discussion of it.

Nor is it material that the defendants do not set up the illegality in their answers, as no waiver by them or consent of parties can oblige a court to determine their rights under an illegal contract. *Cardoze* v. *Swift*, 113 Mass. 250. *Evans* v. *Richardson*, 3 Meriv. 469. If the money thus received by Presby was not partnership property, in which his partners were entitled to share, of course the bill must be dismissed. If on the other hand, as contended by the plaintiff, the money so received belonged to the partnership, to be accounted for by Presby as the profits of the joint undertaking, it is clear that it can only be reached by the plaintiff through the illegal agreement by the terms of which he is entitled to receive one quarter part of the profits coming to the partnership from the unlawful enterprise. The case falls within the rule laid down in *Armstrong* v. *Toler*, 11 Wheat. 258, and *Thomson* v. *Thomson*, 7 Ves. 470, that no action can be maintained on such a contract to enforce its obligations or secure its fruits to either party. The cases bearing on this question are collected and considered in *Snell* v. *Dwight*, *ante*, 9.

Bill dismissed.

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JAMES O. SAFFORD & another *vs.* PATRICK F. MCDONOUGH.

Suffolk. Nov. 15, 1875. — May 6, 1876. ENDICOTT & LORD, JJ., absent.

If a seller of merchandise, in order to maintain his lien for its price, refuses to permit the purchaser to take possession or control of it, he thereby prevents an acceptance and receipt of it by the purchaser within the statute of frauds.

Upon an agreement for the sale of merchandise and payment therefor by a satisfactory note, the purchaser examined the merchandise, had it weighed, marked with his initials, and piled up by itself in the seller's warehouse, to be taken away upon payment for it or giving a satisfactory note for its price. The purchaser never complied with these terms, and the seller refused to allow him to take the merchandise away, claiming a lien upon it for its price. After remaining for several months it was destroyed in the warehouse by fire. *Held*, that there was no such delivery of the merchandise as to constitute the seller a bailee for the purchaser.

MORTON, J. This is an action of contract to recover the price of a quantity of leather, exceeding fifty dollars in value, alleged to have been sold by the plaintiffs to the defendant There was no memorandum in writing of the contract, and the purchaser did not give anything in earnest to bind the bargain or in part payment.

It appeared on the trial that the defendant on May 17, 1872, went to the plaintiffs' store and agreed to purchase the leather at the price named, to be paid for by a satisfactory note.

On the thirty-first day of the same month, he again went to the plaintiffs' store, examined the leather, had it weighed, marked with the initials of his name, and piled up by itself, to be taken away by him upon giving a satisfactory note for the price, or the payment of the price in money, but not otherwise. He never complied with the terms of the agreement. The plaintiffs refused to allow him to take the leather from their store without such compliance, claiming a lien upon it for the price due. It remained in their store till November 9, 1872, when it was burnt with the store. Upon this evidence the presiding justice of the Superior Court ruled that the leather had not been so accepted and received by the defendant as to take the contract out of the statute of frauds, and the plaintiff excepted to such ruling.

It should be kept in mind that the question is not whether, if a valid contract of sale upon the terms above named had been proved, the title in the property would have passed to the de-

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fendant so that it would be at his risk. In such a case, the title would pass to the purchaser unless there was some agreement to the contrary, but the vendor would have a lien for the price, and could retain possession until its payment. *Haskins* v. *Warren*, 115 Mass. 514. *Morse* v. *Sherman*, 106 Mass. 430. *Townsend* v. *Hargraves*, 118 Mass. 325. But the question is whether the defendant had accepted and received the goods, so as to take the case out of the statute of frauds, and thus complete and make valid the oral contract relied on. Unless there was such acceptance and receipt, there was no valid contract by virtue of which the title to the goods would pass to the defendant. To constitute this, there must be a delivery by the seller, and some unequivocal acts of ownership or control of the goods on the part of the purchaser. *Knight* v. *Mann*, 118 Mass. 143, and cases cited.

In the case at bar, there was no actual acceptance and receipt of the goods by the defendant. They were never in his possession or control, but remained in the possession and control of the plaintiffs, who refused to allow him to take them, claiming a lien for the price. If they had and asserted a lien as vendors, this is inconsistent with the delivery of possession and control, necessary to constitute an acceptance and receipt by the vendee. In *Baldey* v. *Parker*, 2 B. & C. 37, 44, Holroyd, J., says: "Upon a sale of specific goods for a specific price, by parting with the possession the seller parts with his lien. The statute contemplates such a parting with the possession, and therefore, as long as the seller preserves his control over the goods, so as to retain his lien, he prevents the vendee from accepting and receiving them as his own within the meaning of the statute." Benjamin on Sales, (Am. ed.) 151, and cases cited. Browne on St. of Frauds, § 317.

It is true there may be cases in which the goods remain in the possession of the vendor, and yet may have been accepted and received by the vendee. But in such cases the vendor holds possession of the goods, not by virtue of his lien as vendor, but under some new contract by which the relations of the parties are changed. *Cusack* v. *Robinson*, 1 B. & S. 299, 308. *Castle* v. *Sworder*, 6 H. & N. 828. *Dodsley* v. *Varley*, 12 A. & E. 632.

In the case at bar, the vendors refused to permit the vendee to take possession or control of the goods but claimed and asserted

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their lien as vendors for the price. We are therefore of opinion that the ruling of the Superior Court was correct.

Exceptions overruled.

T. H. Sweetser & B. F. Hayes, for the plaintiffs.

S. A. B. Abbott, for the defendant.

JOHN J. HALEY & another *vs.* MANUFACTURERS' FIRE AND MARINE INSURANCE COMPANY.

Suffolk. March 8. — May 6, 1876. AMES & MORTON, JJ., absent.

A mortgagee of chattels agreed to assign his mortgage, of which there had been a breach of condition, to a person proposing to purchase the chattels, (who was not then and who never became the owner of the equity of redemption,) upon the payment of certain notes given by him for the purchase. The agreement contained the following clause: "In case of failure to pay said notes, or either of them, or the interest, the said party of the first part [the mortgagee] resumes the right to foreclose said mortgage, or take or sell said property, the same to all intents or purposes as if said notes below mentioned were the notes mentioned and specified in said mortgage, and it being the intent hereof to allow said mortgage to remain as security for the payment of the notes below mentioned." *Held*, that this agreement was collateral to the mortgage, and that the payment of one of the notes was not a payment *pro tanto* of the mortgage debt.

A mortgagee of chattels agreed to assign his mortgage upon payment by the purchaser of $62,000. He had previously insured his interest as mortgagee to the amount of $57,000. After a partial payment of $20,000 by the proposed purchaser, there was a loss by fire of $53,000 on the mortgaged property. *Held*, that the insured interest was not diminished by such partial payment.

A mortgagee of chattels agreed to assign his mortgage, with a stipulation that, until the assignment was completed, the proposed purchaser should keep the property insured for the benefit of the mortgagee. This he did not do, and the mortgagee insured his interest as mortgagee in his own name. *Held*, that a liability of the proposed purchaser for the cost of the insurance under his contract with the mortgagee, did not affect the contract between the mortgagee and the insurer.

CONTRACT upon a policy of insurance, by which the defendant insured the plaintiffs in the sum of $5000, on "their interest as mortgagees" in certain furniture, in the Grand Central Hotel, at Saratoga Springs, from January 10, 1874, to January 10, 1875. The case was submitted to this court on agreed facts, in substance as follows:

The property insured was mortgaged to the plaintiffs by two mortgages, one by Charles R. Brown and the other by Robert

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Hamilton, to secure the sum of $99,462.88, both mortgages being dated August 1, 1872. Default was made in the performance of the conditions of the mortgages, and, without taking any steps to foreclose the same, the plaintiffs, on June 2, 1873, no part of the mortgage debt having been paid, entered into an agreement with George O. Marcy, whereby they agreed to assign to him the mortgages and notes, upon the payment to the plaintiffs, by Marcy, of $90,000. Under this agreement, Marcy paid the sum of $25,000, and on April 8, 1874, he, without having made any further payment under the agreement, relinquished all his claims thereunder.

On May 1, 1874, the plaintiffs, as parties of the first part, entered into an agreement, under seal, with Alexander Cherry, as party of the second part, which, after reciting that the parties of the first part were holders of the Brown and Hamilton mortgages, and that the party of the second part was desirous of purchasing the mortgages, and all the right, title and interest of the parties of the first part in the furniture and property included in said mortgages, proceeded as follows:

"1. The said parties of the first part agree to assign and transfer to said party of the second part, his heirs or assigns, the said chattel mortgages, and all their right, title and interest in said furniture and property therein described, on payment of all the four promissory notes hereinafter mentioned.

"2. Said party of the second part agrees to keep said furniture and property insured for the benefit of said parties of the first part, pursuant to the terms and conditions of said mortgages, in responsible companies.

"3. In case of failure to pay said notes, or either of them, or the interest, the said parties of the first part resume the right to foreclose said mortgages, or take or sell said property, the same to all intents or purposes as if said notes below mentioned were the notes mentioned and specified in said mortgages, and it being the intent hereof to allow said mortgages to remain as security for the payment of the notes below mentioned.

"4. Said party of the second part may, from this date, take possession of said furniture and property.

"5. In consideration of the above, the said party of the second part has made, and at the time of the execution of this

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agreement delivered to the said parties of the first part, his four promissory notes amounting to $62,500, payable to the order of Henry A. Clark and George Harvey, and indorsed by them and payable at the Commercial National Bank of Saratoga Springs, with interest, as follows: $20,000 in four months; $20,000 in sixteen months; $20,000 in twenty-eight months; $2,500 in twenty-eight months."

Cherry paid the first of the notes secured by said agreement, and no further payment has been made by him. On October 28, 1874, he assigned to the plaintiffs his interest under said agreement. Neither Marcy nor Cherry ever purchased the equity of redemption of said furniture.

On October 1, 1874, the Grand Central Hotel was destroyed by fire, and a portion of the property insured was burned; due proof of this loss was made by the plaintiffs. The value of the mortgaged property before the fire was $66,308.26, and the value of the portion saved was $13,167.69, making the amount of loss on the furniture by the fire $53,140.57. The total amount of insurance was $57,000.

The plaintiffs still hold their original mortgages and mortgage notes, and have paid premiums for insurance to the amount of $3724, which, by the terms of the mortgages, should have been paid by the mortgagors. Other collateral security, mentioned in the agreement with Marcy, for said notes, is worthless, and the makers are insolvent. No part of said notes or the interest thereon has ever been paid, unless the facts hereinbefore stated constitute payment.

The plaintiffs contend that their interest as mortgagees was equal to the whole value of the mortgaged property at the time of the loss; and it is agreed that, if this claim is sustained, judgment is to be entered for the plaintiffs for $4661.45, with interest from January 23, 1875.

The defendant contends that the value of the plaintiffs' interest as mortgagees, and for which they are entitled to indemnity at the time of the loss, is determined by deducting the payment by Cherry of $20,000 from the sum of $62,500, for which said plaintiffs agreed to sell to Cherry, also deducting the value of the property saved. If this position is sustained by the court, judgment may be entered for $2573.01, with interest from January 23, 1875.

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W. G. Russell & G. Putnam, Jr., for the plaintiffs.

H. C. Hutchins & A. S. Wheeler, for the defendant.

DEVENS, J. It is contended by the defendant, as the plaintiffs had agreed to sell their mortgages (upon which a much larger amount was due) for the sum of $62,500, upon payment by Cherry of certain notes with interest, amounting to that sum, one of which notes, amounting to $20,000, had already been paid at the time of the occurrence of the loss, that the sum of $42,500, with interest, is all that can now be recovered of the insurers, although the loss of property by the fire was $53,000 in amount, that being all that the plaintiffs would have received if Cherry had paid his notes. This argument treats the interest of the plaintiffs as mortgagees as determined by the amount for which they were ready to sell their mortgages, although the debt due the plaintiffs upon the mortgages and the property upon which they were secured both exceeded the amount of the loss.

The contract made by the plaintiffs with Cherry was one collateral to that made by the mortgages, and was for the sale of those mortgages, which were to be transferred upon full payment by Cherry of the amount agreed upon. Whether the plaintiffs continued to own them, or whether they became the property of Cherry, the mortgages still continued to exist, unaffected by any payments which Cherry might make to the plaintiffs upon his contract. He was not the owner of the equity of redemption; and, if these mortgages are to be treated as paid *pro tanto* by the payments made by him, the result would follow that, when these were completed and the mortgages were transferred to him, no debts would exist, upon non-payment of which he could foreclose them as against the owner of the equity. While the agreement provides that the plaintiffs were not to foreclose their mortgages or to sell the property so long as Cherry continued to make his payments, it declares that in case of the failure to pay the notes, the plaintiffs resume the right to foreclose them, and to take or sell the property, as if the notes of Cherry were the notes mentioned in the mortgages, it being the intent to allow the mortgages to remain as security for the payment of the Cherry notes. These latter clauses cannot be construed as limiting the foreclosure to the amount due upon the Cherry notes. The mortgages were not to be foreclosed until there was a fail-

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ure by Cherry to pay his notes; but when this default was made and the plaintiffs resumed their rights, these rights were not affected by what had been paid by Cherry, or by the existence of the contract with him.

Nor is the interest of the plaintiffs as mortgagees, which is the interest insured, limited by the amount due upon the Cherry notes. They held the legal title to the mortgages, and had an interest in the property insured to the amount of the debt it was mortgaged to secure. Although they had made a contract for the sale of those mortgages, such contract was executory simply, its terms might never be complied with, or it might be abandoned by mutual agreement of the parties. No property had passed to Cherry, and, although he had made no default, he had not complied with the terms upon which he was to obtain these mortgages when the loss occurred. Even if he was in possession of the mortgaged property, he was not in possession of the mortgages, which the plaintiffs had agreed to sell; these were kept in their own possession. *Suffolk Ins. Co.* v. *Boyden*, 9 Allen, 123. *Rider* v. *Ocean Ins. Co.* 20 Pick. 259. An executory contract to convey a mortgagee's interest does not deprive him of his right to insure, or limit his recovery to the amount of the unpaid purchase money. *Davis* v. *Quincy Ins. Co.* 10 Allen, 113.

There was a provision in the contract that Cherry should keep the property insured for the benefit of the plaintiffs; but while this was not done by him, but by the plaintiffs, who had the property actually insured at the date of the agreement, even if it were held that the premiums for this insurance were properly chargeable to Cherry and the amount could thus be treated as paid by him, this would not affect the result. If a creditor, at his own expense and for his own benefit, insures the property mortgaged, the debtor has no benefit therefrom; yet if the debtor insures property held as collateral for the benefit of the creditor, any sums received from such insurance are applied for the benefit of the debtor. *King* v. *State Ins. Co.* 7 Cush. 1. The interest of the plaintiffs was still an interest to the amount of the mortgage debt, the preservation of which was essential for the protection of Cherry as well as themselves; the mortgages and the right to the property described therein were theirs. If, by reason of their agreement with Cherry and its

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subsequent performance by him, they should afterwards become responsible to account to him for such sums as they might have received over and above what he was to pay, it would be a matter not affecting their rights here and in which the defendant had no interest.

Nor is it important that, by the relinquishment of the contract with Cherry, which took place after the loss but before action brought, the plaintiffs will in fact receive a larger amount from the insurance than they would have done if such contract had been carried out. That the occurrence of the loss may either, because of the existence of collateral contracts, or because of the abandonment of such contracts, indirectly give to the insured an advantage, does not concern the insurer. He does no more than indemnify the insured according to his policy if he pays no more than the value of the property destroyed, the sum insured upon it and the interest of the insured at the time of the loss. *Suffolk Ins. Co.* v. *Boyden*, 9 Allen, 123, 127.

By the terms of the agreed statement of facts there must be judgment for the plaintiffs for the larger sum.

Judgment for the plaintiffs accordingly.

JONATHAN G. KELSO *vs.* CITY OF BOSTON.

Suffolk. March 8. — May 6, 1876. AMES & MORTON, JJ., absent.

The question of the invalidity of a sewer assessment, by reason of the omission therefrom of persons benefited by the sewer, cannot be tried in an action to recover money paid under protest upon such assessment. The proper proceeding is by certiorari.

A city ordinance provided that the superintendent of streets, whenever any sewer was built or repaired, should "make an accurate plan of its depth, breadth, mode of construction and general direction, insert the same in a book kept for the purpose, and insert on said plan all entries into the same then existing and as they are thereafter made." *Held*, that the ordinance was merely directory of the duties of the officer, and that a sewer assessment by the city was not invalidated by his non-compliance with its provisions.

Land that has not in the mean time been alienated may be sold for a sewer assessment under the Gen. Sts. c. 48, § 5, after the expiration of a year from the time when the assessment is laid.

CONTRACT to recover back the amount of a sewer assessment paid under protest.

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At the trial in the Municipal Court of t
trict, the plaintiff offered to prove that an
ous persons for the cost of repairs on a
Lyndeboro' streets, was passed by the ma
the city of Charlestown on December 15,
in by the common council on December 22
the plaintiff was charged with the sum of
lector of taxes advertised his estate for s
1874; that he attended at the time and pl
sale, and paid the assessment of $12.03, and
ing in all $17.47, under protest, and to pr
sale of his estate.

The plaintiff also offered to prove that tl
ordinance of the city of Charlestown, a co
margin; * and that neither when said sewe
when it was repaired did the superintendent
in conformity with said ordinance; that
sewer having been kept, water-pipes had
over the said sewer, and the expense of re
creased; that several persons, who enter
into the sewer, or who by more remote
thereby for draining their cellar or land, h
or charged for any part of the expense of
that more than a year had elapsed betwee
said assessment and the time set for the sa

At the request of the defendant, the j
the above facts, if proved, the plaintiff co

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* "SECTION 7. The superintendent of streets
drains, under the direction of the committee on d
superintendence of all main drains, common sewe
charge of building and repairing the same, and ma
ply of labor and materials therefor. Whenever a
drain is built or repaired, he shall make an accurat
mode of construction and general direction, inser
for the purpose, and insert on said plan all entrie
ing and as they are thereafter made.

"SECTION 8. The superintendent shall keep
cost and expense of each common sewer, main dra
report thereof to the mayor and aldermen."

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action, and ordered a verdict for the defendant; to which ruling the plaintiff alleged exceptions.

The Superior Court affirmed the instructions; and the plaintiff entered the exceptions in this court.

E. T. Swift & E. J. Avery, for the plaintiff.

H. W. Putnam, for the defendant.

ENDICOTT, J. 1. It was not competent for the plaintiff to prove that several persons who enter their drains into the sewer, or who by more remote means receive benefit thereby, were not included in the assessment, as provided in the Gen. Sts. *c.* 48, § 4. The plaintiff's purpose was in this way to show that the assessment was invalid. But that question cannot be tried in this case; if the assessment was erroneous in that respect, it could have been revised on certiorari. *Butler* v. *Worcester*, 112 Mass. 541, 556.

2. The city ordinance had no relation to the assessment; and the assessment is not rendered invalid because the superintendent of streets failed to comply with its provisions. It is directory merely, and provides for the making and recording of an accurate plan of sewers, reservoirs or drains, when built or repaired. Its obvious purpose is to furnish a record for the information of the city authorities in regard to the location and character of these structures. The case is clearly to be distinguished from *Lowell* v. *Wentworth*, 6 Cush. 221, relied on by the plaintiff. See *Lowell* v. *Hadley*, 8 Met. 180, 195; *Torrey* v. *Millbury*, 21 Pick. 64.

3. Nor is the objection well taken that the city could not sell the land for non-payment of the assessment after the expiration of one year from the time it was laid. The assessment constitutes a lien on the land for one year, and may be levied by a sale after proper notice upon the person assessed, or upon any person occupying the estate, and the sale is to be conducted in like manner as sales for the non-payment of taxes. Gen. Sts. *c.* 48, § 5. By the Gen. Sts. *c.* 12, § 22, it is provided that sales of land for non-payment of taxes may be made after the expiration of the lien, if the land has not been alienated in the mean time. As the law stands, therefore, the assessment may be levied by a sale within one year, whoever may be the owner of the estate, and after the expiration of the year, if not in the mean

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time alienated. In this case, the land was c
at the time of the assessment, and at the
sale; and a demand for payment was duly
Holden v. *Eaton*, 7 Pick. 15; *Hayden* v. *F*
E

JULIA A. GOULD *vs.* CITY OF

Suffolk. March 8. — May 6, 1876. AMES &

In the city of Boston, public footways may exist by pr
bound to keep in repair, and is responsible for defects
§§ 1, 21, 22, 26.

An ancient public footway two feet wide, lying between
and of an individual owner, was by an agreement betv
widened to twelve feet, each party contributing a stri
with mutual covenants that it should be used only f
subsequently used by the public and kept in repair by
was liable, as for a highway, for a personal injury to a
a defect therein.

TORT for an injury sustained by the p
fect in a certain way called City Hall
School Street to Court Square in the city

At the trial in this court, before *Ames*,
duced evidence as to the nature of the all
and the injury sustained by her. A que
whether the way in question was a "high
way or bridge" for which the city was
Gen. Sts. *c.* 44; and the judge, deeming
the case should be so far tried as to deter
fect or want of a repair existed in the
of damages the plaintiff should recover
trial to proceed, reserving for future cons
so raised. The trial therefore proceeded
that the way came within the Gen. Sts. *c.*
rendered for the plaintiff.

It appeared that City Hall Avenue
memory, a footpath between the City Ha
adjoining proprietor, paved with bricks, o

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continually used, by all persons having occasion to pass over the same, as a public thoroughfare; that, for a long series of years before the year 1841, there had been an open passageway, two feet in width, between the two estates or lots of land; that on April 27, 1841, the city of Boston and William J. Niles executed the following indenture:

"Whereas the parties aforesaid are respectively owners of two adjoining real estates on School Street, in Boston aforesaid, and have for their mutual accommodation agreed to use, as a passageway in common, a strip of land lying on each side of and adjacent to the divisional line of their said estates, as hereinafter described:

"Now this indenture witnesseth, that the said city of Boston, in consideration of the several covenants and agreements to be performed on the part of the said William J. Niles and his heirs and assigns, doth hereby covenant and agree with him, and his heirs and assigns, in manner following, to wit, that the said city of Boston will and hereby does contribute and appropriate to and for the purposes of a passageway as aforesaid, and for no other purpose, the following parcel of the said city's land; to wit, all that parcel or strip of land which is bounded on the east by the said divisional line of the two estates above mentioned, and on the west by a line beginning at a point in the northerly side of said School Street, twelve feet distant westerly from said divisional line, and from said point running northerly to the rear or northeasterly corner of the City Hall; the parcel hereby so appropriated by said city being twelve feet wide on School Street and two feet wide on the rear line.

"And the said William J. Niles, in consideration of the covenants and agreements herein contained on the part of the said city of Boston to be performed, doth hereby, for himself and his heirs, executors and administrators, covenant and agree with the said city of Boston and its successors and assigns in manner following, to wit, that he, the said Niles, will and hereby does contribute and appropriate to and for the purposes of a common passageway as aforesaid, and for no other purpose, a triangular piece of his land aforesaid, bounded as follows; to wit, beginning at a point in the said divisional line of the two estates of the parties above mentioned, and at the distance of

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ten feet northerly from the north side of
from said point running northerly to a
said City Hall extended, and at the dist
erly from the divisional line aforesaid, the
so appropriated by said Niles being sev
tended rear line, and running to the p
ginning, which is ten feet distant north
aforesaid.

"And the parties aforesaid mutually
parcels appropriated as aforesaid, which
land twelve feet wide on School Street
wide on the rear line aforesaid, shall be
their assigns forever in common as a p
sengers, with all the rights and privile
way.

"And it is further mutually covenante
of the parties and their assigns may, at
tively, project the eaves of any building
in like manner and to the same extent as
said city in the case of buildings standing
thereof.

"And the said city of Boston further
maintain, at its own expense, the said p
fence which the said city may elect to
line thereof, and will grade the said p
and convenient descent from front to rea
no steps in the same; and that the said
and aldermen thereof shall deem it ex
wise,) place suitable posts at the entra
on School Street, so as to exclude all
therefrom; the said Niles hereby giving
of such posts.

"And the said Niles, for himself, his
ministrators, further covenants with said
assigns, that he will not have or erect a
for horses nearer to said passageway t
now has on his said estate; and that h
any passage, from his said estate to sai
for horses, cattle, carts or carriages of a

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for foot passengers; and further, that he will make and maintain a suitable support for the side of the bricks of the brick walk on his line of said common passageway, and a suitable wall or fence (if he shall elect to place anything other than a building or buildings along his said line;) provided, however, that he shall not be required to lay any foundation under the sidewalk.

"And the said city of Boston in like manner covenants that it will not have or make any passageway from its said estate into said common passageway, except for the use of foot passengers only; and further, that in case the said city shall at any time hereafter continue said common passageway towards Court Street, the said Niles shall have a right to use the same in common with and for the like purposes as the city shall use it, during such time as it shall be so continued.

"And the said city of Boston hereby further agrees that the promissory note heretofore given by said Niles to the said city for the sum of one thousand dollars, shall, upon the execution of these presents, be given up to him, he, on his part, agreeing to surrender thereupon his existing contract with said city in relation to the said premises, and to relinquish all claims whatever that he might or could have by virtue of said contract; which said delivery of said promissory note and surrender of said contract shall be, and hereby is, declared and agreed to be in full settlement of all manner of claims existing between the parties by reason of the premises.

"And the said city of Boston further agrees that the work requisite in the premises shall be completed as soon as the season will permit."

Upon the east side of the way, as established by the indenture and upon the land now or formerly of said Niles, are numerous shops and other buildings having their entrances from said way. Upon the other side there are no doors from the City Hall, or any part of the city's land, opening upon the avenue, the access to the hall being direct from School Street on one side, and from Court Square on the other. The passageway was not intended or used other than as a footway, except as herein stated. There was evidence tending to show that when the passageway was first opened to twelve feet wide, a step was removed, and cor-

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tain posts, to prevent the passage of
down on School Street, but not so as t
gers; but that in 1858 said posts were
the steam fire-engine, which was kept
old City Hall building, opening on Co
through this way, which was called Cou
steam fire-engine had passed through the
and that men on horseback had ridd
seldom; but no carriages or teams, exc
avenue being paved with brick only, and
level of the carriageway in both Court S
to the level of the sidewalk, and boun
stone curb; and there was no evidence t
whatever had ever been put up showin
public way. The evidence also tended
where the accident happened was on the
which was the land of the city. There
formal acceptance of the way by the ci
street, and although the same had been c
repair by the city, it was contended, on i
pursuance of said indenture and under
only.

If in the opinion of the full court the
not come within the provisions of the C
dict was to be set aside and the case stan
judgment on the verdict.

J. L. Stackpole & J. Healy, for the defe

B. F. Butler & S. W. Harmon, for the

GRAY, C. J. In *Hemphill* v. *Boston*, 8
decided was that the city of Boston was n
to a horse and carriage by a defect in a wa
out and dedicated as a footpath only. In
Mass. 489, the decision was that a footpa
in the city of Worcester, which was not sh
out by municipal authority, or specially d
use as a footpath, was not a highway for
city was liable to travellers under the Ge
But in each of those cases the court abst
the question how far it was competent fo

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nals to lay out public ways for foot passengers only. 8 Cush. 196. 102 Mass. 495.

For the purposes of the present case, it may be assumed that, before the St. of 1874, *c.* 299, cities and towns and their officers had no authority, under the general laws of the Commonwealth, to lay out, or to accept the dedication of footpaths, so as to make them liable to passengers for defects therein.

In *Tyler* v. *Sturdy*, 108 Mass. 196, an opinion to that effect was expressed; but it was held that public footpaths might be created by dedication, so as to give the public a right of way over them; and reference was made to several special statutes which authorized the selectmen of the town of Boston to lay out, widen and discontinue not only "streets and lanes," but "alleys" or footpaths. Sts. 1799, *c.* 31, § 3; 1804, *c.* 73; 1816, *c.* 90. And in the earlier case of *Commonwealth* v. *Boston*, 16 Pick. 442, Chief Justice Shaw considered the St. of 1799, *c.* 31, § 3, empowering the selectmen to lay out or widen any street, lane or alley of the town, and providing that the owners of buildings removed for that purpose should receive compensation in the manner pointed out by the acts directing the method of laying out highways, as a clear recognition that these terms, describing the different kinds of ways, "when used as applicable to this city, are deemed to be synonymous with public ways or highways."

Although the Gen. Sts. *c.* 44, § 1, requiring towns and cities to keep public ways in repair, mention only "highways, townways, streets, causeways and bridges," and §§ 21, 22, 26, making them responsible for defects therein, omit "streets" from the enumeration, all these sections are manifestly intended to include all ways authorized by general or special statute to be laid out by municipal authority for any kind of public travel, and to charge the city or town for injuries, occasioned by want of repair therein, to any traveller lawfully using them for the purpose for which they are intended and appropriated.

In view of the special statutes above referred to, the evidence introduced at the trial, tending to show that City Hall Avenue had been immemorially used by the public as a footpath, warranted the jury in finding that it had been lawfully laid out, by the municipal authorities or otherwise, as a footway, and

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was a public way by prescription, whi
keep in repair. *Reed* v. *Northfield*, 1
Cummington, 18 Pick. 312. *Folger*
Commonwealth v. *Belding*, 13 Met. 10.
Gray, 73. If such was the fact, the
agreement between the city owning th
the private owner of the land on the
character of the way.

No reason therefore is shown by th
there should not be *Ju*

JOHN T. SEVERY *vs.* FREDERICK N

Suffolk. March 9. — May 6, 1876. AME

A laborer, employed in loading ice on board a vessel
his work, went on board the vessel for the gratifica
fell down an open hatchway and broke his leg. *He*
and that the owners of the vessel were not liable fo

TORT for an injury sustained by the pl
fendants' vessel, by a fall through a h
without proper guards or barriers. The
appeared at the trial in this court, before
lows:

The plaintiff was employed by his s
employ of the Boston Ice Company, by
loaded, to assist in loading a quantity of
At an early hour of the day, before sun
quite dark, the plaintiff and his son we
of ice to the wharf where the vessel la
board, upon the middle deck, down s
wharf, through a port-hole in the vessel's s
the plaintiff hauling the ice upon the slid
it on board. The son, after the ice was
ward to the ice-chest; and the plaintiff
time on the wharf, also went on board, en
the middle deck by the port-hole through

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on board. It was quite dark there, and the upper hatch was closed. After standing a short time, he concluded to go and see where the ice-chest was, and for that purpose walked forward, supposing it to be perfectly safe and seeing no danger, when he fell through the hatchways on the middle deck and the deck beneath, into the hold, breaking his leg and sustaining other injuries. The plaintiff had never been on board the vessel before, and was not directed or called by his son to go on board or to go forward to the ice-chest. The only caution that his son gave him was to be careful as he came down the slide. When the plaintiff and his son arrived at the vessel, the hatches of the upper deck were on, and the heavy doors of the port-holes were closed.

Upon this evidence the judge ruled as matter of law that the action could not be maintained, directed a verdict for the defendants, and reported the case for the consideration of the full court. If the ruling was incorrect, the verdict was to be set aside and the case stand for trial; otherwise, judgment on the verdict.

G. A. Somerby & F. F. Heard, for the plaintiff.

C. T. Russell, Jr., (*C. T. Russell* with him,) for the defendants.

DEVENS, J. The distinction which exists between the obligation which is due by the owner of premises to a mere licensee, who enters thereon, without any enticement or inducement, and to one who enters upon lawful business by the invitation, either express or implied, of the proprietor, is well settled. The former enters at his own risk; the latter has a right to believe that, taking reasonable care himself, all reasonable care has been used by the owner to protect him in order that no injury may occur. There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated. *Sweeny* v. *Old Colony Railroad*, 10 Allen, 368. *Indermaur* v. *Dames*, L. R. 1 C. P. 274; and L. R. 2 C. P. 311.

There was no evidence that the defendants, by any servant or agent, directed the ice to be put on board at the time it was done,

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or contemplated that any such thing wa
shown that the hatches of the upper deck
doors of the port-holes were closed, by
could alone be obtained to the middle
and his son arrived at the vessel. Assu
plaintiff's son, in whose employ he wen
break open the port-holes, and proceed t
and that the son, as well as any workman
him to aid in stowing the ice, had a r
proper precautions would be taken to pr
this service, and that as to them it was
hatchways open, the plaintiff still fails to
which he has a right to complain. He ha
which his son had desired him to do, i
from the wharf upon the middle deck.
time upon the wharf, he went on board
standing a short time, he concluded to
ice-chest was," and, in walking forward
injury occurred. He did not go on boa
ward, in response to any request or ca
simply told him to be careful as he came
any purpose of aiding in the stowing of
circumstances he was not on the steame
as a licensee. He was an intruder, who
middle deck solely for the purpose of g
and no liability was incurred by the o
any injury sustained by him while thus a
been guilty of any active misconduct towa

It is unnecessary, in this view of the ca
the plaintiff, in moving about in the dark
of a vessel with which he was unacquaint
exercise of due care. *Jud*

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TIMOTHY REMICK *vs.* JOSEPH H. SANDFORD & others.

Suffolk. March 14, 15. — May 6, 1876. AMES & MORTON, JJ., absent.

In an action for goods sold and delivered, the seller, if relying on an acceptance by the buyer to take the case out of the statute of frauds, must show some unequivocal act of acceptance, and, if the goods were sold by sample, it is not enough for him to show merely that the goods came into the possession of the buyer, and that they corresponded with the sample.

CONTRACT against Joseph H. Sandford, George Lovejoy and Robert P. Gould, copartners doing business under the firm name of O. A. Bingham & Co., to recover the price of twenty-four bags of wool of the value of $2930.40, sold and delivered by the plaintiff to the defendants. Answer: 1. That the sale was by sample, and with the representation and warranty that the wool corresponded with the sample, and that in fact it did not so correspond. 2. The statute of frauds.

After the former decision reported 118 Mass. 102, the case was tried in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff introduced evidence to show that the wool sold was a uniform lot of unwashed fleece wool, bought by him of a wool dealer at Norwich, Connecticut, who was present and testified that the wool was all one lot, with no difference; that he bagged it from a pile indiscriminately, and shipped it to the plaintiff. The plaintiff's witnesses further testified that the wool was received at the plaintiff's storehouse; that eight bags, without selection, about one third of the entire lot, were emptied of their contents on the floor; that the remainder was piled up in the bags in the next room, and the ends or sides ripped open and examined by Hall and Hollister, men in the employ of the plaintiff, who pronounced it alike; that the room, where the bags were, had other goods in it, and had no windows, but was lighted by double doors on each side, which were kept open during the day; that in March, 1872, the plaintiff requested one Williams, a wool broker, to find a purchaser for this wool; that Williams went down and examined both that on the floor and that in the bags, and Williams testified that it was a uniform lot of heavy fleece wool; that on March 20 he took the defendant Lovejoy

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down to examine it for purchase; that
tiff's office, and Hall, in the employ o
with them to the storehouse; that L
in the pile, and asked Hall if it was
said he had examined it and could see
was all bought at the same time of
the rest of the wool was in the next
be got out in a few moments; that L
ined it all he wanted to; that Lovejoy
and examined the bag of super-pulled
take that if he took the other; that he
his wagons for it; that Hall said it wou
send it by their wagons, and Lovejoy
take it; that there was no statement o
wool was all alike, or that that in the b
ity as that on the floor; that the price
was forty-nine cents, and that for the
cents per pound; that in the afternoo
broker met Lovejoy on the street, and
would take the wool at the prices name
to his office and made out triplicate sal
handed to Lovejoy at the defendants' co
at it and said it was "All right;" that
tiff, and kept one himself. The one ha
put in evidence, and is as follows:

"Bo

"Sold for account of Mr. T. Remick to
Abt. 5,500 lbs. Un'hs Fleece Wool,
1 Bag Super-pulled, price .
Bags @ value.
Tare 3 lbs. each.
"Cash. Terms, 30 days. H.

It was further in evidence, that the al
count of the sale; that the plaintiff's fir
was on receipt of the sale note; that or
was weighed, and in the afternoon sen
store, who received and hoisted it into
it was sent to the defendants, that, on M
sent the plaintiff the following letter: "

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you not being like sample shown us, we refuse to accept, and hold the same subject to your order;" that was the first knowledge he had of any complaint by the defendants; that he replied by letter, dated March 26, stating that the wool was fairly represented, and that he should hold the defendants to the trade, and received a letter from the defendants, dated March 27, inclosing the bill rendered, and requesting the removal of the wool without delay; that Hall and Williams, at the request of the defendants, three or four days after the sale, went and looked at a portion of the wool emptied out of the bags at the defendants' store; that Lovejoy said he had bought this to go with another lot of wool he had sold; that it was not so good, and did not look like the same wool. Hall asked him to pick out one bag different from the rest, and Lovejoy said there was no difference, it was alike, but it was not the wool he bought; that he found no fault with the pulled wool, but did not want that unless he had the whole. One Miller, a wool merchant, who had examined the wool at Norwich, with a view to purchase it, and afterwards recognized and examined it at the plaintiff's storehouse prior to the sale, testified that it was a uniform lot of fleece wool. It was in evidence that this was the only lot of fleece wool the plaintiff had at the time, and that the bag of super-pulled wool was all one grade of super-pulled wool.

The defendants offered evidence tending to show that Lovejoy had been taken by Williams, as the broker employed by the plaintiff, to the plaintiff's store; had met Hall there, and was taken into one loft in the plaintiff's storehouse on Russia Wharf, and there shown about three bags of wool opened on the floor; that he examined it and found it was a good lot of unwashed fleece wool; that he asked Hall where the rest of the wool was, and Hall replied that it was in the other loft; that it was dark there; that the wool was in bags piled up behind some shoddy and waste wool, and that it would be very inconvenient to get at it. Lovejoy then asked if this was a fair sample of the entire lot, and Hall replied that it was; that Lovejoy then said if this was a fair sample of the lot he would purchase it; that Hall said it was, and Lovejoy bought it then and there, and said he would send his own wagon after it when he wanted it; that either on the same afternoon, or upon the next, about 4 o'clock, a lot of

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wool arrived at the defendants' store, in
plaintiff; that Lovejoy was then abou
could not stop to examine the wool, bu
hoist it into the loft, which was done,
there unopened until the next morning, v
to open the bags, and had opened eight
man, who had before seen the samples at
ing that this was not the wool he had
men to stop opening the bags, and sent
into the loft and saw the wool opened, an
inferior kind and condition, and not two
sample shown him at the plaintiff's store
the men to stop opening the bags, simpl
of the other bags, and saw that it was
condition; that he examined the bags of
that it contained a large proportion of i
and he then sent immediately for Hal
the wool; that Hall was out of town; th
Williams, who called the next day, looke
"it was not the wool Lovejoy had boug
him he should not take it, but should se
or two after this Hall came in, and was
same position and condition as when th
it, and was told by Lovejoy that it was n
and he should refuse to take it; that on
wrote the letter above referred to, dated
25th, after Hall called and refused to tak
joy had it repacked in the original bags,
plaintiff, and had it stored in the loft in
easily be inspected or delivered to the p
mained there subject to the plaintiff's or
defendants, until it was destroyed in the
10, 1872. The defendants also offered ev
that Lovejoy never received or saw any b
such a note was never received or seen by
or by any one in their employ.

The defendants also put in other evi
that this was a sale by sample; that th
store was inferior to that shown by the

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soon as the inferior condition of the wool was ascertained, they refused to take it.

Upon this evidence, the defendants contended that the plaintiff could not recover unless he proved a receipt and acceptance of the wool or some part thereof, or that something had been given in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the bargain was made and signed by the defendants or by some person thereunto by them lawfully authorized; that, if the sale was by sample, then it was a sale with a warranty that the bulk of the wool corresponded with the sample; that if it was such a sale, then the broker, having authority only to reduce to writing the actual terms of the sale, would have no right to sign any note or memorandum which did not contain that fact or element, and the note in this case would be invalid; and that, unless the jury found there had been a receipt and acceptance of the wool by the defendants, there could be no recovery in this case; so that the question for the jury was whether this was a sale by sample; that if they found that it was, then, whether the bulk of the wool corresponded with the sample or not, they must find a verdict for the defendants.

The defendants asked the judge to instruct the jury as follows:

"1. There can be no recovery in this case unless the wool has been received and accepted by the defendants, or unless there was a sufficient memorandum in writing.

"2. If, as soon as the wool was received and opened by the defendants, they refused to receive and accept it, and so notified the plaintiff, there would in law be no such acceptance of the wool as to bind the defendants or to answer the provisions of the statute of frauds.

"3. If there was no such acceptance, then, unless there was some note or memorandum in writing of the sale, signed by the defendants or some person by them duly authorized, the plaintiff cannot recover.

"4. If the actual sale made was by sample, such sale by sample would be a warranty that the bulk of the wool corresponds with the sample shown, and the broker would not be authorized to sign in behalf of the defendants any note which did not contain in effect this warranty.

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"5. If the sale was by sample, and
contain this element, such note would
"6. If such note is invalid, then the
which would bind the defendants."

The judge gave the 1st, 4th and 5
declined to give any of the others in th
were presented; but, to cover the point
tions alluded to, instructed the jury as

"The important questions, upon whic
whether the sale was an honest sale or
was in the ordinary way, without the
the wool as a sample, the defendants
and having opportunity to examine th
sale was by sample, with representation
to the sample, which would imply a wa
stantially the plaintiff's theory, and the
defendants' theory. If the plaintiff's
proved, then it was a good sale, and no
of frauds, giving the plaintiff the right t
the note signed by the broker Williams
memorandum in writing of the sale; a
the wool at the storehouse of the defen
them into their storehouse, (if the jur
evidence upon that point,) was a deli
their part, sufficient under the statute
jury are satisfied of the truth of the defe
sale was by sample, then if the defendan
ery and receipt of the wool into their s
first time that the bulk did not substanti
ple, they had a right to give the notice w
free from obligation to pay for the wool,
position that there was no acceptance of t
on their part, and no memorandum in w
ute aforesaid requires." Other instructi
jury as to what constituted a sale by sa
spects, which were not objected to by the

The jury returned a verdict for the
amount claimed; and the defendants alie

C. T. Russell & C. T. Russell, Jr., for
F. S. Hesseltine, for the plaintiff.

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DEVENS, J. To the instructions given, upon the theory of the plaintiff, that the sale of the goods was in the ordinary way, and not a sale by sample, with an implied warranty that the goods should be equal to the sample, no exception is taken. It was however contended by the defendants that the sale was by sample, and that there was no written memorandum of the contract (it being a sale of goods to the value of more than fifty dollars) such as is required by the statute of frauds. The broker's note did not afford such evidence, as it omitted the important element of a warranty upon the sale, and, if such was the sale, was unauthorized. *Remick* v. *Sandford*, 118 Mass. 102. The plaintiff, to meet the theory of the defendants, and to avoid its effect, contended that the goods were accepted and received by the defendants, and that therefore, this being proved, no written memorandum of the contract was necessary, but that its terms might be proved by parol.

As the verdict rendered was general, it cannot be ascertained whether the jury found for the plaintiff on the ground that the sale was not by sample, or on the ground that, although it was a sale by sample, yet that there had been an acceptance of the goods under the sale, and that they corresponded to the sample. It becomes necessary to inquire, therefore, whether the instructions were, upon the latter aspect of the case, correct.

These treat the delivery of the wool at the storehouse of the defendants, and its receipt therein by them, as a delivery and an acceptance on their part, sufficient, under the statute of frauds, to permit parol evidence of the contract; but recognize that if, upon examination, it was found not to correspond to the sample, the defendants might reject it, and take "the position that there was no acceptance of the delivery of the wool on their part" such as the statute requires. The right to reject the wool, thus accorded to the defendants, is only the same right which they would have had if it had been sold by sample and a written memorandum thereof made. They could then have returned it after delivery, and defended successfully against an action for its price, if it failed to correspond to the sample. The wool having been taken into the defendants' warehouse, the question whether there was an acceptance and receipt was thus made to depend upon whether it should have been accepted, inasmuch as it corresponded to the contract.

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There may undoubtedly be an ac
afford conclusive evidence that the cont
its terms complied with, and which w
and let in evidence of those terms, w
be proved by writing. If the buyer ac
which he purchased, he may afterwards
not what they were warranted to be, bu
But, while such an acceptance satisfie
have that effect it must be by some une
part of the buyer, with the intent to tak
as owner. The sale must be perfected,
not by proof of a change of possession
with such intent. When it is thus d
the relation of vendor and vendee exists
contract is dispensed with, although the
with warranty, may still retain his righ
they do not correspond with the warra
15 Q. B. 428. *Johnson* v. *Cuttle*, 105
Mann, 118 Mass. 143, and cases cited.

That there has been an acceptance o
the buyer has conducted himself, in r
owner, (as by a resale, which would depr
take or decline them, and which is of its
be proved by the party setting up the
inferred, as matter of law, merely from th
goods have come into the possession of t
ruling gives to the defendants is the righ
they did not correspond to the sample,
had by the common law, even if there ha
orandum. But they had more than this
memorandum; they had a right arbitrari
ance of the goods, unless they did or had
tion to them consistent only with their c
consistent with that of the seller. Th
which they received the goods, and the
acted in reference to them, were to be c
These might show that they received the
to accept them, as being the goods they
owners of them, but they might also sh

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them only for the purpose of examination. A receipt for such a purpose is not inconsistent with their continuing still the property of the seller. *Hunt* v. *Hecht*, 8 Exch. 814. *Curtis* v. *Pugh*, 10 Q. B. 111. *Exceptions sustained.*

GEORGE M. COOK & others *vs.* HENRY BALDWIN.

Suffolk. March 16. — May 6, 1876. AMES & MORTON, JJ., absent.

The words "I take notice of the above," written and signed upon an unnegotiable bill of exchange by the drawee, do not of themselves necessarily import an acceptance of it, and parol evidence of a refusal to accept by the drawee, at the time of its presentation, is admissible.

A part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder.

CONTRACT on five drafts, payable to the plaintiffs, drawn on the defendant and alleged to have been accepted by him. Trial in the Superior Court, before *Pitman*, J., without a jury, who allowed a bill of exceptions in substance as follows:

The plaintiffs introduced evidence tending to show that the defendant wrote the following words on four of the drafts: "I take notice of the above, Henry Baldwin;" and, on one of these drafts, for $600, subsequently made a partial payment of $400; that these orders were drawn on the defendant by certain debtors of the plaintiffs in their favor, to pay them for building materials by them furnished to said debtors, with which to build four brick dwelling-houses, one on each of four lots of land in Linwood Street, in Boston; that before any of the orders were drawn, one of the debtors made four several mortgages, one on each of said lots of land, and each to secure said debtors' note to the defendant for the sum of $6000, for the purpose of raising money to pay for said land and building said dwelling-houses, which the defendant contested; that the defendant retained the entire consideration for the mortgage notes in his own control, and afterwards made payments for the land, and for labor and materials for erecting the dwelling-houses thereon; and that, at the time the orders were respectively drawn and presented to

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him, he had a sufficient sum remaini
consideration of said mortgages to pay
ing to their terms; and that the work
forward, so that all of said orders woul
September 15, 1872, if the defendant

The plaintiffs put in other parol evi
put in parol evidence tending to show
or to become bound to pay the plaintif

The plaintiffs asked the judge to ru
words on these orders by the defend
acceptance of the same by him, and re
the same; and also that writing the
$600, and subsequently paying a port
tuted a valid and legal acceptance of
the defendant liable to pay the remainc

The judge refused so to rule, but held
on the orders, and the acts of the de
amount to an acceptance of either of
defendant liable to pay the same or a
these acts were only pieces of evidenc
evidence, found no acceptance proved, a
ant. The plaintiffs alleged exceptions.

L. Mason, for the plaintiffs.

H. L. Hazelton, for the defendant.

DEVENS, J. The whole of the facts
rior Court has found that there was no
upon which this suit is brought, are not
when all the facts are found, it is a ques
whether they prove an acceptance, th
whether the writing of the words "I ta
constitutes in itself such complete pro
was not competent for the Superior Cou

These orders may legally be define
change, for, although not negotiable, the
parties to such instruments: a drawer, d
v. *Brigham*, 6 Cush. 6. An acceptanc
may be by an oral promise to pay it as
by such language and conduct on the par
as presented to him, as justifies the pa

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consents to pay it. *Grant* v. *Shaw*, 16 Mass. 341. *Ward* v. *Allen*, 2 Met. 53. *Wells* v. *Brigham*, *ubi supra*. *Dunavan* v. *Flynn*, 118 Mass. 537. The St. of 1 & 2 Geo. IV. *c.* 78, which provides that no acceptance of inland bills of exchange shall be sufficient to charge any person unless the same is in writing, has been followed by similar legislation in some of the states of the Union. *Spear* v. *Pratt*, 2 Hill, 582. No such provisions have, however, been incorporated into the laws of this Commonwealth.

As an oral acceptance may be shown, it follows that an oral refusal may also be shown, when all that has taken place between the parties is oral. And when that which is written upon the bill does not by its terms necessarily import an acceptance, the party sought to be charged should be permitted to show all that was then said and done, in order that it may be determined, from the whole evidence, whether he assented to the request of the bill. The words written upon the bill are a recognition only that the bill has been presented for acceptance; they are not inconsistent with a positive refusal to accept or to become bound to pay the plaintiffs, of which refusal, according to the facts reported, there was evidence.

In regard to the acceptance of bills of exchange, it has sometimes been said that any words written thereon not putting a direct negative upon the request therein contained, such as "presented," or "seen," or the writing of the drawee's name, constitute *primâ facie* a complete acceptance by the law merchant. Bayley on Bills, (2d Am. ed.) 163. In some cases, it has been left to the jury to determine as a fact whether the words indorsed, according to the custom of merchants, import an acceptance. *Anon.* Comb. 401. *Dufaur* v. *Oxenden*, 1 Mood. & Rob. 90. But even if it be held that the words here written would, if unexplained, be a sufficient acceptance, they may be explained as between the payee and drawee, by showing the circumstances under which they were written and accompanying declarations, not inconsistent with an acknowledgment that the bills had been brought to the drawee's notice. Story on Bills, § 243.

The fact that a payment was made upon one of the bills does not in law bind the party thus paying to pay the remainder. It may have been accompanied by a positive refusal to pay more.

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No indorsement of the payment was the fact that the drawee made this taken in connection with other evide he recognized the bill as one accepted bound to pay.

HARRIET E. BIGELOW *vs.* ALEX

Suffolk. March 16. — May 6, 1876. A

The St. of 1874, c. 205, so far as it provides that her husband, for justifiable cause, and he fail make such order as it deems expedient for the tenance of the minor children, is constitutional, a trial by jury.

PETITION filed December 30, 187 c. 205,* representing that the parties 1872, and afterwards lived together in had two children, who now lived with on September 13, 1875, the responde without cause, and they had since live on her part, but by his fault in leavin without just cause, to furnish suitable their children; and praying for an or

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* "Whenever a husband, without just cause, for his wife, or has deserted her, although suc than three years, or when the wife, for justif apart from her husband, the supreme judicial any justice of said court in vacation, may by it wife, prohibit the husband from imposing any erty for such time as the court or justice shall, the further order of the court thereon; and t the application of the husband or wife, make expedient concerning the support of the wife, tenance of the minor children of the parties, of them the children or any of them shall re time, afterwards, on the application of either c such order, or make a new order or decree, as ents or the benefit of the children may require."

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imposing any restraint on her personal liberty, and for further order concerning her support and that of the children.

The petition was heard by *Devens*, J., who made an order by which he determined that the petitioner was actually living apart from her husband, for justifiable cause, and that he had failed to provide suitable support and maintenance for her and their two minor children; and ordered that he should pay to the petitioner thirty dollars a month for the support and maintenance of her and the children, until further order of the court.

The respondent moved that the decree be vacated, because "the statute, under which the petition is brought, is unconstitutional, inasmuch as it makes no provision for trial by jury in accordance with Art. XV. of the Declaration of Rights in the Constitution of this Commonwealth, and Art. VII. of the amendments of the Constitution of the United States." This motion was disallowed; and the respondent appealed.

G. W. Morse & A. S. Hall, for the respondent.

C. H. Chellis, for the petitioner.

GRAY, C. J. By the Constitution of the Commonwealth, in accordance with the practice under the Charter of the Province, the jurisdiction in cases of divorce and alimony was vested in the Governor and Council, until transferred by the St. of 1785, *c.* 69, to this court, where it has since remained; but it belongs to the Legislature to express by general laws the cases in which the court may decree a divorce from the bond of matrimony or a judicial separation, and may order the husband to support his wife lawfully living apart from him. *Sparhawk* v. *Sparhawk*, 116 Mass. 315. *Shannon* v. *Shannon*, 2 Gray, 285, 287. *Adams* v. *Adams*, 100 Mass. 365, 373.

A trial by jury was never had in such cases until it was allowed on libels for divorce by the St. of 1855, *c.* 56; Gen. Sts. *c.* 107, § 15. The fifteenth article of the Declaration of Rights, affirming the right of trial by jury "in all controversies concerning property, and in all suits between two or more persons," excepts "cases in which it has heretofore been otherways used and practised." The seventh article of amendment of the Constitution of the United States is limited to suits at common law, and does not apply to the state courts. *Twitchell* v. *Commonwealth*, 7 Wall. 321. *Commonwea'th* v. *Hitchings*, 5 Gray, 482.

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The St. of 1874, *c.* 205, authorizes husband from restraining the perso to make orders concerning her suppo maintenance of the children of the has deserted his wife or has unjustif her, or she is living apart from him petition alleges that all these facts e mines that the wife is living apart fro ble cause, and orders him to pay a ce support of herself and their children the court.

The object and effect of this proce cial determination that the husband a apart, and that he shall support her the separation. In such a case, the tional right to a trial by jury.

This case does not require us to c the statute could be upheld as a reg of the duty of a husband to support h living with him.

GUSTAVUS D. DOWS & another *vs*

Suffolk. March 17. — May 6, 1876. A

An oral guaranty of the payment of the note of a a debt of the guarantor, is within the

CONTRACT upon a promise of the d of a third person to the plaintiff, upon The answer set up the statute of frauds

At the trial in the Superior Court, be jury, it appeared that the plaintiffs sold goods, taking in part payment his due bi subsequent payments to $200. For thi offered to the plaintiffs the note of o their order, which they accepted, and at up the said due bill in settlement, and h the note was not paid by Robinson at m

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The plaintiffs, after the note became due, sent it to Robinson's place of business and residence for payment, but did not find him, and thereupon demanded payment of the defendant, who refused it. The judge found that the plaintiffs had used due diligence in attempting to collect the note of Robinson, and that there had been due demand upon the defendant.

The defendant requested the judge to rule that the plaintiffs could not recover. The judge refused so to rule, and found for the plaintiffs for the amount of the note and interest, "upon and by reason solely of the verbal promise, which he found, as a fact, that the defendant did make; and held and ruled that, it appearing that the leading and immediate object of the defendant in giving and verbally guaranteeing the note of Robinson was the payment of his own debt, the promise was not to be considered as collateral to the debt of another, but as creating an original obligation from the promisor, — a part of the mode and manner in which he was to pay his own debt, — and so was not within the statute, although one effect of its performance would be to discharge Robinson's liability." The defendant alleged exceptions.

J. B. Richardson, for the defendant.

D. B. Gove, for the plaintiffs.

GRAY, C. J. The defendant was doubtless once liable for the goods sold and delivered to him, and upon the due bill which, upon paying part of the price of the goods, he gave to the plaintiffs for the balance. But upon his procuring and delivering to them the note of Robinson, as the bill of exceptions states, "they at the same time gave up the said due bill to him in settlement," and he orally promised to pay Robinson's note at maturity, if Robinson did not. The claim of the plaintiffs, and the finding of the court, did not proceed upon the defendant's liability for goods sold, but solely upon this oral promise of his, thereby necessarily assuming that his previous liability had been settled and discharged by the giving and receiving of the note of Robinson. Upon this state of facts, the only direct liability was that of Robinson upon his note, and the oral promise of the defendant to pay that note, if Robinson did not, was a collateral promise to pay Robinson's debt, and as such within the statute of frauds. Gen. Sts. c. 105, § 1. *Nelson* v. *Boynton*, 3 Met. 396. *Ames* v. *Foster*, 106 Mass. 400. *Brightman* v. *Hicks*, 108 Mass. 246. *Gill* v. *Herrick*, 111 Mass. 501. *Exceptions sustained.*

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PATRICK J. MOLEY & another *vs.* J

Suffolk. March 22. — May 6, 1876. DEVENS

The members of a partnership contributed to the comm
tions, with an agreement that the profits should be eq
Upon the dissolution of the partnership the assets w
the contributions of the several members in full. *He*
divided in the proportions of the contributions, and
partners equally. *Held, also*, that the fact that one of t
a minor made no difference.

BILL IN EQUITY to close up a partnership
ing, before *Wells*, J., the plaintiffs relied on
by the three partners, of which the following
ment made this third day of August A. D.
Brine, P. J. Moley and E. F. Jackson. Th
fore existing under the firm of Brine Bros.
solved. E. F. Jackson is alone authorized
the firm in liquidation, make collections, pay
and draw checks, until the old business is
arranged. The other partners shall assist is
ness, except as aforesaid. From collection
Jackson is to receive the sum advanced by
interest. The balance of assets and property
to be divided between Messrs. Brine and
their interest in the business; that is to
interest, to Moley, and the balance to Brin
store and business. Brine and Moley assun
counts and contracts up to August 1, 1871.
from the business after August 1, 1871, by I
Jackson is to be deducted from the above p
agreement Jackson had begun to liquidate t
prior to the filing of this bill.

It was then ordered: 1st. That that agre
and annulled as an agreement, the said Bri
that date, and having elected to avoid the s
and that said writing be taken to have no f
than as evidence upon the question of the
and relations between the parties." 2d. "
ferred to a master to hear the parties and re

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findings as to the actual relations between the parties and their respective rights in and to the funds and assets that are now in or that may come into the hands of the receiver; and also to state the accounts between them."

The master's report stated the following facts: The partnership was formed about July 1, and was dissolved by mutual consent on August 4, 1871. At the formation of the partnership, Jackson contributed to the common stock $1874, Moley $1800, and Brine $882, and it was agreed that each should receive one third of the profits. During the continuance of the partnership, Jackson drew out $34, Moley $100, and Brine $673.15. There were no profits of the partnership, and the assets were not sufficient to pay back in full the original contributions.

At the final hearing, before *Colt*, J., the plaintiffs contended that, no agreement being shown as to the division of the common stock upon a dissolution of the partnership, each partner was entitled to the amount of his contribution and interest, and that the deficiency in assets should be borne by the partners equally.

The defendant contended: 1st. That the assets should be equally divided among the three partners, without regard to the amounts contributed by each. 2d. That if such was not the rule, then the deficiency should be borne by the several partners in proportion to the several amounts contributed by them, and that the defendant should not bear any part of the deficiency.

The case was reported for the consideration of the full court; such order or decree to be entered as the case required.

S. J. Thomas, for Moley.

T. P. Proctor, for Jackson.

M. A. Blaisdell, for the defendant.

GRAY, C. J. The assets remaining upon the settlement of the business of the partnership, being less than the amount contributed by all the partners to the common stock, must be divided among them according to the amount of their contributions, and the deficiency must be borne by the partners in the same proportions in which they were to bear profits and losses, that is to say, in this case, equally. *Whitcomb* v. *Converse*, 119 Mass. 38.

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This rule is not affected by the fa
infant. According to the agreemen
contributed less than one eighth of th
receive one third of the profits of t
entered into the partnership, had the l
and drew out the greater part of his
remaining at the time of the dissolutio
the claims of all the partners, the loss
the three partners in equal proportio
throw upon his copartners the obligatio
ciency. *Breed* v. *Judd*, 1 Gray, 455. *
552; *S. C.* 8 Taunt. 508. *Ex parte T*
254. *Aldrich* v. *Abrahams*, Hill & De
v. *Watrous*, 7 Hill, 110, 112, 113. *He*
251. *Decree for the*

EDWIN M. BIGELOW *vs.* CITY

Suffolk. March 23. — May 6, 1876. DEV

Upon a petition to the Superior Court for a jury to r
ment, the burden is upon the petitioner to show tha
Upon exceptions by the petitioner to the ruling in th
tion for the revision of an assessment of a bettern
the bill of exceptions, as to the jurisdiction of the
cannot be considered.

PETITION under the St. of 1871, *c.* 38
Court for a jury to revise an assessment
by the board of aldermen of the city of
of the petitioner, fronting on Shawmut
was taken to widen that street. Trial be
allowed a bill of exceptions in substance a

By an order passed by the board of al
Boston on August 29, 1870, and appro
October 10, 1870, Shawmut Avenue was
from Dover Street to Tremont Street, tak
tioner's land. On October 7. 1872, the b

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judged the benefit and advantage to the remainder of the petitioner's land thereby to be $10,000, and assessed thereon $5000. The petitioner having the opening and the closing argument, the judge ruled and instructed the jury, pursuant to a request by the respondent, that the burden of proof was on the petitioner to prove that he was aggrieved by said adjudication and assessment, and that his land was not benefited, or not benefited to the extent adjudged by the board of aldermen. The jury returned a verdict that the petitioner's estate had been benefited in the sum of $10,000, and assessed damages against him in the sum of $5000. The petitioner alleged exceptions to the above ruling.

E. M. Bigelow, pro se, contended, in addition to the point raised by the bill of exceptions, that under the Sts. of 1871, *c.* 217, § 1; *c.* 382, § 1; all power to make assessments vested exclusively in the board of street commissioners, that the board of aldermen acted without authority, and that the Superior Court had no jurisdiction of the petition.

J. L. Stackpole, for the respondent.

MORTON, J. The only question raised by this bill of exceptions is as to the correctness of the ruling that the burden of proof was on the petitioner to prove that he was aggrieved by the adjudication and assessment by the board of aldermen, and that his land was not benefited to the extent adjudged by the board.

We are of opinion that this ruling was correct. The petition to the Superior Court, provided for by the St. of 1871, *c.* 382, § 7, is in the nature of an application for the abatement of a tax. *Boston Seamen's Friend Society* v. *Boston*, 116 Mass. 181. It is not like an appeal at common law, which vacates the judgment appealed from and reopens the whole case in the appellate court. Upon this petition the Superior Court has no power to increase the tax assessed upon the petitioner; the only authority it can exercise is to abate or reduce the assessment if it is shown to be excessive. *Lowell* v. *County Commissioners*, 3 Allen, 546. If for any reason the petition for an abatement is not prosecuted, the original assessment stands and creates a lien upon the land. The petition alleges that the assessment is excessive. Upon this issue the petitioner is the plaintiff or actor; he has the affirmative, and the burden of proof is upon him to maintain his allegations.

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The petitioner has argued the point
men had no authority to make the ass
this point was not raised in the Sup
volved in the decision of these exceptio
by the petitioner, the action of the boa
out authority and all the proceedings
Superior Court were *coram non judice*
grieved by the ruling that the burden
His right to test the validity of the acti
men in the proper mode is not affected
not required to consider this question i
judgment can be rendered, quashing or
of the board of aldermen. The legali
be tried by certiorari, or some other pro

JONATHAN B. SIMONDS, trustee, *vs*

Suffolk. March 28. — May 6, 1876. Co

An assessment upon an estate under a betterment act,
sor, may be recovered by him of a lessee, who, by a
of any betterment act, has covenanted to pay "all
levied thereon during the term," if the lease was
before the passage of the St. of 1871, *c.* 382.

On the assignment of a lease of land by the original
was executed by the assignee, by which he agreed t
premises, to be paid for by the lessee, and to reassign
ment being made in full. *Held*, that this contract
reassignment, and that the assignee was liable upon

CONTRACT by the surviving trustee u
than Simonds, to recover of the defend
assessment made upon an estate, situated
ren Street and Eliot Street, by the board c
of Boston, for the widening of Eliot Stree

At the trial in the Superior Court, befo
a jury, it appeared that the trustees unde
Simonds leased the above described estat
the term of eighteen years from January 1,

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nanting to pay "all taxes and duties levied or to be levied thereon during the term;" and that Rosenfeld on May 31, 1856, assigned the lease to the defendant and one Joel Snow, copartners under the name of Job A. Turner & Co., for the residue of the term, taking from them a contract of even date, by which they agreed to make certain repairs and improvements upon the premises, to be paid for by Rosenfeld, and to reassign the lease, which was described and referred to, to him when such payment was made in full.

In pursuance of an order of the board of aldermen of the city of Boston, approved December 31, 1869, Eliot Street was widened, part of the leased land was taken, and a betterment assessed upon the remaining part, on December 20, 1870, in the sum of $1700. The plaintiff paid this assessment on November 22, 1871, and no notice was given the defendant or Snow of the assessment, and no demand to pay the same was made upon either of them. The lessor did not appeal from the assessment, or apply for a jury to revise the same, and the defendant and Snow were given no opportunity to do so by notice.

The judge ruled that upon the foregoing facts the plaintiff was not entitled to recover of the defendant the whole or any part of the amount paid by the plaintiff as a betterment; and the plaintiff alleged exceptions.

C. R. Train & J. O. Teele, for the plaintiff.

A. A. Ranney, for the defendant.

GRAY, C. J. This case must follow those of *Curtis* v. *Pierce*, 115 Mass. 186, and *Blake* v. *Baker*, 115 Mass. 188. In *Blake* v. *Baker*, indeed, the covenant, which was in the very words now before us, was made after the passage of statutes imposing assessments for betterments. But in *Curtis* v. *Pierce*, as in the case at bar, the covenant was made before the passage of any such statute; and the covenant to pay "all taxes and duties levied or to be levied thereon during the term," though expressed in less full and comprehensive language, is equivalent in substance and effect to the covenant in *Curtis* v. *Pierce*, and in the other cases there cited. See also *Post* v. *Kearney*, 2 Comst. 394. It must therefore be held to cover all assessments imposed by law upon the land during the term.

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The lease was duly assigned by Snow. The contract contemporaneo which they agreed to make improvem be paid for by him as therein provide to him, did not amount to a present sively shows that they accepted the lease, and are liable upon the coven *Bosanquet*, 1 Brod. & Bing. 238; *S. C* v. *Foster*, 2 Penn. 23. The nonjoind to, and was matter of abatement only.

GEORGE W. WHITE *vs.* CONNECTICUT PANY.

Suffolk. March 28. — May 6, 1876. DE

In an action on a policy of insurance against fire, c pany should not be liable by virtue of the policy actually paid, it appeared that the company's ge the usual course of his business with a certain insu containing this clause to him, without requiring miums, charging him therewith instead, in person monthly bills thereof, deducting an agreed commiss broker in his monthly settlement paying the pren collected them or not; that a large number of su by the agent, with the company's knowledge and w been paid on many of them, though no such cases w pened before an actual payment of the premium; tion to the agent for insurance upon behalf of the ingly filled up, executed and countersigned a polic to the broker, who informed the plaintiff that he had call on him the first of the following month, and peared that the broker had been in the habit o plaintiff and keeping his policies for him, and freq tiff in his hands, and had never demanded of him p policy in suit. *Held*, that this evidence would warr duly authorized agent of the company had accepte broker as a payment of the required premium; and to maintain the action.

A policy of insurance against fire provided that the i at any time at the option of the insurer on giving no

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ing a ratable proportion of the premium for the unexpired term of the policy *Held*, that a notice of a desire to terminate the policy, without an offer to return part of the premium, was not sufficient.

A policy of insurance against fire provided that any person other than the assured, who might have procured the insurance, should be deemed the agent of the assured, and not of the insurers, under any circumstances whatever, or in any transaction relating to the insurance. *Held*, that the clause referred to the original transactions connected with obtaining the policy, and could not be construed to mean that an insurance broker procuring the policy should be the agent of the assured to receive notice of its termination.

CONTRACT upon a policy of insurance against fire. At the trial in the Superior Court, *Pitman*, J., by agreement of the parties, after verdict for the plaintiff, reported the case to this court, the verdict to stand, if upon the evidence reported the jury would be authorized to return such verdict; otherwise, judgment for the defendant. The evidence sufficiently appears in the opinion.

S. Hoar, for the defendant.

A. Wellington, for the plaintiff.

COLT, J. The policy in this case was obtained for the plaintiff by Hunt, an insurance broker, through the defendant's general agent, Darling. It contained provisions, among others: 1st. That the company should not be liable by virtue of the policy until the premium therefor was actually paid. 2d. That the insurance might be terminated by the company on notice to that effect, and on refunding a ratable proportion of the premium for the unexpired term of the policy. 3d. That any person who had procured the insurance, other than the assured, should be deemed to be the agent of the assured, and not of the company, "in any transaction relating to this insurance;" and 4th. That nothing less than a distinct agreement, indorsed on the policy, should be construed as a waiver of any restriction or condition contained in it.

The defence is that there had been no actual payment of the premium, made necessary by the terms of the policy as a condition precedent to its validity; and that the risk was terminated before the fire by notice from the company.

The defendant offered no evidence, and the only question is whether the plaintiff's evidence, as reported, would justify a jury in finding a verdict in the plaintiff's favor. If so, as agreed at the trial, judgment must be entered for him.

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We are of opinion that there is evi
lations of the several parties, the trans
course of business and the delivery of
justify a finding that the company acc
the broker, Hunt, individually, as a p
within the meaning of the terms of the
to their course of business for the gene
to deliver policies to Hunt without re
premiums. Instead of that, he charged
ually, and rendered to him monthly b
commission allowed him for obtaining
The policy in this case was so delivered,
ment of money. A large number of the
taining these same clauses had, with the
been issued by Darling to insurance br
without objection on the part of the de
been paid on many of them, but no case
loss happened before an actual payment
evidence from Hunt, that, in his monthl
ling, he paid the premiums charged to hi
lected them or not, and offered to pay thi
ment in January, next after the date of t
fire; that he had been in the habit of obt
plaintiff and keeping his policies for hi
funds of the plaintiff in his hands, and
him the payment of this premium, altho
that he had informed the plaintiff, before
ance had been procured, and he would c
the following month, with the assurance
uneasiness about the matter. The com
before the fire, that it did not wish the ris
said nothing as to payment of premium.

It is a fair inference from all this, tha
agent of the company had accepted the in
as a payment of the required premium.
waiver, by parol agreement, of an express
ten contract, within the cases cited by
rather a compliance with the condition re
to the policy within a large class of cas

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sufficient. *Tayloe* v. *Merchants' Ins. Co.* 9 How. 390, 402. *Miller* v. *Life Ins. Co.* 12 Wall. 285, 303. *Sheldon* v. *Atlantic Ins. Co.* 26 N. Y. 460. *Sheldon* v. *Connecticut Life Ins. Co.* 25 Conn. 207. *Bouton* v. *American Life Ins. Co.* 25 Conn. 542.

Assuming that the contract of insurance was perfected, so that the risk attached, the defendant fails to show a termination of the insurance before the fire, in accordance with the terms of the policy. The provision is that "the insurance may be terminated at any time at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy." The letter of the general agent to Hunt, giving him notice that the company did not wish the risk at the rate named, and demanding a return of the policy, without an offer to return any part of the premium, was not sufficient. The facts do not conclusively show that Hunt was the agent of the plaintiff to receive notice of a termination of the risk, and the provision in the policy making the person who procures the insurance "the agent of the assured in all transactions relating to the insurance," cannot be construed to mean that such person shall be agent to receive notice of the termination of the insurance at any time during the life of the policy; it plainly refers to the original transactions connected with obtaining it. *Judgment on the verdict.*

SAMUEL J. KALER & another *vs.* BUILDERS' MUTUAL FIRE INSURANCE COMPANY.

Suffolk. March 30. — May 6, 1876. COLT & LORD, JJ., absent.

In an action on a policy of insurance against fire, the issues were whether an addition to the building, in which was the property insured, materially increased the risk, and whether the insurer assented to the addition being made. A witness for the defendant, who had the general management of its business, was asked on cross-examination whether the plaintiff did not, in an interview with him, show him a letter containing the statement: "All my companies have paid, and I see no reason why the others should not pay." The witness answered in the negative. *Held*, that the evidence was collateral and irrelevant to the issues on trial, that the witness could not be contradicted, and that the admission of a letter written by an agent of other insurance companies, containing such a clause, with evidence that it was shown to the witness, gave the defendant good ground of exception.

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CONTRACT upon a policy of insur
chinery, tools and stock in the plaintif
tained the following clause: "This p
upon the following express condition
building hereby insured, or containi
shall be altered, enlarged or appropria
than those herein mentioned, or, if th
increased by any means within the co
out the consent of this company, this p

At the trial in the Superior Court,
case was submitted to the jury on two
addition, which had been made to the
ally increased the risk. 2d. Whether
to the making of the addition.

Charles E. Miles, the vice-president
fendant company, was called as a witne
testified that he had the general mana
company; that the defendant never con
building the addition to, or new structu
taining the property insured. He and
testify as experts, and gave evidence tha
tom of underwriters to charge additiona
consent to building additions to or stru
joining buildings containing property i
counsel asked nearly all these experts wh
custom of underwriters to charge extra
in such cases if they were satisfied that
ings did not increase the risk, and they a
On the cross-examination the plaintiffs'
ask Miles, who had testified to two conve
tiffs, neither of which had been called for
tion, if the plaintiffs did not in an interv
said conversations show a letter containin
stance, "All my companies have paid, an
the others should not pay, as Mr. Joslyn h
his companies that I had for mine." To
ness said they did not, and subsequently,
roduced, witness said that he did not re
letter. The plaintiffs then offered, for t

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dicting Miles, evidence that the plaintiffs showed to Miles the following letter: "Hudson, Sept. 17, 1874. Mr. Miles, Dear Sir: The bearers, Messrs. Kaler & Shaw, of this place, whose piano-forte case stock was insured in your Co., and which was destroyed by fire July 4th, are desirous of having their loss settled. All my Cos. have paid, viz.: Royal, Pennsylvania; Franklin, Hartford; People's, of N. J., and Equitable, of Prov., on the building, and Ætna on the stock. Mr. Pratt, of the First National, has also settled for theirs, and drawn upon the Bangor for theirs. I see no reason why the others should not pay, as Mr. Joslyn had the same notice for his Cos. that I had for mine. Truly yrs, Geo. S. Rawson, Genl. Agt."

This letter was written by one Rawson, who negotiated other insurance for other companies on said building, but who had nothing to do with the insurance in this suit or with the defendant company. The plaintiffs also offered the letter in evidence to contradict Miles. To the admission of this evidence and letter the defendant objected, but the judge allowed it to be given for the purpose of contradicting Miles, and instructed the jury that this letter was admitted only for the purpose of contradicting Miles, and for no other purpose. The jury returned a verdict for the plaintiffs; and the defendant alleged exceptions.

W. F. Slocum & W. S. Slocum, for the defendant.

S. B. Allen & J. D. Long, for the plaintiffs.

AMES, J. The effect, and as may reasonably be supposed the purpose, of the cross-examination of the witness, Miles, was to bring before the jury the contents of the letter from Rawson. The letter was admitted, not in order to explain, or to throw any light upon any conversation in which Miles took part, but for the purpose of contradicting him, and for no other purpose. So far as we can judge from the bill of exceptions, the only contradiction of his testimony was in that part of it in which he said that no such letter had been shown to him, or that he did not remember seeing such a letter. Nothing is disclosed in the report having any tendency to make the letter a part of the conversation, and in that respect the case differs from *Commonwealth v. Vosburg*, 112 Mass. 419, which is cited and relied upon by the plaintiffs.

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It is a well settled rule that a witn
ined as to any fact, which is collat
issue, merely for the purpose of contr
dence, if he should deny it. 1 Greenl.
fact his answers are conclusive. The
are numerous. *Farnum* v. *Farnum*,
wealth v. *Cain*, 14 Gray, 7. *Fletcher*
road, 1 Allen, 9. We see no possible
letter from Rawson could be said to be
and irrelevant. It was merely the exp
ion as to the merits of the plaintiffs'
not an agent for the defendant and ha
policy of insurance. The purport of
companies which he represented had
they had insured upon the same propert
saw no reason why the defendant shoul
as the defendant had nothing to do wi
bound by his judgment, it was wholly
agent Miles had or had not seen his le
of the letter was to show that the defe
resisting a claim which other insuranc
upon investigation to be well founded an
sion in evidence could not fail to be pr
ant.

THOMAS GOLDEN *vs.* SUSAN

Suffolk. April 5. — May 6, 1876. COL

A demurrer to evidence must be in writing with a join
A demurrer to the plaintiff's evidence admits all the fa
prove, and, if it is overruled, the plaintiff is entitled
A report from the Superior Court in an action of cont
dence, and that thereupon "the defendant demurre
is reported for the determination of the Supreme J
that if the defendant's demurrer be sustained, there
defendant; otherwise a new trial." It appeared by
report that a verdict was rendered for the plaintiff
were irregular and erroneous, and that the report m

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CONTRACT, by a vendee, at a sale by auction of a house and parcel of land, against the vendor for breach of an agreement to convey. Trial in the Superior Court, before *Rockwell*, J., who reported the case for the consideration of this court. The substance of the report appears in the opinion.

J. C. Crowley & J. A. Maxwell, for the plaintiff.

A. Cottrell, for the defendant.

MORTON, J. No question of law is properly before us. After reciting the evidence, the report states that thereupon "the defendant demurred to the evidence, and the case is reported for the determination of the Supreme Judicial Court, it being agreed that if the defendant's demurrer be sustained, there shall be an entry of verdict for defendant; otherwise a new trial."

A demurrer to evidence is rarely resorted to in our practice, as the statutes furnish more simple and convenient modes of raising any questions of law which it is desired to submit to this court. Such demurrer, when taken, must be in writing, and there must be a joinder by the adverse party, so that the record may raise an issue of law upon which the court may give judgment. One of the effects of a demurrer is, that it admits all the facts which the evidence of the plaintiff tends to prove; another is, that if the demurrer is overruled, the plaintiff is entitled to judgment. *Copeland* v. *New England Ins. Co.* 22 Pick. 135. *Gibson* v. *Hunter*, 2 H. Bl. 187. *Fowle* v. *Common Council of Alexandria*, 11 Wheat. 320.

In this case there was no written demurrer filed by the defendant and no joinder by the plaintiff. It appears that the defendant demurred orally, and, although the papers transmitted to us show that a verdict was rendered for the plaintiff, the report provides that if the demurrer is overruled there is to be a new trial. The whole proceeding was irregular and erroneous.

Report dismissed.

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CHARLES O. NEUERT *vs.*

Suffolk. March 7.—May 8, 1876. A

A city owning a telegraph wire, for the use of i
son injured by coming in contact with the wi
negligence of the city in removing or authorizi
position, for a purpose not connected with the i

TORT for personal injuries sustaine
ing in contact with an electric telegr
one of the streets in the defendant ci
travelling on the street. Trial in t
Aldrich, J., who reported the case fo
full court in substance as follows:

The plaintiff introduced evidence t
noon, on December 11, 1871, he wa
Street, and, when near the place whe
Railroad passes under the street, and
came in contact with an electric telegr
the street, and from eight to ten feet
and the top of the wagon, in which he
from the body of the wagon into th
thereby seriously injured; and that he
part of the street with the same wag
without meeting any obstruction from

It was admitted that the wire was p
ton in 1869, and was owned and main
use of its fire department, and was or
the street at a much greater height t
the accident, and at such a height as t
travel on the street, by being fastened t
on the westerly side of the street, and
house on the easterly side of the stre
until December 6, 1871, at which time
ened at that point by being wound ar
house. The house was the property of
the city on November 15, 1871; and t
the purchaser was to remove the house
after.

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The evidence tended to show that the house was in the process of removal at the time the plaintiff received his injuries, and that the wire, during the removal of the house, swung down nearer to the surface of the street than it had been originally suspen led, and so came in contact with the plaintiff and his carriage, and that the change in the fastening of the wire on the house was rendered necessary and was made in contemplation of the removal of the house.

The fire department of the city was established under the provisions of the St. of 1850, *c.* 262, which act, and the ordinances of the city relating to the fire department, may be referred to by either party, so far as they may be deemed material to this case.

The defendant offered evidence of the election of a superintendent of the fire alarm telegraph for the year 1871, as provided for by section 52 of an ordinance in relation to the fire department, passed August 20, 1861.

Upon the foregoing evidence and admitted facts the defendant requested the judge to rule that the plaintiff, for the reason that the city could not be made responsible for the management or mismanagement of apparatus constructed for the use of the department, could not maintain his action. The judge declined so to rule, the evidence tending to show that the city had, for purposes not connected with the fire department, removed or authorized the said wire to be removed from the original position as fixed for the fire department.

The judge then submitted the case to the jury, with full and appropriate instructions not objected to; and the jury returned a verdict for the plaintiff for $2500. If, upon this report, the action could not be maintained, the plaintiff was to become nonsuit; otherwise, judgment for the plaintiff upon the verdict.

C. F. Kittredge, for the defendant.

J. L. Eldridge, for the plaintiff.

ENDICOTT, J. It appears by the report that the city owned the building to which the telegraph wire was attached; and also owned the wire, which it maintained for the use of the fire department. The building was sold by the city, and was to be removed within thirty days. While the building was being removed the wire was lowered, and the plaintiff's wagon, passing on the highway, came in contact with it. The question for the

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jury was, whether the position of t
accident was caused by the negligen
or authorizing it to be removed from
is no evidence reported that the wire
in charge of the fire department.

The ruling, requested by the defend
not maintain the action, because the
sponsible for the management of ap
department, was properly refused; t
that the evidence tended to show th
wire to be removed, or had authorize
not connected with the fire department.
fore, be entered on the ground that t
tained; and as, by the terms of the r
is presented but judgment on the verdi
J

LUTHER PARKS *vs.* ROBI

Suffolk. March 31. — May 8, 1876. DE

A report of a single justice in equity submits to the
ferences of fact, as well as conclusions of law, invo
tion reserved, upon the facts stated in the report.

When a right of way to certain land exists by advers
that it was used for a variety of purposes, covering
dominant estate, in its then condition, is evidence
right to use the way for all purposes which may be
of that estate, while substantially in the same cond

BILL IN EQUITY alleging that the pl
the fee in the soil and of a right of wa
ing from Purchase Street by land of the
of the defendant, which adjoined the re
fendant on Atlantic Avenue; and prayi
might be restrained from using the way
land on which that store was built, or for
or of carrying merchandise or other thi
and Purchase Street. The answer alleg
had acquired a right to such use by adver

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Hearing before *Wells*, J., who ordered an injunction to issue, and reserved the case for the consideration of the full court, upon a report, the material part of which is stated in the opinion.

W. G. Russell & G. Putnam, Jr., for the plaintiff.

S. J. Thomas, for the defendant.

GRAY, C. J. The report of the judge, before whom this case was heard in the first instance, states the facts proved at the hearing, and his decision that the use of the way in question by the defendant, in the manner and for the purpose complained of, was not justified by any right acquired by Lakin (under whom the defendant claims) through the use of the way by him as stated in the report, and that an injunction should issue, subject to the revision and determination of the full court upon the question, among others, "whether Lakin, upon the facts stated, had acquired such a right of way as to constitute a good defence." The report, being on the equity side of the court, submits to our revision all inferences of fact, as well as conclusions of law. *Wright* v. *Wright*, 13 Allen, 207, 209. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45, 47.

When a right of way to certain land exists by adverse use and enjoyment only, although evidence of the exercise of the right for a single purpose will not prove a right of way for other purposes, yet proof that it was used for a variety of purposes, covering every purpose required by the dominant estate, in its then condition, is evidence from which may be inferred a right to use the way for all purposes which may be reasonably required for the use of that estate while substantially in the same condition. *Ballard* v. *Dyson*, 1 Taunt. 279. *Cowling* v. *Higginson*, 4 M. & W. 245. *Dare* v. *Heathcote*, 25 L. J. (N. S.) Exch. 245. *Williams* v. *James*, L. R. 2 C. P. 577. *Sloan* v. *Holliday*, 30 L. T. (N. S.) 757. But if the condition and character of the dominant estate are substantially altered — as in the case of a way to carry off wood from wild land, which is afterwards cultivated and built upon; or of a way for agricultural purposes, to a farm, which is afterwards turned into a manufactory or divided into building lots — the right of way cannot be used for new purposes, required by the altered condition of the property, and imposing a greater burden upon the servient estate. *Atwater* v.

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Bodfish, 11 Gray, 150. Willes, J., in L. R
bledon Commons v. *Dixon*, 1 Ch. D. 362.

In the present case, the report states
twenty years Lakin had, in the shop abutti
way in question, a steam engine, which wa
the larger building on the lot behind, and w
the machinery in that building, the three
respectively occupied for a blacksmith's s
and a paint shop; that there was a door
the two buildings, which was constantly us
passing between them through the engin
passageway; that the space in the passage
used for the purpose of setting tires upon
with the work in the shop; that all the
boilers was brought in through the passage
the basement or cellar under the engine ro
regular course of business; and that the w
as a back entrance or thoroughfare, as cor
connection with the shops occupied by La
or objection, for more than twenty years.

These facts appear to the court to justif
clusion that Lakin had acquired by presc
for all purposes reasonably necessary for a
two lots, and which, upon the buildings b
and rebuilt for a manufactory and storeho
use for the purpose of bringing goods int
abutting upon the passageway, to be then
larger building, for storage and use therei
no substantial alteration in the conditio
dominant estate, and no change, except i
cise of the easement, and that for this
has not exceeded his rights in the use of t

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CALEB T. SYMMES & others *vs.* JOSEPH H. MOULTON & others.

Suffolk. March 27.—May 9, 1876. COLT & LORD, JJ., absent.

A testator devised all his estate to his children, naming them, "in equal proportions, to them and their heirs: Provided, however, that those of my children who have no lawful issue shall hold to her or their use and benefit the portion of my real estate which may be received by the provisions of this will, during the life of such child having no lawful issue; and at the decease of such child such portion of the real estate shall be divided among my grandchildren, in equal proportions, to those who may then be living." Three of the children had issue; two others were childless. Upon a petition for a decree of sale of the real estate under the St. of 1868, c. 287, *Held*, that the children without issue did not take an estate tail, but took either a life estate or a qualified fee, with contingent remainders or executory devises over to the grandchildren; that a good title in fee could not be made; and that a sale should be decreed.

PETITION under the St. of 1868, *c.* 287, for a decree for a sale of land on the ground that it was incumbered by contingent remainders or executory devises. Hearing before *Gray*, C. J., who reserved the question of law arising on the petition for the consideration of the full court. The facts appear in the opinion.

W. S. B. Hopkins, for the petitioners.

A. E. Jones, for the respondents.

MORTON, J. The only question presented by this report is, whether the estate devised by the will of Caleb Symmes is incumbered by any contingent remainder or executory devise, so that a good title in fee simple cannot now be made to it. The will devises the estate to the wife of the testator during her life, and after her decease to his five children "in equal proportions, to them and their heirs: Provided, however, that those of my children who have no lawful issue shall hold to her or their use and benefit the portion of my real estate which may be received by the provisions of this will, during the life of such child having having no lawful issue; and at the decease of such child such portion of the real estate shall be divided among my grandchildren, in equal proportions, to those who may be then living."

The wife of the testator survived him, but is now dead. Two of the children of the testator have never had issue; the other three have children now living.

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The first clause, devising the estate "to r proportions, to them and their heirs," is in a fee. But the effect of the proviso is to cut case of the children who have no lawful is estate, or to a qualified fee determinable in dying without leaving issue.

It was not the intention of the testator t dren should take an estate tail with the p There is nothing in the will which leads to he intended that the issue of his children sh sion; and, in the case of a child who has no over is upon a definite failure of issue at his being that "at the decease of such child suc estate shall be divided among my grandchild tions, to those who may be then living."

We are inclined to the opinion that the in tor was that each child should take a qualif in the event of his dying without leaving But however this may be, it is clear that t have no issue do not take an absolute fee or take either a life estate or a qualified fee, mainders or executory devises over to the may be living at the time of their death wi It follows that a good title in fee cannot estate, and that a case is presented in wh 1868, *c.* 287, the court has jurisdiction to d

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ORRIN HALL *vs.* SAMUEL K. WILL

Suffolk. March 27. — May 9, 1876. DEVEN

A testator, by his will, devised the residue of his estate income to his children or to the issue of such as shall following provision: "And I further qualify the order children or to the lawful issue respectively of such as decease leaving such issue, as follows, viz.: If either order, children, grandchildren or great grandchildren, care, or a sound discretion in the use of money, or

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ether representatives of either of them, be in doubtful relations as to his, her or their judgment and discretion, as to the proper use of money, in each and every such case the trustee and trustees for the time being are hereby ordered and charged with paying and disbursing the same in such way and ways as shall be most likely to make the same enure and be beneficial to such recipient's wife, child or children, or otherwise beneficial to such recipient in the way of his or her education, or advancement, or support, exercising in all such case and cases the judgment that would be to be expected from a good father to each of such recipients respectively." *Held*, on a bill in equity brought by a creditor of a son of the testator against the son and the trustees under the will to apply the future income of the trust fund to the payment of the debt, that the son had no right in this income, which he could control, except under the discretion of the trustees, and that a creditor had no greater right, and could not attach or apply the future income of the trust fund to such payment.

BILL IN EQUITY, filed January 21, 1876, against Samuel K. Williams and the trustees under the will of Samuel K. Williams, deceased, to reach and apply the future income of a trust fund in their hands in payment of a debt due from the first named defendant to the plaintiff. The defendants demurred for want of equity; and the case was reserved by *Morton*, J., for the consideration of the full court. The material facts appear in the opinion.

H. C. Hutchins, for the defendants.

W. S. Hall, for the plaintiff.

MORTON, J. The will of Samuel K. Williams, after certain bequests, gives and devises all the residue of his property to trustees, who are to hold and manage it, and to pay the balance of the income, after certain annuities are paid, in equal parts to his seven children or to the issue of such as shall decease. It then makes the following provision: "And I further qualify the order to pay into the hands of my children or to the lawful issue respectively of such as shall have deceased or shall decease leaving such issue, as follows, viz.: If either of the recipients under the order, children, grandchildren or great grandchildren, shall be wanting in thrift and care, or a sound discretion in the use of money, or the guardian or guardians, or other representatives of either of them, be in doubtful relations as to his, her or their judgment and discretion, as to the proper use of money, in each and every such case the trustees and trustee for the time being are hereby ordered and charged with paying and disbursing the same in such way and ways as shall be most likely to make the

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same enure and be beneficial to such child or children, or otherwise benefici way of his or her education, or advar cising in all such case and cases the ju be expected from a good father to ea spectively."

In this provision, the intention of th vent either of his children from havin the share of the income designed for h the trustees a large discretion as to the ing each share and as to the person to If they think a son wanting in thrift the use of money, they may pay his sh of, his wife or children, or in such way a eficial to the son in the way of his supp destroyed, and the purpose of the testa has the power of assigning or otherwis of the income in advance of its payment

This view renders easy the decision of tiff seeks to reach and apply, in paymen income which under the will may come ant. As said defendant had no right in t control, except under the discretion of t can have no greater right. To require future income to this and to other credi would convert a contingent into an absol main purpose of the will.

GLENDON COMPANY *vs.* TRUE W. T

Suffolk. March 28. — May 9. 1876. DEVI

Proceedings to enforce a mechanic's lien will not be c proceedings against a debtor who has, before his ba his interest in the land.

A former owner of land, subject to a mechanic's lien, warranty against incumbrances, has not such an int him to dissolve the lien by giving bond under the St

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PETITION under the Gen. Sts. *c.* 150, to enforce a mechanic's lien. In the Superior Court, *Colburn*, J., declined to continue the case, although proceedings in bankruptcy were pending against the first named respondent; and the respondents alleged exceptions. The judge also declined to order a sale of the land and the petitioner alleged exceptions. The facts of the case appear in the opinion.

E. C. Bumpus & E. M. Johnson, for the petitioner.

G. W. Morse, for the respondents.

MORTON, J. The petitioner furnished materials used in the erection of a building upon the land described in the petition, by virtue of a contract made November 16, 1874, with Townsend, then the owner of the land and the purchaser of the materials, and had, by virtue of the Gen. Sts. *c.* 150, a lien upon the land for the debt due for such materials. On January 13, 1875, within thirty days after it ceased to furnish materials, it filed in the office of the registry of deeds, under St. 1874, *c.* 321, § 4, the certificate required by the Gen. Sts. *c.* 150, § 5, and on March 10, 1875, being within ninety days after it ceased to furnish the materials, filed its petition in the Superior Court to enforce the lien. After the contract was made and the materials were furnished in whole or in part, Townsend mortgaged the land, and then afterwards, prior to February 15, 1875, conveyed it by warranty deed in the usual form, not excepting the lien. On April 7, 1875, Townsend filed a bond, with sureties, for the purpose of releasing his interest in the property from the lien, under the St. of 1874, *c.* 321. On May 21, 1875, Townsend filed in the District Court of the United States his petition for the benefit of the bankrupt act, and he was duly adjudicated a bankrupt, and an assignee appointed.

Upon these facts, it is clear that the petitioner is entitled to a lien which has priority of the mortgages and conveyances made after the contract under which the lien is claimed. *Dunklee* v. *Crane*, 103 Mass. 470. The mortgagees and the grantees of the equity of redemption, who have been made parties to this suit, do not dispute this.

The facts show that, before Townsend petitioned for the benefit of the bankrupt act, he had conveyed away all his interest in the property upon which the lien is claimed. In the absence

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of any suggestions to the contrary, we mu
ance to have been made in good faith and

This suit is in the nature of a proceedi
of which is to reach the land to which
Townsend is merely a nominal party, and
ruptcy has no interest in the land or in
thus distinguished from *Clifton* v. *Foster*,
land on which the lien exists is not a pa
bankrupt, and the District Court has no
subject matter of this suit. The fact
Townsend therefore furnishes no reason w
should not proceed and order a sale of th
the lien of the petitioners.

But the respondents contend that the
1875, dissolved the lien, so that no sale ca

The St. of 1874, *c.* 321, § 1, provides t
ing an interest in property upon which a l
may, at any time before final judgment in
force such lien, release his interest in su
portion thereof from such lien, by giving
to pay, within thirty days after final jud
sum fixed as the value of the property or
so much of such sum as may be necessary
for which such property or interest may b
to such lien in such suit. This gives the
lien to those persons only who have an int
which means an estate in the land capable
this case, Townsend had conveyed all hi
upon which the lien is claimed, before he
might become liable upon the covenants
was sustained, and was thus remotely inte
involved in the suit, but he had no interest
could convey, or upon which a release co
of opinion, therefore, that he was not wit
the bond filed by him did not release the
and that the petitioner is entitled to an or
sult is that the respondents' exceptions are

Petitioner's excep

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JAMES WALKER *vs.* WILLIAM BOYNTON.

Suffolk. March 21. — May 16, 1876. DEVENS & LORD, JJ., absent.

The owner of a tract of land divided it into lots, with streets running through it, and had a plan thereof made and recorded. The plan showed, between two of the streets, two lots, the side line of one apparently marked "90," and that of the other "103.70," with a passageway between them marked "8." In fact the distance between the two streets was 193.70 feet, and, according to the scale marked on the plan, the figures marked on the side line of each lot carried that line to the centre of the passageway. In a deed, which referred to the plan, the side line and the line on the passageway, of the first lot, were described as running "ninety feet to a passageway eight feet wide, then turning at a right angle and running on said passageway," a given distance. *Held*, that the plan and the deed must be construed together, and that the side line did not run ninety feet, exclusive of the passageway.

CONTRACT for a breach of the covenants of seisin and good right to convey, contained in a deed from the defendant to the plaintiff of a parcel of land on Greenwich Street in Boston. At the trial in the Superior Court, *Brigham*, C. J., ordered a *pro forma* verdict for the plaintiff, and reported the case for the consideration of this court. The facts appear in the opinion. The report also referred to a plan, a copy of the material part of which is printed on the next page.

S. J. Thomas, for the plaintiff.

H. H. Currier, for the defendant.

MORTON, J. All the land included in the quadrangle between Greenwich, Warwick, Windsor and Madison Streets formerly belonged to the Tremont Improvement Company. In 1866 this company caused the land to be surveyed and laid out into lots, and a plan thereof to be made and recorded. It afterwards conveyed these lots to various persons, the deeds severally referring to this plan. It is necessary to refer to only two of these deeds. By deed dated April 14, 1867, it conveyed to one Pelton seven lots on the easterly side of Windsor Street, as shown on said plan, "beginning at the southwesterly corner of land now or late of said Richardson; thence running southeasterly on Windsor Street one hundred and sixty-eight feet to a passageway eight feet wide; thence turning at a right angle and running on said passageway ninety feet to a second passageway eight feet wide; thence turning at a right angle and running

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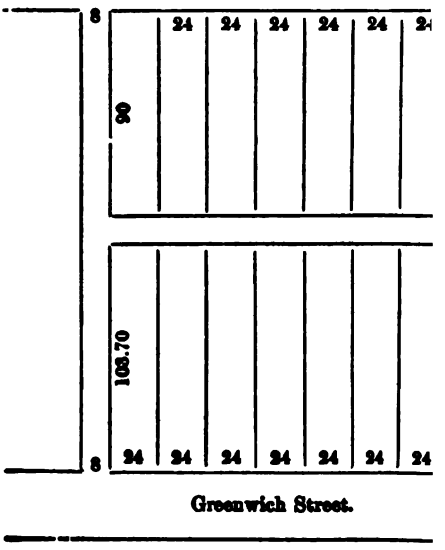
on said second passageway one hundred
land of said Richardson; thence turni
running ninety feet to the place of begi
square feet of land."

By deed dated June 21, 1869, it co
seven lots on Greenwich Street, as show
"southeasterly by an eight foot pas
Greenwich Street to Windsor Street, or
feet; northeasterly by Greenwich Street
eight feet; northwesterly by land of Ha
one hundred and three $\frac{70}{100}$ feet; and so
foot passageway, there measuring one
feet; containing 17,416 square feet of
conveyed the same premises, by the s



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plaintiff by deed dated July 8, 1869, and this action is brought for an alleged breach of the covenants of seisin and good right to convey, contained in the deed to the plaintiff.

It appeared at the trial that the lines of Greenwich Street and Windsor Street are established monuments, and are correctly laid down on said plan, and that the distance between the two streets is one hundred and ninety-three $\frac{7}{100}$ feet. This is exactly the sum of the two lines called for by the deeds to Pelton and the plaintiff as the measure of the depth of their lots.

The plaintiff contends that Pelton, by his prior deed, took land to the depth of ninety feet from Windsor Street exclusive of the eight foot passageway, and that he, the plaintiff, is entitled to a depth of one hundred and three $\frac{7}{100}$ feet from Greenwich Street exclusive of the passageway, but we cannot regard this as the true construction of the deeds. The descriptions in the deeds must be read in connection with the plan, which, by reference, is made a part of them. At first sight it would seem from the plan as if the two lines of ninety feet and one hundred and three $\frac{7}{100}$ feet run respectively to the outer lines of the passageway; but upon examination and the application of the scale furnished by the plan, it becomes plain that they extend to and meet in the centre line of the passageway.

The language of the deed to Pelton, "thence turning at a right angle and running on said passageway ninety feet to a second passageway eight feet wide," does not necessarily import that the length of ninety feet terminates at the outer rather than the centre line of the second passageway. By the common rule of construction, this description carries the land of the grantee to the middle of the passageway as a monument, and by so doing, he gets the length of line which his deed calls for. *White* v. *Godfrey*, 97 Mass. 472. *Stark* v. *Coffin*, 105 Mass. 328. *Lewis* v. *Beattie*, 105 Mass. 410. The same suggestions are true of the description in the deed to the plaintiff.

Construing these descriptions in connection with the plan, it is clear that the intention of the parties was that the lots conveyed to Pelton should run back ninety feet from Windsor Street to the centre of the passageway shown on the plan; that the lots conveyed to the defendant, and now held by the plaintiff, should run one hundred and three $\frac{7}{100}$ feet from Greenwich

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Street to the centre of the said pass
feet passageway should be taken off th
four feet being taken off of each.

The same considerations apply to,
tiff's claim as to the other passageway
Street to Windsor Street.

Upon this construction of the deeds
tiff cannot maintain this action. He
for, and he cannot maintain an action
cause the adjoining owners have enc
the passageways by erecting buildings

Verdict set asid

WAMESIT POWER COMPANY *vs.* CHA

Middlesex. Jan. 19. — May 6, 1876. Co

To constitute a legal taking by the city of Bosto
under the St. of 1872, c. 177, the filing in the re
the stream taken, within sixty days from the tir
the St. of 1846, c. 167, § 1, is requisite; and upo
for damages in an action of tort.

The members of the Cochituate Water Board of
acts by the authority of the city, in an action o
to the same extent as the city might do.

The Cochituate Water Board of the city of Bost
sage of the St. of 1872, c. 177, authorizing th
board "to take, hold and convey to, into and t
Sudbury River," caused a dam to be built ac
cut from it, by which a portion of its water wa
Lake Cochituate. The city failed to file in the
from the time of the taking the description of
the St. of 1846, c. 167, § 1. *Held*, in an action
board, that, even if their acts were authorized
trespassers, by reason of the default by the cit
quired by the above named statute.

TORT for diverting the water of S
uate Lake in 1872, by the defendants,
Cochituate Water Board of the city
November 20, 1878.

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Trial in this court, before *Morton*, J., without a jury, who reported the case for the consideration of the full court. The facts appear in the opinion.

B. F. Butler & L. M. Child, for the plaintiff.

D. E. Ware, for the defendants.

MORTON, J. This is an action of tort to recover damages for the diversion of the water of Sudbury River, to the injury of the plaintiff. The defendants were the members of the Cochituate Water Board of the city of Boston for the year 1872.

To prove the diversion and its extent, the plaintiff put in evidence the report of the water board to the city council of Boston, for the year ending April 30, 1873, signed by all the defendants, by which it appeared that the board, having previously constructed an aqueduct or channel, on June 19, 1872, let the water of the Sudbury River into it, and diverted large quantities to Lake Cochituate between said June 19 and September 17, 1872, when the channel was closed, and has not since been used. The defendants admitted this taking and diversion of the water, and justified their acts under the St. of 1872, *c.* 177.

The first section of the St. of 1872 provides that "the city of Boston is hereby authorized, by and through the agency of the Cochituate Water Board, to take, hold and convey to, into and through said city" the water of Sudbury River. The fifth section provides that the city shall be liable to pay all damages sustained by any persons by the taking of or injury to any land, water or water rights, or injury to any use or enjoyment of the water to which any person, at the time of such taking, is legally entitled; and that in regard to such taking, injury and damages, the city and all persons claiming damages shall have all the rights and be subject to all the duties provided in the St. of 1846, *c.* 167.

The St. of 1846, in its first section, authorizes the city of Boston, through the agency of three commissioners, to take and convey into the city the waters of Long Pond and other ponds and streams, and to take any lands necessary for aqueducts and reservoirs, and provides that "the city of Boston shall, within sixty days from the time they shall take any lands or ponds or streams of water for the purposes of this act, file, in the office of the registry of deeds for the county where they are situate, a description

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of the lands, ponds or streams of wate
required in a common conveyance of lar
purpose for which taken, which said d
shall be signed by the said mayor." T
tions provide an exclusive remedy for a
taking of land, water or water rights, b
of Common Pleas, to be brought witl
taking of land, or, where water rights
years from the time when the waters a
diverted under the authority of the act

The defendants contend that, under
statutes, the only remedy of the plai
the Superior Court for an assessment of
city of Boston, and therefore that this
tained. This would be true if the act
constituted a legal taking of the wat
the city of Boston, under the St. of 18

But, among other facts, it appears th
never filed a description of the water o
fendants, or a statement of the purpose
In January 1875 the city filed a descrip
taking of the water of Sudbury River u
it is clear that this statement does no
diversion of the water in 1872 by the
order of the city council, of which th
which it is admitted was passed Januar
Cochituate Water Board, as the agent
water of Sudbury River, and obviously
description and statement of the water
scription of a taking in 1872.

The statute requires the city, within
it takes any land or stream, to file a d
stream taken, and a statement of the
taken, in the registry of deeds. Such
a condition subsequent of the right to
justify the taking of the land or water
show that it has complied with the st
do so, its justification fails, and it is lia
it was held in *Wilson* v. *Lynn*, 119 M

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der a statute similar to that we are considering, that the city of Lynn was liable in an action of tort in the nature of trespass, because the description of the land taken was not sufficiently definite to enable the landowner to identify it, and ascertain what land was taken.

In the case at bar, therefore, we are of opinion that the city of Boston, having failed to comply with the provisions of the statute, could not justify under it the diversion of the water of Sudbury River, proved by the plaintiff. The law gave it the right to take the water upon the condition that it should within sixty days file the proper description and statement. As it failed to perform this condition, the owner of land or water had the right, at least while the default continued, to regard the acts as trespasses, and to bring an action of tort.

Whether, if the city had filed the description before the action, though after the sixty days, the plaintiff's only remedy would have been a petition under the statute, we need not consider. It would seem from the case of *Moore* v. *Boston*, 8 Cush. 274, that he might maintain such petition if he so elected.

It follows that the defendants in this action are liable. If they did the acts proved without any authority from the city, they were acting in their own wrong, and were trespassers. If they were authorized by the city, they can justify their acts to the same extent as their principal can, and no further. It is therefore unnecessary to decide whether they were duly authorized by the city to divert the water. The plaintiff has a right of action against any person who diverts water, to which it is entitled, without a legal justification.

If the defendants are injured by the failure of the city to comply with the statute, and thus to justify their acts, their remedy, if any, is against the city. *Judgment for the plaintiff.*

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COMMONWEALTH *vs.* EMEI

Suffolk. April 3. — May 4, 1876. Co

If the instructions given to the jury embrace subst
ground of exception that they are in different lan
Upon an indictment for keeping a disorderly house,
during some substantial portion of the time covere
ant had, in whole or in part, the control and ma
plained of; and that, while so kept and maintaine
common nuisance, as a common, ill-governed and
It is sufficient, to support an indictment for keeping
fendant suffered and allowed the place to be the
thieves and prostitutes until late and unseasonable
The common nuisance charged in an indictment for
consist in drawing together dissolute persons enga

INDICTMENT for keeping and maintai
Trial in the Superior Court, before *Pi*
bill of exceptions in substance as follow

At the close of the evidence, the
judge to instruct the jury as follows:

"First. That the issue for the jury i
was kept by the defendant during any pc
in the indictment; but the question is,
defendant, during the time, or some s
time alleged in the indictment, keep a n
at number 41 Ferry Street, in the city o

"Second. The offence alleged is a c
every material averment in the indictn
the jury beyond a reasonable doubt, and
presumed innocent until every part alle

"Third. It is necessary, under this
the government to prove beyond a reaso

"1st. That the defendant kept the sal
by the witnesses as being saloon numb
the city of Boston, during some portion
the indictment; or that he had control o
some substantial portion of the time alle

"2d. That it would not be sufficient e
keeping or control over the premises,
show that, upon one or two occasions dur

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the indictment, the defendant assisted in preserving or
aided in the general management and control of the busine
ried on at this place; but the government must go furthe
prove that the house itself, that is, the premises complain
was actually under the control and management of the defe
and that, while under his charge and control, he permitte
of disorder to take place on said premises.

"8d. If the jury should be satisfied beyond a reasonable
that the defendant on one or two occasions within the per
time included in the indictment, actually had control ove
premises, or assumed or aided in the management of the
ness carried on there, and that, while thus in control or assu
authority over it, acts of disorder were committed on the p
ises, this in itself would not be sufficient, as these acts of disc
must be shown to have been permitted by him while the pr
ises were under his control.

"4th. If acts of disorder were committed upon the premi
under the circumstances mentioned in the above request, and
defendant endeavored to preserve the peace, prevent disor
and remove the persons creating the noise and disorder, then
would not be liable for these acts, as his keeping of, or his c
trol over the premises, and the permission of acts of disorder
the premises under his control must be coördinate and conc
rent. If the government fail to prove these facts, the jury shou
acquit."

It was admitted by the government that, if these reque
were correct in law, there were some aspects of the evidence e
titling the defendant thereto. The judge declined to give the
instructions, and instructed the jury as follows:

"In this case, starting with the presumption of innocence,
in every other criminal case, the jury must be satisfied, beyo
a reasonable doubt, that, during some substantial portion of t
time covered by the indictment, the defendant kept and mai
tained, that is, had in whole or in part the direction, control a
management of the premises complained of; and that, while
kept and maintained, it was a common nuisance, as a commo
ill-governed and disorderly house, and that the defendant so co
ducted the place as to be responsible therefor. The nuisan
may consist in allowing the place to be so noisy and disorder

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as to disturb the public peace and ann
it is not necessary to show any such n
may consist in drawing together diss
unlawful practices, thereby endanger
corrupting good morals. In the preser
isfied, upon the evidence, that, while u
trol of the defendant, he suffered and
the habitual resort of drunkards, thieve
same to remain until late and unseaso
then it is sufficient to support the ch
fence that the defendant endeavored t
and breaches of the peace."

The jury returned a verdict of guilt
leged exceptions.

J. W. Mahan, for the defendant.

C. R. Train, Attorney General, for t

MORTON, J. The instructions given
elements necessary to constitute the o
correct. They embraced substantially,
guage, all the material instructions req
and he has no ground of exception.

COMMONWEALTH *vs.* JOHN

Suffolk. April 3. — May 19, 1876. Co

An indictment may contain two or more counts alleg
of the same general description, and the mode of t
ishment are the same.

An instrument falsely made, with intent to defraud, is
been genuine, other steps must have been taken bef
been perfected, and these steps are not taken.

The written application to a master in chancery, und
defendant, who wishes to give a bond to dissolve an
by him.

Real property was attached as the property of A., stan
condition of a bond given, under the St. of 1870, c.
ment, was that if A. and B. should pay to the pla
amount at which the property was appraised,) if he sl

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or any amount not exceeding that sum, within thirty days after final judgme
bond should be void, otherwise to remain in full force. *Held*, that the bon
valid.

An indictment for the forgery of a bond to dissolve an attachment need not se
how the bond could have been used to defraud.

On the trial of an indictment for forging and uttering a bond to dissolve an
ment of real estate, a bond was produced with an approval annexed, whi
alleged in the indictment was without an approval. *Held*, that the appro
not constitute a part of the bond, and that there was no variance. *Held*, als
the approval might properly be put in evidence as bearing upon the ques
the intent with which the bond was made.

On the trial of an indictment for forging and uttering an appeal bond, the g
ment offered evidence tending to show that the name of one of the sureties
to the bond was fictitious, by proving who the person really was, who repre
himself by the fictitious name to the clerk of the court, in which the bon
given, and that his statements as to his business, residence, occupation and
ship of property were false. *Held*, that the evidence was competent, althou
defendant admitted that the name was fictitious.

On the trial of an indictment for forging and uttering a bond to dissolve an a
ment of real estate, it appeared that the signature of one of the sureties w
titious. The defendant contended that the person signing the fictitious nam
assumed it before this transaction; and asked the presiding judge to instru
jury that they must find that the person assumed and used the fictitious nam
the purposes of fraud in this particular case, and that it was not enough to c
tute forgery, if he had previously assumed and used the same name for the
poses of crime or fraud generally. The judge declined so to instruct the
but did instruct them that, although a party might sign or use a fictitious
which he had adopted, for innocent purposes, he could not acquire a right to
for fraudulent purposes by so using it any number of times. *Held*, that t
fendant had no ground of exception.

INDICTMENT for forgery, in four counts. The first c
charged the defendant with making, and the second with u
ing, a bond of the tenor following:

"Know all men by these presents, that we, Marion Pearce
John F. Costello, of Boston, in the county of Suffolk and
monwealth of Massachusetts, as principals, and Willia
Schell and Isaac Judson, of said Boston, as sureties, are h
and stand firmly bound and obliged unto John Belcher, of
throp, in the county of Suffolk and Commonwealth afor
in the full and just sum of thirty-six hundred dollars, to be
unto said John Belcher, his executors, administrators or ass
To which payment, well and truly to be made, we bind
selves, our heirs, executors and administrators, jointly an
erally, firmly by these presents. Sealed with our seals.

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the twenty-fourth day of February, in t
thousand eight hundred and seventy-fiv

"The condition of this obligation is
John Belcher has caused the goods an
Pearce to be attached as the estate of
value of ten thousand dollars, to be att
in a civil action, by virtue of a writ bea
February, A. D. 1875, and returnable to
to be holden at Boston within and for t
the sixth day of April next; in which
cher is plaintiff, and said John F. Co
whereas the said defendant wishes to
ment, according to law, on one house
being numbered 26 Cooper Street in
attachment,

"Now, therefore, if the above boun
John F. Costello shall pay to the pla
amount of thirty-six hundred dollars, if
therein, or any amount not exceeding th
thirty days after the final judgment i
above written obligation shall be null
remain in full force and virtue.

"Mari
"John
"Will
"Isaac

"Signed, sealed and delivered in pres
"John F. Fenton,
"J. E. Fitzgerald,"

"Suffolk, ss. Feb. 25, A. D. 1875.
"~~The above-named sureties are appro~~
"~~J. E. Fitzgerald, Master i~~

The third count charged the defendan
fourth count with uttering, a bond of th

"Know all men by these presents, t
tello, of Boston, in the county of Suffol
Massachusetts, wife of John F. Costello
as principal, and William P. Schell,

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County, residing at 24 Linwood Avenue, doing business at 23 Doane Street, Boston, as surety, are holden and stand firmly bound and obliged unto James M. Carter, in the full and just sum of one hundred dollars, to be paid unto the said Carter, his executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals, dated at Boston, the eleventh day of March, in the year of our Lord one thousand eight hundred and seventy-five.

"The condition of this obligation is such, that whereas the said Carter, by the consideration of the Justices of the Municipal Court of the city of Boston, holden at said Boston, within and for the county of Suffolk, for civil business, on the tenth day of March, in the year of our Lord one thousand eight hundred and seventy-five, recovered judgment against the said Amelia H. Costello, for the sum of one cent damages, and costs of suit, taxed at twelve dollars and thirty-seven cents, also for a return irrepleviable of the goods described in the writ, to wit, one set china, lavender-band crockery ware, comprising dinner set, in a personal action, brought by said Amelia H. against said Carter, in which the said Amelia H. set her damages at two hundred and fifty dollars. From which judgment the said Amelia H. appealed to the Superior Court to be holden at said Boston, within and for the county of Suffolk, for the transaction of civil business, on the first Tuesday of April next. Now if the said Amelia H. Costello shall do and prosecute her said appeal at said Superior Court with effect, and pay all such costs as may arise after said appeal, then this obligation to be void; otherwise to abide in full force, power and virtue.

"Amelia H. Costello. [Seal.]
"Wm. P. Schell. [Seal.]

"Signed and sealed in presence of
"J. L. Eldridge, to A. H. C.
"W. T. Connolly to W. P. C."

In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment for the following reasons:

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"1. The indictment, as to all the
precision and certainty in not setting
required, how they could be given, or
ive for any purposes, or how they coul
intended.

"2. There is nothing set forth ther
ing of the instruments within the St.
5, 6, or any other specific statute.

"3. There is nothing therein set fo
instruments are such as, if genuine, w
poses intended.

"4. The want of validity or value o
on their face; the instrument of the fi
cause it does not appear to have been a
or by the proper officer, or by any per
required by law appear to have been
instrument could not effect any fraud.

"5. The condition inserted in the i
dition required by the statute, and it d
instrument was given, or could be giv
accordance with the provisions of the s

"6. The indictment avers the false m
the false making of a bond or writing o
writing obligatory' being descriptive o
statute, and the word 'bond' is broader

"7. There are no such averments t
expressly mentioned in the statutes, as w
the true meaning of the statutes.

"8. Because the third and fourth cou
ing of a bond, and the instrument app
and a record of a court.

"9. Because it is no offence to utter a
ment of no validity.

"10. Because the first and second co
ous acts, and the third and fourth count
felonious acts, and the same are not p
ransaction, and said counts are improp

"11. Because there is no averment t
describe the same act or transaction."

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Colburn, J., overruled the motion, and the defendant excep
The defendant was then tried, and a bill of exceptions, in
stance as follows, was allowed:

The judge declined to order the government to enter a
prosequi as to either count or set of counts, or to elect
which it would proceed, or to grant a separate trial, holdin
two distinct felonies to have been rightfully joined. It was
ceded that the two felonies charged in the different counts
separate, distinct and independent, and not depending o
same facts or transactions, save that the same person sign
William P. Schell in each bond. The forgery relied upon b
government at the trial consisted, as was claimed, in the
that a person, whose name was actually Frank Hayes, si
under an assumed or a fictitious name as one of the sur
signing himself as Wm. P. Schell, in the presence, and by
procurement, of the defendant, with the intent to defraud
said name of Wm. P. Schell representing, and intending to
resent, no other existing person.

The suits, in which the bonds were given, are sufficientl
scribed in the conditions of the same. By the return of the
cer in the suit of Belcher against Costello, it appeared that
estate was attached as belonging to the defendant, but stan
in the name of Marion Pearce. None of the proceedings in
other suits were put in evidence, except the bond.

The government was allowed to introduce in evidence, ag
the defendant's objection, a written application to Mr. Fitz
ald, the master in chancery, for the dissolution of the att
ment in said suit, the same being personally presented by
defendant to the magistrate, but never signed; also the
praisal of the three appraisers appointed by Mr. Fitzgerald
sworn by him, and the bond itself, with proof that the
had been delivered to the clerk of the court where the sui
returnable.

The defendant objected to the admission of the bond t
solve, because of a variance; the copy embodied in the i
ment showing an approval erased, and the paper procured
ing an approval not erased. The judge overruled the objec

The government put in evidence the notice to Belcher, a
officer's return thereon, with evidence that the same was

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returned to the magistrate; it then wa
the defendant's objection, that no ser
but that one McMahan personated Bel
Hayes, by arrangement with McMaha
upon the evidence in the case) by th
fendant, pointed McMahan out as said
and the service was made upon him,
or knew anything about it. The judg
on the question of intent.

The defendant contended that the
thorized by law, and was void; so that
of the signature, nor if the name of th
contended. The papers in evidence, i
of attachment, stated hereinbefore, we
to that subject.

The government was allowed to sho
objection, that said Hayes, whose sig
have been forgeries, appeared before M
presence of the defendant testified, ur
was William P. Schell; that he lived
Boston Highlands; that he owned hou
Avenue, Chelsea; that, before the cle
the appeal bond was given, he testifie
fendant, that he was a coal-dealer, and
Street, Boston, and lived at 13 Linwoo
defendant contended that these staten
oath and in course of an examination
clerk, were not competent evidence ag
the same on his part could be implied.

The government was then allowed,
objection, to prove, by other evidence,
ments of Schell were not true, as tendi
fictitious person. The defendant, in o
said that he admitted now that Willia
real name of said person who signed t
was an assumed name under which he
the evidence competent, notwithstandin
claim on the part of the government
consisted of.

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The defendant contended, and asked the judge to rule, the bond to dissolve an attachment, upon the evidence, w valid in law, and did not and would not, if the signatures genuine, operate to dissolve the attachment, but the sam mained, and would remain, in force notwithstanding, for th lowing reasons: that there was no written application sign any one, or the party applying; that notice was not waive none was given, as was conceded, to Belcher; that there w written warrant or authority given to the appraisers; tha bond, its condition, and the other proceedings were not in formity to the statute. The defendant contended that, th ing so, the attachment would not be dissolved or affected b that, if the signatures were genuine, the bond would not the attachment, and if valid for any purpose it would only additional security, so that in fact there was no fraud in respect.

The judge was asked to rule upon this subject and these tions; but he declined doing so, saying to the jury, substant that all he proposed to say upon these subjects was, that the were to take and consider the bond as sufficiently valid to b subject of forgery, the same as if it were in fact a promi note attempted to be forged; that the jury were to assume to be so, both as regards the forgery and the uttering cha and the question of intent.

The defendant contended that it did not appear that H assumed and used the name of William P. Schell for the time and for the purpose of fraud in this particular case that it appeared that he had assumed, and gone by, the before; that his life had been irregular and he had been le a criminal life, living with a woman not his wife, and occu with her different rooms in various places apart from his tives and friends, and concealed from them and those who him as Frank Hayes. But the government contended tha name of William P. Schell had only been used in these actions with the defendant. The judge was requested b defendant to instruct the jury, that they must find that assumed and used this fictitious name of Schell for the pu of fraud in this particular case; and that it was not enou constitute forgery if he had previously assumed and us

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same name for the purpose of crime or
the judge ruled otherwise, and instructe
might assume and use and sign an assun
which he had adopted generally for innoce
Samuel M. Clemens's assumption of the
so that either name would not be a forger
not be so if the name had been assume
solely for the purpose of fraud and crim
acquire a right to use it for fraudulent pu
number of times solely for fraudulent pur

The jury found the defendant guilty up
the defendant alleged exceptions.

A. A. Ranney & J. L. Eldridge, for th
question of the joinder of counts, cited 1
559; *State* v. *Porter*, 26 Misso. 201;
Humph. 69; *M'Gregg* v. *State*, 4 Blackf
4 Pike, 56; *Kane* v. *People*, 8 Wend. 20
Fost. 184; *State* v. *Lincoln*, 49 N. H. 46
Fost. & Finl. 19; *Regina* v. *Barry*, 4 Fo
King v. *Roberts*, Carth. 226; *The King* v.
1572, *Rex* v. *Benfield*, 2 Burr. 980; *You*
R. 98, 105; *O'Connell* v. *The Queen*, 11 Cl
Cr. Pro. (1st ed.) §§ 205–213.

C. R. Train, Attorney General, for the

DEVENS, J. 1. The first inquiry preser
is whether the counts for forging and utt
solve an attachment in the suit of Belcher a
purported to run to John Belcher, might
one indictment with the counts which al
ttering the bond which purported to run
and to be given on condition of prosecut
Superior Court from the Municipal Court
the offences charged in these two sets of
criminal acts.

It has long been common in practice ir
to include in one indictment charges of dis
even when such acts are felonious in their
of the same general description, and the
nature of the punishment are the same. T

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has been recognized fully by several decisions of this court,
it has been held, as it is competent for the court, if it sees
danger that the defendant will be embarrassed by the m
plicity of the charges against him, to direct the governme
proceed upon one count or set of counts only, that no ri
of the defendant are imperilled thereby. *Carlton* v. *Com*
wealth, 5 Met. 532. *Booth* v. *Commonwealth*, 5 Met. 535.
lyn v. *Commonwealth*, 6 Met. 236. *Commonwealth* v. *Cain*,
Mass. 487. *Commonwealth* v. *Sullivan*, 104 Mass. 552. No
the matter of the joinder of offences, distinct and separat
their character, been in any way changed by the St. of 1
c. 181, but continues to stand exactly as it did previously to
enactment. We are aware that a different result from tha
which we have arrived has been reached by courts of some o
states; but, without undertaking to discuss the cases cited
counsel, or their argument in detail, we remain satisfied w
the rule which has heretofore been adopted by the tribunal
this Commonwealth.

2. It is contended that the bond alleged to have been inten
to dissolve the attachment, could not have operated so to do,
that, as it was void for that purpose, (the steps requisite to g
it final validity not having been taken,) there could have b
no forgery of it. It is true that the false making of an ins
ment merely frivolous, or one which upon its face is clearly v
is not forgery, because from its character it could not have
erated to defraud, or been intended for that purpose; but, if
instrument is one made with intent to defraud, although, be
it can have effect, other steps must be taken or other proc
ings had upon the basis of it, then the false making is a forg
notwithstanding such steps may never have been taken or
ceedings had. So if, with this intent, it is to be or has
connected with facts, the existence of which are essential t
validity, which are merely simulated so that it would no
operative even if truly signed, because such facts had no a
existence, it is still a forgery. If, for instance, there had
no actual notice to the attaching creditor, a party having
employed (as there was evidence tending to show had been
in this case) falsely to personate him, the bond could not op
as against him to dissolve the attachment; yet if the false

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ing of the bond was one of the steps with this fraud, a pretended dissolutio to be effected with a fraudulent intent, less a forgery, because the previous fra the bond inoperative to dissolve the att natures had been real.

It is objected that there was no ap signed by the defendant, by which an the attachment by giving bond could ha there was a written application by the that the statute requires; it was not have been signed by him. *Coddington* 486. The defendant further contends could have been operative, there must h it by the master, which does not appe have been done. It is not, however, un prepared before the steps necessary to g ally taken; and if this is made falsely, fraud by causing such steps to be ther bond been sufficient, and had the defe proval of it by the master, upon the ret would have obtained an apparently go could have been used to deceive any pers that which had been attached.

It is further argued that the bond was could not therefore have been a forgery. under the St. of 1870, *c.* 291, § 8, and w an attachment of real property alleged to conveyed. It differs from the bond there that, while it binds the obligor to pay wh cover, not exceeding $3600, it does not pr shall establish his title to the land, agai the record title thereto, by a writ of entry upon the signers thereof a heavier respo compelled to take in order to dissolve the omission would not render the bond, if tr one for the purpose of dissolving the att to enforce the bond, the plaintiff were no writ of entry, he could not object to it

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suggestion that it bound the obligors to pay $3600 in any e
is not well founded. While this portion of the bond is
wardly expressed, its evident meaning is that the obligors
pay the amount recovered, not exceeding $3600.

How this bond could have been used to defraud need not
been set out in the indictment in detail; it was enough th
appeared from the character of the instrument, together
the provisions of the statute, that it might have been so
in connection with other facts, real or simulated, either
existing or with which it was to be afterwards connected.
Commonwealth v. *Hinds*, 101 Mass. 209, 211.

3. The considerations which have been suggested, as to
counts of the indictment relating to the bond to dissolve
attachment, dispose of the objections in regard to the co
relating to the appeal bond.

4. The defendant relies upon an alleged variance betwee
bond to dissolve the attachment, as set forth in the indictm
and that produced at the trial, the former being a bond wit
an approval, and the latter with an approval annexed. But
approval does not constitute a part of the bond, and it was
necessary in the indictment to aver that it had actually been
proved, because, as before held, if made fraudulently with in
that it should be approved, it was a forgery; and if offered
approval, it was uttered as a forgery. The approval might p
erly be put in evidence, because it bore directly upon the
tion of the intent with which the bond was made.

5. The statements made by Hayes before the clerk of
court — that he then called himself Schell, that he describe
places of business, his residences, his occupation, and his
ership of a particular house — bore directly upon the ide
of the person described as Schell in the bond, and, in conne
with the contradiction of them and the proof who the p
calling himself Schell actually was, tended to show tha
name of Schell was fictitious. The defendant could not, b
mitting that the name was fictitious, prevent the governmen
ary legitimate evidence, from proving it so. *Commonwea*
Miller, 3 Cush. 243. *Commonwealth* v. *McCarthy*, 119
354.

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6. The instruction, as requested by jury must find that Hayes assumed an of Schell for the purposes of fraud in that it was not enough to constitute for assumed and used the same name for crime generally, is somewhat ambiguou

If all that was meant by it was that the use of the name should be shown that it was not enough merely to show Hayes fraudulently before, such instr given. An assumption of the name ge fraud would not be enough, unless it w party used the name, or procured it to the instance charged. Whether the na ticular instance with intent to defraud identity of the person whose signatur question of fact for the jury.

The request, however, cannot be con to draw the attention of the presiding principle, that an intent to defraud mu ticular instance. This instruction he c give, except by inadvertence. The obje obtain a ruling that if Hayes had previ and used it for the purposes of fraud reference to this fraud, his use of it wo forgery. That it was so understood by obvious from the ruling given by him in substance that, although a party might name which he had adopted for innocen acquire a right to use it for fraudulent p number of times for fraudulent purpose correct. The essential element of forge when making the signature or procurin it off fraudulently as the signature of an who actually makes it. If this intent t exists, the instrument is still a forgery, is actually the same name with that b signs it. So there may be a forgery by name, as well as by the use of a perso

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tent exists to commit a fraud by deception as to the identi
the person who uses the name. 2 East P. C. 941, and
cited. *Mead* v. *Young*, 4 T. R. 28. *Regina* v. *Rogers*, 8
P. 629. *Rex* v. *Whiley*, Russ. & Ry. 90. *Commonweal*
Foster, 114 Mass. 311. Where a party signs a name no
own, but one which he has adopted, using it without the i
to deceive as to the identity of the person signing, it is
forgery. *Rex* v. *Bontien*, Russ. & Ry. 260, and cases cited.
v. *Peacock*, Russ. & Ry. 278, 282.

In *Rex* v. *Bontien*, *ubi supra*, which is much relied on b
defendant, it was held, after conviction, that it did not
ciently appear upon the evidence that the prisoner had no
fore gone by the name he used, or that he had assumed i
the purpose of accepting the bill in question. The questi
treated by the court as one of fact, and the case simply l
that, by the mere use of a name not his own, there was
sufficient evidence that the party had sought to deceive a
his identity, he having previously borne the name used.
cannot be considered as sanctioning the position, that, if a p
fraudulently uses a false name, or even his own with inter
deceive as to his identity, this is not a forgery.

The previous use of the fictitious name would be evid
that, by the use of it in the case charged, the person so usi
did not do so for the purpose of representing himself to be ano
than the actual signer, just as evidence that he described
self correctly in all particulars as to business and occupa
would have a similar tendency. So where one assumes the n
of an existing person other than himself, or an entirely ficti
person, and connects it with an entirely false description a
plied to himself, it is evidence that the use of the name is o
the acts by which the fraud is carried on, and that it is inte
that the credit shall be given not to himself, but to the i
inary person whom he creates and describes, and that he
uses the name with a view to avoid the responsibility of th
or to prevent himself from being traced as its author.

Exceptions overrul

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COMMONWEALTH *vs.* FITCHBURG R

Middlesex. Jan. 14, 22. — M

Where an indictment charges a single offence in se
ferent ways, inconsistent with each other, a general
the whole indictment, as for a single offence, or a
proved, if either is proved, and not guilty upon all
to allow the jury to return a verdict of guilty upo
dict is rendered, the government is not entitled t
the counts but one, and retain the verdict as to th

The degree of negligence on the part of the servan
quired to be proved on an indictment under the Ge
by the St. of 1871, *c.* 352, and, on an indictment u
gence of the servants of the corporation is relie
averred and proved.

If an indictment against a railroad corporation, und
the St. of 1871, *c.* 352, does not allege that the ne
tion to give the signals required by law contribu
killed, evidence of such neglect is inadmissible.

INDICTMENT, in five counts, under th
and the St. of 1871, *c.* 352,† to recover,
and children of Charles Keniston, a fin
of his life, from being run over on Ma

---

* Gen. Sts. *c.* 63, § 98: "If by reason of the
a corporation, or of the unfitness or gross neglige
vants or agents while engaged in its business, the
the exercise of due diligence, and not being a pas
of such corporation, is lost, the corporation shall
ceeding five thousand nor less than five hundred
indictment and paid to the executor or administr
and children."

† St. 1871, *c.* 352, § 1: "If a person is injured
collision with the engines or cars of a railroad corp
crossing of a public way or travelled place, such
of chapter eighty-one of the acts of the year eigh
and it appears that the corporation neglected to
said section, and that such neglect contributed t
shall be liable for all damages caused by the collis
by indictment, as provided in the ninety-eighth se
ter of the General Statutes, unless it is shown tha
of ordinary care, the person injured, or the perso
son or property, was, at the time of the collision,

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and train of cars of the defendant, at a place in Somerville w
the defendant railroad crosses Park Street, so called, at grad

The first count was as follows:

"The jurors for the Commonwealth of Massachusetts, on
oath, present that the Fitchburg Railroad Company, a cor
tion duly and legally established in this Commonwealth,
duly authorized and empowered to propel engines and car
the power of steam, along, over and upon the railroad herein
described, was on the seventh day of May, in the year of
Lord one thousand eight hundred and seventy-four, as it stil
the owner of a certain railroad leading and extending from
ton, in the county of Suffolk, in this Commonwealth, to
through the city of Somerville, in this said county of Middle
and further, and was then in full occupation, possession and
of said railroad, and was a common carrier, over, along and u
said railroad, of passengers and merchandise, and that said
poration, being such owner, and in such possession, use and oc
pation of said railroad, did on said seventh day of May, at S
erville aforesaid, by its servants and agents, they being there
direct it and being then and there engaged in the busines
said corporation, and while said servants and agents then
there were legally engaged in the business of said corporati
run, propel and drive by the power of steam, a certain loco
tive engine over, along and upon said railroad, and that by
son of the unfitness and gross negligence and carelessness of
servants and agents, while engaged in said business as afores
said engine was then and there run, propelled and driven
aforesaid, rashly and without watch, care or foresight, and w

---

ligence or was acting in violation of the law, and that such gross or w
negligence or unlawful act contributed to the injury."

St. 1862, c. 81, § 1: "Every railroad corporation shall cause a bell,
least thirty-five pounds in weight, and a steam whistle, to be placed on
locomotive engine passing upon its road; and such bell shall be rung or
whistle sounded at the distance of at least eighty rods from the place w
the road crosses a turnpike, highway or townway, upon the same level th
with; and in like manner when the road crosses any travelled place,
which a sign-board is required to be maintained, as provided in section eig
five of chapter sixty-three of the General Statutes; and such bell shall be
or such whistle sounded, either one or the other, continuously or alterna
until the engine has crossed such turnpike, way or travelled place."

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great, unusual, unreasonable and ir
said engine then and there was, by
gross negligence and carelessness of
in the business of said corporation, a
and upon the body of one Charles K
he, said Keniston, being then and t
diligence, and not then being in or
said corporation, and not then being
tion, and not then being in the empl
and that said engine did then and t
aforesaid by said agents and servan
iently strike Charles Keniston, and d
divers wounds, bruises and injuries i
and limbs of him said Keniston, of
and injuries said Keniston then and
so the jurors aforesaid, upon their
on said seventh day of May, in the y
sand eight hundred and seventy-four,
and gross negligence and carelessness
of said corporation while engaged in
the life of said Charles Keniston, he s
there being a passenger of said corp
ment, and then and there being in the
was lost, in the manner and form afor
burg Railroad Company has become li
ing five thousand dollars nor less than
recovered by indictment and to be paid
istrator of said Charles Keniston, for
children of said Charles Keniston; and
said Somerville, widow of said Charles
appointed, and now is, the administratr
of said Charles Keniston, and that said
the said time of his decease two lawfull
of whom are now living. Against th
wealth, and contrary to the form of
made and provided."

The second count was as follows:

"And the jurors aforesaid, for the
chusetts, on their oath aforesaid, do

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COMMONWEALT
Fitchburg Railroad Co
tablished in this Com
powered to propel eng
over and upon the ra
enth day of May, i
hundred and sever
railroad leading
Suffolk, in this
erville, in this
then in full o
was a commo
sengers and
course in a
sected, and
monly kno
way, and
Somerville
the point
sected the
and occup
said railro
poration d
ing there
business o
of steam,
railroad, a
where said
did, by re
ness of its
gaged in
there run
negligently
unusual and
if said un
servants had
ration of a
against a
said Char
les Ke
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said, he being then and there in the exer
not then and there being in or upon any
tion, and not being then a passenger of
being then and there in the employment
that said engine, being so driven as afo
said unfitness and gross negligence and
vants and agents, suddenly and violently
ton, and did then and there and thereb
wounds and injuries in and upon the b
him said Keniston, of which said bruises
said Keniston then and there instantly d
aforesaid, upon their oath aforesaid, do s
day of May, in the year of our Lord one
and seventy-four, by reason of the unfitn
and carelessness of said servants and ag
while engaged in its business as aforesaid
Keniston, he said Keniston not then and
of said corporation, nor in its employme
being in the exercise of due diligence, v
and form aforesaid, whereby said Fitchb
has become liable to a fine not exceedin
nor less than five hundred dollars, to be r
and to be paid to the executor or admin
Keniston, for the use of the widow and c
Keniston; and that Eliza Keniston, of sa
said Charles Keniston, has been duly app
administratrix of the goods and estate of
and that said Charles Keniston had at
cease two lawfully begotten children, b
living. Against the peace of said Comm
o the form of the statute in such case m

The third count was as follows:

"And the jurors aforesaid, for the Co
chusetts, on their oath aforesaid, do fu
Fitchburg Railroad Company, a corpor
established in this Commonwealth, and d
powered to propel engines and cars, by th
over and upon the railroad hereinafter de
enth day of May, in the year of our L

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was any whistle upon, from or con
sounded continuously during said pass
ous signal and warning given by said
by either the ringing of such bell a
whistle alternately without cessation o
bell was then and there rung and no w
sounded during said passage over said
that said Keniston being so lawfully tr
aforesaid, and not being then and ther
of said engine, — the said engine, being
at a great and unusual speed, did the
said failure to give said warning as req
suddenly strike and collide with said
being drawn and travelling as aforesai
inflict divers fatal bruises, wounds and
body and limbs of said Keniston, wh
then and there instantly died. And so
their oath aforesaid, do say that said
enth day of May, in the year of our
hundred and seventy-four, was fatally i
thereby lost his life by collision with t
poration passing over the crossing of s
at the same level therewith, and *that sa*
aforesaid to give the signals afore *spec*
contributed to said injuries and *death,*
at said time of said collision guilty *of g*
nor then acting in violation of law, nor
either by gross or wilful negligence or
such collision or injury, whereby said
liable to pay a fine not exceeding five
than five hundred dollars, to be recove
be paid to the executor or administrat
ton, for the widow and children of sai
that Eliza Keniston, of said Somervil
Keniston, has been duly appointed, an
trix of the goods and estate of said C
said Charles Keniston had at the sai
lawfully begotten children, both of
Against the peace of said Commonwe
form of the statute in such case made

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a mere want of ordinary care, (wh
at the time of the collision, by whi
of gross or wilful negligence or w
and that such gross or wilful neg
tributed to his loss of life.

The jury were directed to retur
separately, which they did accordi
guilty on each of the first three co
leged exceptions.

The case was argued at the bar, a
upon written arguments.

G. A. Somerby & W. S. Stearns, f
T. H. Sweetser & O. S. Knapp, (C
the Commonwealth.

LORD, J. The indictment in thi
and, as appears by the bill of exce
fence, although it is not alleged, as so
ous counts are different modes of cha
has long been the practice in this Co
eral misdemeanors in different coun
and to enter verdicts and judgments
the same manner and with the same e
ment had been returned upon each cha
established that the same offence may
by different means or in different mode
of an indictment, and that a general v
indictment and judgment thereon is a
offence, and is deemed to be upon tha
to which the evidence is applicable.

The first count charges generally
named therein within the city of Son
gross negligence of the servants of t
agement of a locomotive engine then i

The second count charges the killing
at the crossing at grade of a highway
of the same negligence.

The third count charges that the de
the defendant's own neglect or the negl
sion at the crossing at grade of a tow

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that it was by reason of neglec
charge to ring the bell or sou
said crossing as required by la
It is not necessary to refer t
verdict of not guilty upon the
The jury returned a verd
three counts. The court s
deemed to have been a m
and the jury should hav
verdict of guilty or no
for a single offence, wh
the long and well estab
they should have be
upon the count pr
upon all the othe
corporation was
three of which i
found not guilty
one offence wa
qui may be e
the other.
may be suppo
to some extr
determine wh
have been.
Several qu
ciency of the
form. In ter
form, and, if
the trial, appe
of much di ffi
grounds, in the
terial, no opinio
As to the thi
the part of the
sion. It charges
neglect of the serva
it does not charge th
part of the servants.

The learned judge who preside
structed the jury that inasmuch as
ment contained no charge of negli
poration, or of unfitness of its ser
sustained only by proof of gross
Such gross negligence must be aver
lect to ring the bell or sound the w
of the servant or of the corporation.
one done under the direction of the
which the corporation might be resp
If the third count is to be construed
ration directed that no bell should l
it is not necessary to aver gross neg
sufficient. If, however, it is to be
neglect of servants acting under the
corporation within the scope of thei
ance of their duty, then the act mus
gross negligence of the servants. It i
which is charged. The St. of 1871,
the court to intend to change the mod
so far as the acts of the defendant or
whether or not it is necessary to chan
to the conduct of the person killed, it

In the second count, in which the c
been at the intersection of a public
ant's railroad, there is no charge that
the whistle sounded. The bill of exce
tion given upon the second count wh
been admitted by inadvertence. The i
jury were satisfied that the neglect o
tion to give the signals required by t
tributed to the death of Keniston, the
find the defendant guilty upon the se
the person killed was not in fault acc
the law. But the second count did no

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COMMONWEALTH *vs.* HAMILTON MANUFACTURING CO

Middlesex. Jan. 11. — May 6, 1876. COLT & ENDICOTT, JJ.

The St. of 1874, c. 221, prohibiting the employment of all persons under t
eighteen, and of all women, in laboring in any manufacturing establishm
than sixty hours per week, violates no contract of the Commonwealth i
the granting of a charter to a manufacturing company.

The St. of 1874, c. 221, prohibiting the employment of all persons under t
eighteen, and of all women, in laboring in any manufacturing establishm
than sixty hours per week, violates no right reserved under the Constituti
individual citizen, and may be maintained as a health or police regulatio
A law, which merely prohibits a woman's being employed in any manufa
tablishment more than a certain number of hours per day or week, does
her right to labor as many hours per day or week as she may see fit, an
the power of the Legislature to enact.

COMPLAINT under the St. of 1874, c. 221, to the Polic
of Lowell against a cotton and woollen manufacturing c
for employing an unmarried woman named Mary Shirl
was over twenty-one years of age, to work in the def
manufacturing establishment in the manufacture of cott
for sixty-four hours per week. The defendant demurre
complaint upon the following grounds: "1. That th
1874, c. 221, is unconstitutional and void. 2. That the
ant, having been incorporated under a charter prior to
sage of the statute under which the complaint was m
statute was as applied to the defendant, in violation of
gation of the Commonwealth to the defendant assume
charter, and was therefore void and of no force and effect
the defendant." The demurrer was overruled; the d
was found guilty; and appealed to the Superior Cour
Court demurrer was overruled and the judgment of th
affirmed; and the defendant appealed to this cou

G. Oldrich & F. T. Greenhalge, for the defendan

T. Swain, Attorney General, *& W. C. Loring*,
G. Marshall, for the Commonwealth.

C. B. The defendant contends that the St. of
C. R. which the complaint in this case is made,
Attorney and void. The provision, which it is alleged
Lord, J. under the Constitution, is, that "no mi
221, under
stitutional
ont authority

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the age of eighteen years, and no w
employed in laboring by any perso
manufacturing establishment in thi
ten hours in any one day," except i
no case shall the hours of labor exce

The learned counsel for the defe
not refer to any particular clause o
this provision is repugnant. His g
the defendant's act of incorporation,
with the Commonwealth, and that
tract. The contract, it is claimed,
an act of incorporation to manufactu
by necessary implication confers upo
capacity to contract for all the labor
this is conceded to the fullest exten
the corporation that it may contract
is no contract implied that such labo
law might be employed by the defe
Court would not perform its constitu
wholesome laws thereafter as the pub
The law, therefore, violates no contra
the only other question is, whether it
reserved under the Constitution to th
this question, there seems to be no ro
forbid any person, firm or corporatio
persons or as much labor as such p
may desire; nor does it forbid any
hours a day or a week as he chooses
in an employment, which the Legisla
to some extent dangerous to health, n
in labor more than ten hours a day or
can be no doubt that such legislation
as a health or police regulation, if it
either of those sources for power. T
frequently recognized in this Commo
the decisions is unnecessary.

It is also said that the law violates
to labor in accordance with her own j
of hours she shall work. The obvio

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E. F. Johnson, for the defendant.

C. R. Train, Attorney General, fo

LORD, J. The complaint in this c defendant was unlicensed as a seller is therefore to be presumed that he w as provided by law.

The statute, however, prohibits th cating liquors to a minor. St. 187 precise question in this case is, whet intoxicating liquor to a minor, who for another, or, as this case finds, fo prohibition. The court are all of opi previous laws an unlicensed sale was p the person to whom made; and this c to the agent of another, when the age be alleged to be a sale to the agent. Gray, 124. The sale was a prohibite to name the purchaser, not to give cl the purposes of identification, that the the trial what charge he was to me necessary he might be able to plead quittal. Under this complaint, the pe made is material; it is the element wh act, and is the only criminal element mischief which the statute designs to of intoxicating liquor by a minor for h his own control. If this view of the would be found in the 15th section o that "Whoever, by himself or his ag or give intoxicating liquor to any mi loiter upon the premises where such forfeit one hundred dollars for each offenc parent or guardian of such minor in an

The sale in this case was not a s meaning of the statute, and therefore t

Excep

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COMMONWEALTH vs. PRINCE W. KENNEY.

Barnstable. June 19. 1876. COLT & DEVENS, JJ., abs

On the trial of an indictment for polygamy, it appeared that the defend
Protestant, had been married in Ireland to a Roman Catholic, by a
olic priest, that he had cohabited with the woman there as his wife
had afterwards, while his wife was living, been married to another
Commonwealth. Held, that the law of Ireland must be proved
fact; and that, in the absence of evidence what that law was, the
must be considered as legal.

INDICTMENT for polygamy. Trial in the Super
fore Brigham, C. J., who allowed a bill of exce
stance as follows:

The evidence for the government, which was
tended to show that on September 30, 1884, t
married to Catharine Manning, in Queenstow
Rev. P. Sullivan, a Roman Catholic priest
of the alleged marriage the defendant w
Catharine a Roman Catholic; that the
duly recorded in the Catholic marriage re
Queenstown, Ireland; that the defend
together as husband and wife in Qu
years, and from thence removed to
where three children were born to
Yarmouth, Nova Scotia, and ultima
wick, where they continued to live
Chatham, all ten children born
that during the year 1859 the de
was married in this Commonwe
to Harwich, to one Betsey Coo
wealth, at said Yarmouth, and
Cook in Harwich until some
arine, having in the mean ti
the defendant, came to Har
together returned to St. Joh
and wife to Boston in this
of one week; that the defen
as man and wife in St. John
when the defendant again. lef

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wich, and there cohabited with Betsey until this indictment.

There was evidence that the defendant said Catharine was his wife, and letters fro Catharine, addressing her as his wife, were It was also proved that no other marriage place between the defendant and said C aforesaid marriage ceremony by the said S defendant and Catharine had never cohabi wealth, except during the space of about October, 1874.

Upon this evidence, the defendant cont would not be warranted in finding a verdic judge declined so to rule, and instructed th foregoing facts they would be authorized guilty. The jury returned a verdict of gu ant alleged exceptions.

H. P. Harriman, for the defendant, conte of Ireland, the defendant being a Protest Roman Catholic, the marriage there was il

C. R. Train, Attorney General, for the not called upon.

By the Court. The law of Ireland, matter of fact, of which our courts have without proof; and no proof of it was in A marriage solemnized by a priest, and un have cohabited as husband and wife, is *pr* riage everywhere. *E*

Patrick Fanning *vs.* Commo

Norfolk. April 8. — June 21, 1876. Colt

The provision of the Gen. Sts. c. 76, § 26, requiring th the reform school, "the court shall cause notice of t given to the mayor of the city, or one of the selectm resided at the time of his arrest," is merely directo notice does not affect the validity of the sentence.

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WRIT OF ERROR to reverse a judgment rendered
monwealth, upon an indictment for an assault, at D
1874 of the Superior Court in Norfolk, upon whic
in error was sentenced to the State Reform Sch
signment of error was as follows: "That the sen
by the court in said case is erroneous, illegal an
reason that neither of the selectmen of the tow
the town wherein said Patrick Fanning reside
was arrested for committing the offence alleged
ment, was notified of the pendency of said case
rior Court before passing said sentence, as i
laws of said Commonwealth, said Patrick Fa
the age of seventeen years, to wit, of the age
Plea, in nullo est erratum.

J. E. Cotter, for the plaintiff in error.

W. C. Loring, Assistant Attorney Gen
torney General, with him,) for the Comm

AMES, J. The provision contained i
that, before sentencing a boy to the
shall cause notice of the pendency of
mayor of the city, or one of the s
the boy resided at the time of his
having reference to a subsequen
rendering such city or town re
cents a week for such boy's
no other special or pecuniar
stand in any such relation
defence. There can be no
court over the offence wi
plaintiff in Commonwealth,
no commonwealth error, it was h
and pronounce law jurisdictio
for his commitment to the judgment
ing in the father of the
from that law under consi
statute.

The ... session to give th
trial in any way whatever.

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words, importing that the sentence shall be such omission. The manifest purpose of impose upon the town or city a liability to otherwise be subject, having reference to the county against certain expenses that are to be sentence. We think that this may be consid direction only. *Rex* v. *St. Gregory*, 2 A. & *Hadley*, 8 Met. 180. Neither the nature of formed, nor the language used by the Legi shows that it was intended as a limitation o court, or a condition precedent to its exercis 6 Wend. 486. *Pond* v. *Negus*, 3 Mass. 230. *District*, 21 Pick. 75. The omission of th may relieve the town from a pecuniary li the validity of the sentence.

MARY S. SPARHAWK *vs.* GEORGE

Middlesex. Jan. 12. — 29, 1876. COLT & June 21, 1876. COLT & DEVE

On a petition to make absolute a decree of divorce *nisi* and to award a gross sum in full of all alimony, inste at a preceding term, the decree of alimony may be tered circumstances of either or both of the parties, conduct of the parties, the circumstances of the separ which any former decree was founded, as well as any n question, may be taken into consideration.

In a case of divorce or alimony, no appeal lies to the full

PETITION, filed at October term 1874, decree of divorce *nisi* obtained by the petit spondent at April term 1872, for extreme cr her a gross sum in full of all alimony, a of $4000 annually, as ordered by the cou

The divorce was accordingly made abs ing upon the question of alimony, the that it is a general rule in equity that in

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mer wife applies for alimony on the ground of cruelty, conduct must not be impeachable with such violence o as might provoke her husband to retaliate; and offered to substantiate the position." *Ames*, J., ruled that such was not admissible in this proceeding and at this stag case; and the respondent alleged exceptions to this rulin were argued in January, 1876.

G. Sparhawk, pro se.

H. G. Parker, for the petitioner.

AMES, J. This motion was heard and considered by t as if it were merely an attempt to settle upon a sum in gro should be as nearly as possible an equivalent, considering and expectation of life of the respective parties, for th allowance already decreed to the wife as alimony. Bu satisfied that this was an erroneous view of the case. libellant thought proper to open the subject of alimony tion to change the form of the allowance, it rendered i and necessary for the court to consider, not only what a proper substitute, as an equivalent for the sum alread as a matter of periodical payment, but also what th circumstances of the case required. Upon such a mo only the decree for alimony may be revised for the altered circumstances of either or both of the parties, the former relations and conduct of the parties, the circu of the separation, and the facts upon which any forme was found, as well as any new facts bearing upon the may be taken into consideration. *Graves* v. *Graves*, 1 314. It follows that the *Exceptions must be sus*

The matter was then further heard before *Ames*, J., ered a decree awarding to the petitioner alimony in gro sum of $3,000. From this decree the respondent appe the appeal was argued in June, 1876.

H. G. Parker, for the petitioner.

G. Sparhawk, *pro se*, contended that the judge hea case should have reported the evidence to the full co under the Gen. Sts. *c.* 107, § 53; *c.* 113, §§ 8, 21, the ca be reheard on the evidence; and that the evidence wo that the amount of alimony awarded was too large.

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GRAY, C. J. This appeal is founded upon
of the statutes which regulate the practice
exercise of the different branches of its juris
In cases within its jurisdiction in equity o
peal lies in matter of fact as well as in matte
request is made, at the hearing before a s
report of the facts, or the appointment of a co
the evidence, nothing is open before the fu
but the question whether the decree below i
allegations and prayer of the bill or petition
§§ 8, 10, 11, 14, 21; *c.* 117, § 14. *Wright* v
207. *Mason* v. *Daly*, 117 Mass. 403.

This appellant is not therefore entitled
the full court upon any question of fact, eve
be considered as a proceeding in equity. B
to rest our decision on this ground, or to impl
divorce or alimony a party has the right to h
ported or the decision of a single justice revis
In cases at common law, questions of fact
tled by the verdict of a jury or the decisior
prius, and a judgment rendered accordingl
the full court in matter of law and by *bill*
Gen. Sts. *c.* 115, § 7; *c.* 129, §§ 66, 67. S
annes v. *Burt*, 6 Allen, 236, 239.

In cases of divorce and alimony, the stat
jurisdiction and practice as to the trial of fa
exception in matter of law, to conform t
actions at common law. St. 1820, *c.* 14, §
§ 7. St. 1855, *c.* 56. Gen. Sts. *c.* 107, §§ 1
providing that orders for alimony may be e
manner as decrees in equity, that all matte
mony, when the course of proceeding is not
may be heard and determined according to
ing in ecclesiastical courts and courts of e
ecutory orders may be passed in vacatio
jurisdiction of the full court to revise the o
ice. Gen. Sts. *c.* 107, §§ 45, 53. St. 186

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ALPHEUS J. HILBOURNE *vs.* COUNTY OF SUFFOLK.

Middlesex. Jan. 21. — June 27, 1876. COLT & DEVENS, JJ., absent.

Upon a trial to assess damages for land taken to widen a street, it is erroneous to instruct the jury that no benefit, which was shared in common with other estates on the highway, from which no land had been taken, can be deducted from the damages of any abutter.

PETITION to the county commissioners for a jury to assess damages for the taking of land for the widening of Washington Avenue in Chelsea.

At the trial before a sheriff's jury, it appeared that, for a part of the distance between the two terminal points of widening, the widening was wholly on one side of the avenue, and for the residue of the distance was on both sides of the avenue, so that from some estates, between the two terminal points of widening, land was taken for the widening; but from other estates, between these terminal points, no land was taken.

The presiding officer instructed the jury, that "if there was a general benefit or advantage to the petitioner's remaining real estate received from the widening, but that the same general benefit or advantage was also received from the widening by real estate of other persons on Washington Avenue, no part of whose estates was taken for the widening, such general benefit or advantage to the petitioner's remaining real estate cannot be deducted from the petitioner's damages."

The jury returned a verdict for the petitioner. In the Superior Court, the verdict was accepted; and the respondent appealed to this court.

J. L. Stackpole, for the respondent.

J. D. Ball, for the petitioner.

ENDICOTT, J. Where land is taken for a highway by public authority, the owner is entitled to a just and fair compensation for that of which he has been deprived. In determining the amount of his compensation, the direct and peculiar benefit which results to his remaining and adjoining land is to be considered. In an early case, it was said that the rule of damages was "the value of the land taken, the expense of fencing against the road, and the damage done to the land remaining, from

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which is to be deducted the benefit of the owner of the land." *Commonwealth* v. *Norfo* See also *Commonwealth* v. *Coombs*, 2 Mass. 4 as to deduction of benefits was afterwards e utes. St. 1824, *c.* 158. Rev. Sts. *c.* 24, § 3 § 16 In *Meacham* v. *Fitchburg Railroad*, held that there must be some limitation of tion, as stated in the statute; and the rule any direct and peculiar benefit or increase o land of the same owner, adjoining or conn taken, and forming part of the same parcel way of set-off, but not the general benefit received by such land in common with other borhood. This distinction has been obser which have been since decided. *Upton* v. *So Railroad*, 8 Cush. 600. *Farwell* v. *Cambr Dickenson* v. *Fitchburg*, 13 Gray, 546. *W Maine Railroad*, 3 Allen, 133. *Allen* v. *Ch* 243. *Upham* v. *Worcester*, 113 Mass. 97. appears that there are two kinds of benefit bounding upon a way laid out, altered or special and direct benefit arising from its the way itself; and, second, the general ben its location on the way, but from the facili caused by the way, which affect all estates equally, and which are shared in commor The direct and peculiar benefit may be set efit cannot.

The highway in question, called Washing sea, was widened through its entire length. widened by taking land on one side only, so tion, there were other estates from which nc

The ruling of the presiding officer upor benefits should be set off under the statu that no benefit could be set off which wa with other estates on the highway, from wh taken.

This ruling was clearly erroneous. Unde direct benefit, accruing to the estate from

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highway itself, could not be allowed, if similar direct benefits accrued to other estates on the same highway from which no land had been taken. These other estates may have received peculiar benefits by the widening, and they may also have received general benefit common to all the estates in the neighborhood. The advantages that an abutter may receive from his location on a highway laid out, altered or widened, are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of a similar kind. *Allen* v. *Charlestown*, 109 Mass. 243. The ruling in that case, held to be bad, was that if all the estates abutting on the street are benefited in a similar manner, the amount of his benefits cannot be deducted from the damages of any abutter. Here the ruling limits the comparison to the estates abutting on the street from which no land had been taken. But an estate abutting on the street may receive a peculiar and direct benefit, although no land has been taken from it. A new highway may be laid out, or an old way may be widened, so as to cause the estate to abut upon it without taking any of its land. The amount of peculiar benefit thus accruing to it may never be the subject of judicial inquiry, because, no land being taken, no proceedings for damages can be instituted. But the benefit it receives is none the less direct on that account.

We are of opinion that this case falls within the decision in *Allen* v. *Charlestown*, *ubi supra*. *Verdict set aside.*

ELISHA P. PARKS & others *vs.* COUNTY OF HAMPDEN.

Hampden. Jan. 7. — June 27, 1876. AMES & DEVENS, JJ., absent.

Benefits of a general character, caused by the widening of a street, which are common to all the owners of land on the same street, or in the same vicinity, cannot be set off against a claim for damages for taking a part of the land of one owner for such widening, under the Gen. Sts. c. 43, § 16.

PETITION to the county commissioners for a jury to assess damages for the taking of land by the respondent to widen North Elm Street in Westfield.

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At the trial, before a sheriff's jury, the
of set-off to the petitioners' claim for dam
that the remaining land and premises of the
benefited by the widening of the street, by
handsomer avenue in front of them, and by
convenient. The respondent's counsel als
nesses, whose adequate knowledge was not
in their judgment was the damage to th
after setting off any benefits occasioned
street." The respondent admitting that
show any benefits, except such as accrued
with other abutters resident on the same
officer ruled that the respondent could no
benefits of a general character common t
the street, but that it might introduce any
special benefits peculiar to the lands in qu
structing the jury that benefits could be se
as provided by statute, instructed them as
to the petitioners is to be set off against
benefit to an estate of the petitioners as is
acquired by the estates generally on the
benefit arising from said widening or oth
direct benefit to the estate of the petitioner
general benefit to the estates located on sa
no set-off can be made against damages."
verdict for the petitioners.

In the Superior Court the verdict was
spondent appealed to this court.

G. M. Stearns & H. Fuller, for the peti
E. B. Gillett & H. B. Stevens, for the r

ENDICOTT, J. The respondent offered
tates of the petitioners had been benefited
admitted that it did not expect to sho
such as accrued to them in common with
same street. The sheriff ruled that the
troduce evidence of direct and special b
lands in question, but could not put in
a general character common to all the
This ruling was correct. Direct and spec

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ff; but benefits common to all owners in the same street or vicinity, and affecting their estates equally, cannot be set off. Such benefits come from sharing in the common advantage and convenience of the increased public facilities, and the general advance in value of real estate in the vicinity by reason of the laying out, and are not peculiar to any particular estate. *Allen* v. *Charlestown*, 109 Mass. 243. *Hilbourne* v. *Suffolk*, *ante*, 398. The ruling of the sheriff precisely covered the offer as made by the respondent. The instruction to the jury was co-extensive with the ruling, and there is nothing in the report to show that the circumstances of the case were such as to render any further explanation necessary. *Verdict accepted.*

NEW BEDFORD RAILROAD COMPANY *vs.* OLD COLONY RAILROAD COMPANY.

Worcester. Jan. 5. — June 20, 1876. AMES & DEVENS, JJ., absent.

By the St. of 1874, c. 55, the Old Colony Railroad Company was authorized to purchase the rights, franchise and property of the Middleborough and Taunton Railroad Corporation, and the latter was authorized to convey to the former its franchises and property, rights, easements, privileges and powers, and thereupon the former corporation was to "be subject to all the duties, liabilities, obligations and restrictions to which said last named corporation may be subject." *Held*, that the Old Colony Railroad Company, upon the completion of the purchase and conveyance, became directly liable in an action of tort for damage occasioned by the prior neglect of the Middleborough and Taunton Railroad Corporation.

TORT. The declaration was as follows:

"And the plaintiff says that it was, at the time of the acts below set forth, the owner, and operating as common carrier of persons and freight, a railroad for the conveyance of passengers and freight; and that said railroad formed a junction with the railroad of the Middleborough and Taunton Railroad Company, and at said junction the track of said last named railroad was connected with the track of the plaintiff's railroad by means of a switch, and it became, and was, by the provisions of law and the agreement of said railroad companies, the duty of the said Middleborough and Taunton Railroad Company to have the care

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and custody of said switch, and to so arrang
trains of the plaintiff could at any and all pr
times pass said switch in safety, and so that t
of the plaintiff's railroad should be continuo
the place of said junction; but the said
Taunton Railroad Company negligently and
and controlled said switch, so that upon the
senger train of the plaintiff upon its said
plaintiff was using due care in the managem
and train, the said train was violently throw
said junction, by reason of the said switch
said Middleborough and Taunton Railroad C
vants and agents, and the engine and cars
thereby greatly injured, and the track of t
and destroyed, and the passengers and othe
train received grievous injuries, and the plain
to expend large sums of money in repairin
and cars, and in compensating said passenge
paying them the damages to which they wer
said injuries, and has been subjected to ot
burdens, liabilities and expenses by reason
and negligence of the said Middleborough ar
Company. And by the provisions of the st
ter 55, the said Middleborough and Taunto
was authorized to convey its franchises, pr
the defendant, and, since the acts above set
and assigned, in accordance with the provi
to the defendant, all its franchises and p
rights, easements, privileges and powers wh
to said Middleborough and Taunton Railro
virtue of the provisions of said act, the d
compensate the plaintiff for said negligenc
the Middleborough and Taunton Railroad
tion."

The defendant filed a demurrer to the
the following causes therefor:

"1, That said declaration does not state
tion substantially in accordance with the r
Gen. Sts. *c.* 129.

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"2. That the matters set out in the plaintiff's declaration are insufficient in law to enable it to maintain its action.

"3. That as a matter of law the defendant is not liable by the provisions of the St. of 1874, *c.* 55, for the tortious acts of the Middleborough and Taunton Railroad Company, or those of its agents or employees prior to said act, or prior to any conveyance of its property, under the provisions of said act, to the defendant.

"4. That as matter of law, by the provisions of said act, the defendant is not in any event directly liable to the plaintiff's action; nor is it, as a matter of law, in any way liable to the plaintiff's action by the provisions of said act."

The case was reserved by *Colt*, J., on the demurrer, for the consideration of the full court.

W. W. Rice, for the defendant.

G. A. Torrey, for the plaintiff.

COLT, J. The St. of 1874, *c.* 55, authorizes the defendant corporation "to purchase the rights, franchise and property of the Middleborough and Taunton Railroad Corporation," and gives to the latter corporation, upon such purchase, power to convey to the Old Colony Railroad Company "its franchises and property, and all the rights, easements, privileges and powers granted to it." It also declares that upon such conveyance the defendant corporation shall "have and enjoy all the rights, powers, privileges, easements, franchises and property of said Middleborough and Taunton Railroad Corporation, and be subject to all the duties, liabilities, obligations and restrictions to which said last named corporation may be subject."

This action is to recover damages for a tortious act of the Middleborough and Taunton Railroad Corporation, for which it was liable previously to the time of the purchase; and the questions raised by the demurrer are, whether the defendant is liable for that act, and, if so, whether an action can be maintained directly against it, or must be first brought against the other corporation.

The answer to these questions depends upon the intention of the Legislature, to be deduced from the terms of the statute and the manifest purpose of the act. The language is broad enough to place the defendant in all respects in the position of the other

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corporation, upon the conveyance and as
It is equivalent to an amalgamation of
chises, privileges and powers are transf
tion; not merely the franchise to own a
but the franchise of being a body politic,
sion, of acquiring, holding and conveying
and being sued by its corporate name. I
of creditors all property liable to attach
either in contract or tort. It practically
rate existence of the selling corporation,
as such existence may be necessary in or
ute the consideration received for the sale,
ments of the statute which prolongs the l
for three years after dissolution, for th
them to close their concerns. Gen. Sts. *c.*
as a dissolution of the corporation by fo
of the assent manifested by the sale. *La*
ley Railroad, 30 Penn. St. 42.

In view of these results, it would be a r
hold that when the statute subjects the p
"to all the duties, liabilities, obligations a
other, it only intended to impose those obl
poration owed the public under its charte
Commonwealth, and that the property tra
by which it served the public in the exe
In the absence of express provision, it can
was the intention of the act to impair clai
existing liabilities, or to shorten the time
edy must be pursued. The question is n
compels the creditor to accept the defen
new debtor against his will, or an injure
stranger for satisfaction, but whether it
or the person injured to resort, if he ch
stance, to the corporation which, by the
made liable to him. And we are of opi
that the privity necessary to support thi
the statute and the purchase and conveya

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JOHN D. RICHARDS & others *vs.* COUNTY COMMISSIONERS OF BRISTOL.

Bristol. Oct. 28, 1875. — June 20, 1876. MORTON & LORD, JJ., absent.

By the St. of 1843, c. 54, the Norfolk and Bristol Turnpike Corporation was authorized to surrender its charter, and the towns through which a part of the road passed were authorized to lay it out as a common highway. The inhabitants of one of these towns voted in a town meeting to accept the turnpike as a highway, and authorized the selectmen so to lay it out, which they did, and made a record of it. It continued to be used as a highway to the year 1875. *Held*, that, whether the action of the town was or was not legally effectual, the attempted compliance with the provisions of the St. of 1843, c. 54, followed by actual, general and uninterrupted public use of the road since, was enough to establish it as a highway.

The provisions of the Gen. Sts. c. 43, § 82, do not apply to a turnpike road, given up to the public by the turnpike corporation by a surrender of its charter, and subsequently used as a public highway.

Under the Gen. Sts. c. 43, § 12, the county commissioners, in making a new location of a road, have power to change its grade and to prescribe such manner of construction as the alterations ordered in its course and width may render necessary.

Upon the neglect of a town to make a highway established by the county commissioners, the Gen. Sts. c. 43, § 49, impose upon them a duty, as to the exercise of which no discretion is left to them; and, upon their neglect, a mandamus lies to compel them to complete the way as ordered.

COLT, J. The petitioners ask for a writ of mandamus, requiring the county commissioners to construct and complete parts of Main Street and Elm Street in the town of Attleborough, which the petition states they had widened, straightened and located anew, but which that town had refused to make and complete under the commissioners' order.

The answer, signed by the commissioners, admits the facts stated in the petition; but denies that the roads in question were highways or county roads at the time of the order, averring that Elm Street was a town way; and, as to Main Street, referring to the case of *Hayden* v. *Attleborough*, 7 Gray, 338, for the facts connected with its origin and history. Main Street appears from the report in that case to have been originally a part of the Norfolk and Bristol Turnpike, which the towns were authorized, upon the surrender of the charter of that corporation, to lay out as a common highway, provided the county did not. The town of Attleborough voted to accept the turnpike as a highway, and authorized its selectmen to lay it out. It was so laid out, and a

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record of it made by the selectmen. Tl
der which this was done, thus gave to
change the highway from a turnpike t
road was located originally through sev
counties, and, from the time of the sur
the turnpike corporation, to the filing of
ber, 1875, it has continued to be used a
travel.

It seems to be assumed, in the discuss
borough, *ubi supra*, that the action of th
effectual to continue the road as a public
it was or not, it is plain that there is not
sumption, which now arises from the fact
time of its relocation the street had becon
prescription. It is not the case of a roac
to the public use by the owner, to whicl
St. of 1846, *c.* 208; Gen. Sts. *c.* 43, § 8
was rather a continuance of the road as a
ance, or at least an attempted compliance
visions of a special statute; and this, if f
eral, uninterrupted public use for the tim
establish a highway. *Jennings* v. *Tisbury*

Under our statutes, the commissioners a
anew any road laid out by the authority o
either for the purpose of establishing the
ing alterations in the course or width of t
assess the expense upon the petitioners,
county. Gen. Sts. *c.* 43, § 12. They ha
grade of the road, and to order the constr
sary by the alterations ordered in its cou
Park v. *County Commissioners*, 117 Ma
highway has thus been established and i
by them, if a town, whose duty it is to m
part thereof, shall fail to make it within t
commissioners are required to complete
thereafter. A public duty is thus impose
reasons, in the exercise of which there i
them. The action of the commissioners in
streets, and in the improvements ordere

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objection; and it is their duty now to complete the construction ordered. *Mandamus to issue accordingly.*

G. Marston, for the petitioners.

T. M. Stetson, for the respondents.

WINFIELD S. PARTRIDGE *vs.* HERMIONE HOOD.

Essex. Nov. 4, 1875.—June 22, 1876. COLT, MORTON & LORD, JJ., absent.

An action will not lie on an agreement entered into for the purpose of compounding any misdemeanor, unless it appears that satisfaction has been acknowledged in and approved by the court in which the prosecution was pending, according to the Gen. Sts. c. 170, § 33, and c. 171, § 28.

CONTRACT upon the following agreement, signed by the defendant, and dated October 5, 1874:

"In consideration of one dollar and other good and valid consideration to me paid, I hereby agree, upon the delivery to me and in my name, within three days from the date hereof, of a quitclaim deed, conveying the land described in a mortgage deed to Winfield S. Partridge given by Edward K. Hood, said quitclaim deed to be given by said Partridge and said land to be free of all incumbrances except a mortgage now held by the South Scituate Savings Bank for twelve hundred dollars covering on a portion of said land, to give said Partridge a first mortgage deed for twelve hundred and fifty dollars, payable in two years at eight per centum per annum, interest payable semi-annually, on my homestead estate situated on Essex Street, Lynn, Mass. And also a power of sale first mortgage upon a portion of said land to be conveyed to me by said Partridge for one thousand dollars, payable in two years with interest thereon payable semi-annually at the rate of eight per centum per annum; said land being the westerly half of said land described in said mortgage from Edward K. Hood to W. S. Partridge."

The answer averred that the consideration of the contract was an agreement on the part of the plaintiff to stop a criminal prosecution against Edward K. Hood, the defendant's son.

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At the trial in the Superior Court, b
a jury, the following facts appeared: I
plaint was entered in the Police Court o
K. Hood, for having mortgaged to the pl
tain real estate in Lynn, without inform
incumbrance upon it. On this complain
to answer at the then next term of the
county of Essex. The land mentioned v
ferred to in the agreement declared upon
the grand jury met, one Silsbee, the plain
house of the defendant, and, according to
her that if she would purchase the land
it cost him, he having sold under his mor
"the matter," meaning the prosecution,
arranged." Under this inducement the
contract. The defendant testified that s
to save her son from jail, and that Silsbe
cution could be stayed." It further app
of the trial the complaint was still pe
Court, never having been heard by the g
acknowledgment of satisfaction had beer
in court or elsewhere of the complaint; t
to be paid by the defendant for the land
due by her son to the plaintiff at the dat
that the plaintiff thereby gave up to the
rity he had for the amount.

The plaintiff contended that the arrang
be made under the Gen. Sts. c. 171, § 28
acknowledgment of satisfaction, and that
a misdemeanor might be compounded by
received no more than his damages by the

The judge found as a fact that the writ
on was entered into by the defendant fo
pounding said complaint, ruled that it wa
ordered judgment for the defendant. Th
ceptions.

R. E. Harmon, for the plaintiff.

D. O. Allen, for the defendant.

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GRAY, C. J. The reason that a private agreement, made in consideration of the suppression of a prosecution for crime, is illegal, is that it tends to benefit an individual at the expense of defeating the course of public justice. The doctrine has never been doubted as applied to felonies, and the English authorities before our Revolution extended it to all crimes. 2 West Symb. Compromise & Arbitrement, § 33. *Horton* v. *Benson*, 1 Freem. 204. Bac. Ab. Arbitrament & Award, A. *Johnson* v. *Ogilby*, 3 P. Wms. 277, and especially the register's book cited by Mr. Cox in a note to page 279. *Collins* v. *Blantern*, 2 Wils. 341. 4 Bl. Com. 363, 364. An appeal of mayhem could be barred by arbitrament, or accord and satisfaction, or release of all personal actions, because it was the suit of the appellant and not of the Crown, and subjected the appellee to damages only, like an action of trespass. *Blake's case*, 6 Rep. 43 *b*, 44 *c*. 2 Hawk. *c*. 23, §§ 24, 25.

Some confusion was introduced into the English law upon this subject by the rulings of Lord Kenyon; Kyd on Awards, (Am ed.) 64–68; *Drage* v. *Ibberson*, 2 Esp. 643; *Fallowes* v. *Taylor*, Peake Ad. Cas. 155; *S. C.* 7 T. R. 475; and by Mr. Justice Le Blanc's suggestion of a distinction between a prosecution for a public misdemeanor and one for a private injury to the prosecutor. *Edgcombe* v. *Rodd*, 5 East, 294, 303; *S. C.* 1 Smith, 515, 520. This confusion was not wholly removed by the opinions of Lord Ellenborough in *Edgcombe* v. *Rodd*, 5 East, 294, 302; in *Wallace* v. *Hardacre*, 1 Camp. 45, 46; in *Pool* v. *Bousfield*, 1 Camp. 55, and in *Beeley* v. *Wingfield*, 11 East, 46, 48; of Chief Justice Gibbs in *Baker* v. *Townshend*, 1 Moore, 120, 124; *S. C.* 7 Taunt. 422, 426; or of Lord Denman in *Keir* v *Leeman*, 6 Q. B. 308, 321.

But in the very able judgment of the Exchequer Chamber in *Keir* v. *Leeman*, 9 Q. B. 371, 395, Chief Justice Tindal, after reviewing the previous cases, summed up the matter thus: "Indeed it is very remarkable what very little authority there is to be found, rather consisting of *dicta* than decisions, for the principle, that any compromise of a misdemeanor, or indeed of any public offence, can be otherwise than illegal, and any promise, founded on such a consideration, otherwise than void. If the matter were *res integra*, we should have no doubt on this point.

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We have no doubt that, in all offences v
to an injured party for which he may n
competent for him, notwithstanding the
nature, to compromise or settle his privat
he may think fit. It is said, indeed, that i
he may also undertake not to prosecute or
It may be so; but we are not disposed t
ther."

In *Fisher* v. *Apollinaris Co.* L. R. 10
pursuant to an agreement of the defendar
cution against him under St. 25 & 26 Vic
of their trade mark, gave them a letter of
ity to make such use of it as they might
after they had published it by advertise
filed a bill in equity to restrain them from
cation, which was dismissed by the Lords J
grounds of the decision appear to have be
had done nothing that the plaintiff had
to do; and that, even if the publication
reputation, a court of chancery had no jur
See *Prudential Assurance Co.* v. *Knott*, L
ton Diatite Co. v. *Florence Manufacturing*
was indeed observed that "it was no more
to accept an apology in such a case than i
mise an indictment for a nuisance or for
way on the terms of the defendants ag
nuisance or repair the highway." L. R.
observation was not necessary to the decis
v. *Blakemore*, 14 Q. B. 544, an agreemer
of an indictment for not repairing a hig
and void. All the other recent English
judgment of Chief Justice Tindal, above
Hardey, 14 Q. B. 529, 541. *Clubb* v. *H*
414. *Williams* v. *Bayley*, L. R. 1 H. L.

In *Jones* v. *Rice*, 18 Pick. 440, 442, Mr
livering the opinion of this court, after al
cases in the time of Lord Kenyon, relied
tinction between considerations arising f
of felonies, which is admitted to be illegal

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of misdemeanors, which is alleged to be lawful," said: "We do not think that such a power is vested in individuals. It would enable them to use the claim of the government for their own emolument, and greatly to the oppression of the people. It has a direct tendency to obstruct the course of the administration of justice; and the mischief extends, we think, as well to misdemeanors as to felonies. The power to stop prosecutions is vested in the law officers of the Commonwealth, who use it with prudence and discretion. If it were given to the party injured, who might be the only witness who could prove the offence, he might extort, for his own use, money which properly should be levied as a fine upon the criminal party for the use of the Comm wealth."

It is true that the prosecution in *Jones* v. *Rice* was for a riot as well as for an assault. But the language and the reasoning of the opinion extend to the compounding of any offence whatever. Any act which is made punishable by law as a crime is an offence against the public, and, especially in this country, where all prosecutions are subject to the control of official prosecutors, and not of the individuals immediately injured, cannot lawfully be made the subject of private compromise, except so far as expressly authorized by statute. And this view is supported by the great weight of American authority. *Hinds* v. *Chamberlin*, 6 N. H. 225. *Shaw* v. *Spooner*, 9 N. H. 197. *Shaw* v. *Reed*, 30 Maine, 105. *Bowen* v. *Buck*, 28 Vt. 308. *People* v. *Bishop*, 5 Wend. 111. *Noble* v. *Peebles*, 13 S. & R. 319, 322. *Maurer* v. *Mitchell*, 9 W. & S. 69, 71. *Cameron* v. *M'Farland*, 2 Car. Law Repos. 415. *Corley* v. *Williams*, 1 Bailey, 588. *Vincent* v. *Groom*, 1 Yerger, 430. Met. Con. 226, 227. 1 Story Eq. Jur. § 294.

The Legislature of the Commonwealth has defined the cases and circumstances in which the compromise of a prosecution shall be allowed. By a provision first introduced in the Revised Statutes, when a person is committed or indicted for an assault and battery or other misdemeanor for which the party injured may have a remedy by civil action, (except when committed by or upon an officer of justice, or riotously, or with intent to commit a felony,) if the party injured appears before the magistrate or court and acknowledges satisfaction for the injury sustained,

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a stay of proceedings may be ordered. c. 136, § 27. Gen. Sts. c. 170, § 33; c. 1 knowledgment of satisfaction does not e be discharged, but leaves it to the discr or court whether a stay of proceedings is terests of public justice. *Commonweal* 115 Mass. 133. See also *State* v. *Hunter*

In the case at bar, it being found as a f sued on was entered into by the defend compounding a complaint against her son it not appearing that satisfaction has ev in or approved by the court in which the ing, judgment was rightly ordered for the

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ANDREW J. PERKINS *vs.* CHAR

Essex. Nov. 4, 1875. — June 26, 1876. COL absent.

A. made an oral contract to sell land to B., and ga thereof. B. soon after made a contract with C. to re on the premises. After this, A. gave B. a deed of tl B. gave A. a mortgage upon it, both being dated as tract of sale was made. C. began work under his mortgage were given, and continued the work after facts, a judge, who tried the case without a jury, seisin of B. was instantaneous, and rule that A.'s ri precedence of C.'s lien.

WRIT OF ENTRY to recover possessio n Lawrence. Plea, *nul disseisin*. At the Court, before *Brigham*, C. J., without a j ware found:

In April, 1869, the demandant, who the premises, and Sarah O. Adams, made a sale and purchase of them, and Adams and so continued until January 1, 1870, the demandant executed and delivered t the consideration was stated to be $320(delivered to him a mortgage deed of t

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the consideration was stated to be $2900. Both of these deeds were dated April 22, 1869, and acknowledged and recorded on June 12, 1869. They were so dated because the contract for the sale and purchase of the premises was then made, and with a view to the taxation of the estate. On April 29, 1870, the demandant foreclosed the mortgage made to him by Adams, for a breach of the condition thereof.

While Adams was in possession of the premises, in May, 1869, she made a contract with one Henry J. Couch, to repair or enlarge the buildings on the demanded premises, and Couch performed labor and supplied materials for those purposes, beginning in May, 1869, and ending on March 1, 1870. On March 2, 1870, he filed in the office of the clerk of the city of Lawrence a certificate of such contract, performance of labor and supply of materials, and of his intention to claim a lien therefor on the demanded premises; and on June 30, 1870, on a petition duly filed in the Superior Court to enforce the lien, judgment was entered for the petitioner, and a sale of the demanded premises was ordered, to satisfy the judgment. On August 27, 1870, under this order, the premises were sold to the tenant, and a deed made to him the same day.

On these facts and their legal effect, the judge ruled that the demandant was entitled to recover, and ordered judgment for him; and the tenant alleged exceptions.

C. G. Saunders, for the tenant.

W. S. Knox, for the demandant.

AMES, J. As, by the consent of the parties, this case was tried by the court without a jury, the rulings of the presiding judge upon matters of law only are open to examination in this court; but his findings upon matters of fact are conclusive, and cannot be here revised. It appears from the bill of exceptions that the conveyance of the lot of land from this demandant to Sarah O. Adams, and her mortgage deed of the same to him for what appears to have been about nine tenths of the purchase money, both occurred on the same day, and were acknowledged and recorded on the same day. This fact is an indication that the two instruments really constituted but one transaction; and the presiding judge may be supposed to have found that (as against the mortgagee) they gave to Mrs. Adams only an instan-

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taneous seisin, so that all incumbrances t
ject the property would apply only to he
There is nothing in the facts reported th
ing that the grantor was to advance mone
sale, to enable her to build a house on the
fore does not come within the rule laid d
rill, 106 Mass. 528. The deed, although
take effect from its delivery, which was
building contract. But the difficulty witl
in the nature and extent of the title whicl
by the conveyance in the land conveyed.
the deeds exchanged by the parties were
terms of their unwritten contract. If, t
Mrs. Adams only held an equity of redem
power to create any incumbrance or lien
could take precedence of the mortgage, ex
of the mortgagee. Of such consent we l
follows from this view of the case that
claims under that mortgage, has the olde
that the tenant's *Exception*

STEPHEN E. WESTCOTT, trustee, *vs.* TH
& others.

Suffolk. Nov. 16, 1875.—June 20, 1876. Co

Where a testator bequeaths the residue of his personal
scription or other words indicating an intention that
and the property is invested in a commercial partne
by the testator to remain for a short time, and not
investment, the amount received upon the winding u
distributed between the tenant for life and the remai
sum, if received at the death of the testator, adding i
annual rests, would produce the amount afterwards
partnership, and by investing the original sum, so co
tributing the residue as income.

BILL IN EQUITY by the trustee under
Westcott, to obtain the instructions of the
heard on the bill and answers by *Wells*, J
consideration of the full court, and was in

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The testator, by his will, dated July
the plaintiff the residue of his property
prudently invest the same, and to pay ov
est thereof, in equal parts, to his childr
be made quarter yearly, and the remain
children on their coming of age. The
following clause: "It is my will that th
of S. Westcott & Son shall be continue
March following my decease, and that sai
tled and wound up as soon after said first
safely and prudently be done."

The testator died on June 13, 1874, and
member of the firm mentioned in the will, e
business. There were no articles of partner
interest in his business at the time of hi
$162,514.07 - The business was continued u
when the interest of the estate of the testat
was worth $193,919.57. The testator left c
children, and the question submitted to the
the children above mentioned were entitled to the difference
thereof was to be regarded as income, or whether the
above mentioned as principal.

M. Storey for the children of the testator, co
case was taken out of the general rule laid down
Brigham, 5 Allen, 270, by the fact that the co
estate was not to take place at the death of th
cited *Hinves* v. *Hinves*, 3 Hare, 609; *Skirving*
Beav. 275; *Collins* v. *Collins*, 2 Myl. & K. 703;
per, 2 Myl. & K. 699; *Pickering* v. *Pickering*, 2 B
4 Myl. & Cr. 289; *Hubbard* v. *Young*, 10 Beav.
Selby, 22 Beav. 373; *Boys* v. *Boys*, 28 Beav. 43
Warren, 2 Sm. & Col. Ch. 290; *Burton* v. *Mount*,
Sm. 383; 103 Mass. 297. *Lovering* v. *Minot*, 9 Cush. 151; *Sargen*

J. O. Teele, for the grandchildren.

GRAY, C. J. Where a testator bequeaths the res
personal property, without specific description or othe
licating an intention that it shall be enjoyed *in specie*
tenant for life, and then to a remainderman, and thus

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his purpose that the same fund shall be
both, the necessary inference and the e
it must be invested as a permanent fun
fixed at the time when the right of the
is to say, at the death of the testator.
present case, the property is then invest
nership, and is directed by the testator
for a short time, merely for the purpose
ness of the partnership and ascertaining
and not for the purpose of a lasting inv
ceived upon the winding up of the part
uted between the tenant for life and the
puting what sum, if received at the deatl
interest at six per cent. with annual re
amount afterwards actually received fro
by investing the original sum, so comp
distributing the residue as income. *K*
Allen, 270. *Sargent* v. *Sargent*, 103 1
Young, 9 Ves. 549. *Meyer* v. *Simonsen*
Brown v. *Gellatly*, L. R. 2 Ch. 751. *Spe*
Ch. 211.

IN THE MATTER OF THE EASTERN R
Samuel C. Lawrence, pe

Suffolk. June 20. — 21, 1876. ENDICOTT

This court, under its general equity jurisdiction to en
tion of trusts, may appoint trustees to administer
express provision for such appointment is made by
creating the trust.

The appointment of trustees under the St. of 1876, c
be made to them by the Eastern Railroad Company
of indebtedness, and to perform the other duties rec
made in the exercise of the equity jurisdiction of
appointed may be ordered at any time hereafter to
without any express provision to that effect in the
pointment.

PETITION by the president of the East
and a creditor thereof, for the appointme

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St. of 1876, c. 236, the material provisions of which are stated in the opinion.

Hearing before *Ames*, J., who reserved, for the consideration of the full court, the question whether the appointment should be made.

W. G. Russell, C. L. Woodbury & C. A. Welch, in support of the petition.

GRAY, C. J. This court, under its general jurisdiction in equity to enforce and regulate the execution of trusts, may appoint trustees to administer any lawful trust, although no express provision as to such appointment is made by statute or by the instrument by which the trust is created. Gen. Sts. c. 100, § 9; c. 113, § 2, cl. 2. *Bowditch* v. *Banuelos*, 1 Gray, 220. *Bailey* v. *Kilburn*, 10 Met. 176. *Winslow* v. *Cummings*, 3 Cush. 358. The power of the court has not been limited to appointing trustees under trusts already existing; but it has often been authorized, in cases of trusts which would not be complete until a trustee was appointed, to appoint trustees for the purpose of selling or conveying or holding and managing property. Gen. Sts. c. 43, §§ 17, 18; c. 90, §§ 39, 41; c. 100, § 15. *Felch* v. *Hooper*, 119 Mass. 52. Sts. 1868, c. 287; 1869, c. 249; 1871, c. 322; 1874, c. 388. *Parker* v. *Parker*, 118 Mass. 110. The court has long been vested with, and has constantly exercised, the power, upon the dissolution of a corporation, or the expiration or annulling of its charter, to appoint trustees or receivers to take charge of its property, collect its debts and wind up its affairs. St. 1833, c. 145. Rev. Sts. c. 44, § 8. St. 1852, c. 55. Gen. Sts. c. 68, § 37. See also *Ellis* v. *Boston, Hartford & Erie Railroad*, 107 Mass. 1.

By the St. of 1876, c. 236, the Eastern Railroad Company is required to deliver certificates of indebtedness for all its existing debts; and to execute a mortgage of all its franchises and property, present and future, to secure the same, to three trustees, to be appointed and removable by a justice of this court sitting in equity, and who are to issue such certificates to those creditors of the corporation whose claims shall be admitted by the trustees or be judicially ascertained. §§ 1, 3, 4, 6–10. The trustees are also authorized to assent to the sale by the corporation of such of its property as is not used or required in conducting its business, and

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to the application of the proceeds to th
incumbrances and the payment of cur
claims specified in the act; and, after
hold the proceeds of such sales, and the
the road, as a sinking fund for the re
the certificates of indebtedness. §§ 13, 1
dition of the mortgage, the trustees are
and take possession of the mortgaged
the railroad, and to collect the income, a
payment of expenses and of all charges
equity in the case of a receiver or trust
mortgage; and, after such foreclosure,
meeting of the holders of the certificate
purpose of organizing a new corporatio
is made in § 12 for the appointment by
of a new trustee to fill any vacancy; an
tion of the trustees is to be determined

Upon consideration, we are all of op
the duties of the trustees to be appoint
such that the appointment may be ma
exercise of its general jurisdiction in
necessary consequence, the trustees so ap
at any time, upon the application of a p
or account to this court, without any e
effect, either in the act of the Legislat
pointing them. *T*

ADOLPHUS DAVIS & another *vs.* I

Suffolk. Nov. 10, 1875. — June 22, 1876. E

The defendant and C. and D. bought a quarry and
taking his notes in payment. In a subsequent s
defendant a balance due him on the sale, and als
to pay and save him harmless from an outstan
money, while the defendant gave to C. and D.
assume at maturity a share of the outstanding n
of a part of the quarry "in case said R. shoul
Held, in an action on this agreement by the assig
to recover the amount of an unpaid note of R., th
and not an original promise of the defendant.

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CONTRACT, by the assignees in bankruptcy of Henry Currier and George W. Dean, upon the following agreement, signed by the defendant:

"$29,500. Boston, Jan. 1, 1867. In consideration of one dollar paid to me by Currier & Dean, I hereby agree to assume one fourth part of the notes of H. B. Richmond and interest at maturity, amounting to $29,500, given in purchase of Marble Quarry, in case said Richmond should fail to pay them at maturity."

Writ dated March 5, 1870. At the trial in the Superior Court, before *Bacon*, J., the jury returned a verdict for the plaintiffs; and the defendant alleged exceptions, the substance of which appears in the opinion.

O. Stevens, for the defendant.

I. W. Richardson & J. D. Long, for the plaintiffs.

COLT, J. The defendant was jointly interested with Currier and Dean in the purchase of a quarry. Advancements had been made, and expenses incurred by the latter in the purchase and improvement of the same, and part had been sold to one Richmond and his notes taken in payment. The defendant, in a settlement with Currier and Dean, was charged with his share of the expenses and of the original cost, and credited with the part sold; the balance was paid to him by Currier and Dean, who also gave him a written agreement to pay and save him harmless from an outstanding joint note for the purchase money. The defendant, on his part, at the same time gave to Currier and Dean a separate written agreement to assume at maturity, a share of the outstanding notes of Richmond, given for his purchase of a part of the quarry, in case he should fail to pay.

This action is brought on the last named agreement, by the assignees in bankruptcy of Currier and Dean, to recover a balance unpaid on one of the Richmond notes which became due in 1868. The defendant offered to prove that he had no notice of the nonpayment of this note until about the time of the commencement of this action, and that, for more than two years after the note fell due, Richmond was in good credit, and could have paid it, but Currier and Dean voluntarily gave him time upon it. The court ruled that the evidence would not amount to a defence; and the only question is whether the promise de-

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clared on is an original promise of the d
debt, or only a guaranty of the debt of a
of the court it is the latter.

By the settlement between the partie
came the sole owners of, and had alone t
receive payment of the notes against F
note is now a valid obligation in the pl
of the bankrupt estate. The defenda
with respect to these notes and nothing e
strued as an absolute original promise t
contingency, advances then made. It w
and pay the notes at maturity if the ma
guage used is the appropriate languag
ambiguity justifying a resort to surrou
relations for explanation. The fact that
benefit from the transaction is not alone
original promise, for there must always
to support a mere collateral undertaking
leading object of the contract, as ascer
of it, is one of suretyship. By these te
defendant's promise in this case was inte
the original principal obligation of anot
in rejecting the evidence offered. *Nels*
396. *Alger* v. *Scoville*, 1 Gray, 391.
Mass. 296. *Ames* v. *Foster*, 106 Mass.
118 Mass. 187.

MICHAEL GERAGHTY *vs.* CITY

Suffolk. March 17. — June 23, 1876. Co

Where a change of grade in a highway is a part of it
tion for a jury to assess damages must, under the Ge
within one year from the time of the adoption of
way.

PETITION to the Superior Court, filed
to assess damages occasioned to the peti
the laying out of Lincoln Street, in th

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merly Brighton, and by raising the grade of the land taken in the original construction of the street.

At the trial, before *Brigham*, C. J., it appeared in evidence that Lincoln Street, between Market Street and Everett Street, was duly laid out as a town way June 13, 1873, and that during August, September and October of the same year the town authorities entered upon, constructed and completed the street as it has ever since existed, and in so doing filled the land laid out as Lincoln Street, to make it conform to the grade of Market Street and Everett Street, both of which were higher than Lincoln Street, and by such filling the street was raised about four feet above the level of the petitioner's adjoining land, by which raising, as well as for taking a part of his land for the laying out of Lincoln Street, the petitioner claims to have been damaged. This filling was in accordance with a grade and plan furnished to the superintendent of streets by the engineer of the town in August, 1873.

Upon the foregoing evidence, the respondent requested the judge to rule as a matter of law that the petition could not be maintained, for the reason that the filling of Lincoln Street, for which the petitioner claimed damages, was done in the original construction of the street, and for such damage the petition must be brought within one year from the laying out of the street; but the judge declined so to rule, and instructed the jury "that if the town of Brighton laid out on June 13, 1873, the way described in the petition, and in August following fixed the grade and entered upon the construction of such way continuing such construction until October following, when the work was completed, and if, in such construction, the land upon which such way was laid out was raised so that the petitioner sustained damage thereby, the petitioner can maintain this petition and recover the damages thus sustained by him, provided he petitioned the mayor and aldermen of Boston, within one year from the time when the work of raising such land was completed, for compensation for such damages, and notwithstanding such raising was a part of the original construction of such way as laid out on June 13, 1873."

The jury returned a verdict for the petitioner; and the respondent alleged exceptions.

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C. F. Kittredge, for the respondent.

S. J. Thomas, for the petitioner.

DEVENS, J. Under a petition for d laying out of a highway, the petitioner value of his land actually taken, but a maining land on account of all chang which is taken, which were necessary t as a public street. *Snow* v. *Provincetor* v. *Boston*, 118 Mass. 248. The petitic by the laying out must be brought withi so to do. Gen. Sts. *c.* 43, § 22. If, h tion came on to be heard, the constructi should not have been completed, it wc the discretion of the court to postpone could not then conveniently be ascertair

If, after the way is laid out as a high public authorities order a change in its entitled to apply for damages under th 20, by reason of the "raising, lowering purpose of repairing such way," and cai one year after the completion of the wo 119 Mass. 392. These sections of the existence of a public way in which such ages for the laying out of which it must been paid. The learned judge was thei that, if the raising of the grade of Linc the original construction of the way, the tain his petition if he commenced it w completion of the work. Such petition menced within one year after the laying could have recovered all the damages t by reason of the grade fixed on the orig street. If the petitioner were permitted the laying out of the street, and, in addit the filling necessary for its original con cover twice for the same injury.

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MARY E. MURPHY *vs.* CITY OF BOSTON

Suffolk. March 15. — June 23, 1876. AMES & MORTON, JJ., absent.

Under the St. of 1870, c. 337, § 2, the board of street commissioners has no authority to change the grade of an existing street; and a petition for a jury to assess damages, alleging that the damage was caused to the petitioner's estate by a change in the grade of an existing street made pursuant to an order of the street commissioners, cannot be maintained.

PETITION to the Superior Court for a jury to assess the damages to the petitioner's estate on Silver Street in Boston. The petition alleged that the city had "raised the grade" of said street, and that certain damages were caused thereby.

At the trial, before *Rockwell*, J., the petitioner offered to prove that Silver Street had been used by the public for foot passengers, and with horses and carriages, for over seventy years, or so long that the memory of man runs not to the contrary; and that in 1874 the grade of the street was raised one foot, in pursuance of a resolve and order of the board of street commissioners, a copy whereof is in the margin,* by the said city, which had previously made repairs thereon.

It was not contended by the petitioner that the street was ever formally accepted by the public authorities prior to the passage of said resolve and order; but the petitioner contended that the street had long been used by the public, and that the

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* "In Board of Street Commissioners, May 23, 1874. Resolved, That the safety and convenience of the inhabitants of the city require that Silver Street should be laid out from D to E Street, and that the grade thereof should be established; and for that purpose it is necessary to take and lay out as a public street or way of the said city, a parcel of land belonging to the city of Boston and others, bounded as follows. [Then followed a description of the land taken.]

"And whereas due notice has been given of the intention of this board to take the said parcel of land for the purpose aforesaid, as appears by the return hereunto annexed, it is therefore ordered, that the parcel of land before described be and the same hereby is taken and laid out as a public street or way of the said city, and the grade of the same is established, according to a plan of the said laying out and profile of the grade made by T. W. Davis, City Surveyor, dated April 16, 1872, and deposited in his office. And this board doth adjudge that the expense of laying out and establishing the grade of the said Silver Street, as aforesaid, will amount to nothing."

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action of the city in laying out the stre
and order, and establishing the grade a
was a repair or change of grade; and
was injured thereby, she might recover.

The respondent contended that the w
was not a repair or change of grade f
could recover in this proceeding; and t
by consent of both parties, reported the
the determination of this court. If the r
ment was to be entered for the respond
to stand for trial.

S. B. Allen, for the petitioner.

C. F. Kittredge, for the respondent.

COLT, J. The street commissioners, by
laid out or attempted to lay out and f
Street. The petitioner claims, in her pe
change of grade only, alleging that the c
to change the grade of an existing wa
shown by the record to have been laid c
public authorities, had nevertheless bee
from time immemorial, and had become a
the meaning of the statute. *Jennings* v.

The street commissioners of Boston ha
merly exercised by the board of alderme
altering or discontinuing the streets and v
1870, *c.* 337, § 2. They may, under th
make changes in the surface required
construction of a street laid out by them,
may have compensation in the damages s
Snow v. *Provincetown*, 109 Mass. 123.
have no authority to change the grade or
street already existing; and if it be true t
public way at the time of the order in qu
of the commissioners was of no effect, a
made responsible for any unauthorized
followed upon the facts here presented.

If, on the other hand, Silver Street wa
and established by that order, then the pe
application for an assessment of damages

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ing out of a street, which will include damages for a change of surface caused by its original construction. Gen. Sts. c. 43. *Hartshorn* v. *Worcester*, 118 Mass. 111. *Ryan* v. *Boston*, 118 Mass. 248. *Barker* v. *Taunton*, 119 Mass. 392. *Geraghty* v. *Boston*, *ante*, 416. *Judgment for the respondent.*

SAMUEL WEST *vs.* ISAAC L. PLATT & another.

Suffolk. March 20.—June 23, 1876. DEVENS & LORD, JJ., absent.

In an action to recover damages for breach of a contract to deliver a lot of plate-glass, the case was submitted to the Superior Court on an agreed statement of facts, from which it appeared that the contract was completed by correspondence between the parties in August, 1871, in which the defendants offered to furnish the glass within sixty days from the date of the order, and the plaintiff ordered the same, stating that it would not be needed before the following December; that on October 17, 1871, the defendants notified the plaintiff of the arrival of the glass, and requested shipping directions, and the plaintiff replied on November 3, 1871, that he did not then need the glass, owing to building delays, and offering to make a deposit to retain the glass until required; that on December 9, 1871, the defendants informed the plaintiff that they would retain the glass subject to his order upon the receipt of $1500 on account, and on December 26 the plaintiff sent $400, and promised after the first of the year to do better; that from this time the parties continued to deal with each other, the plaintiff making purchases amounting to more than $400, and nothing further was said about the plate-glass until August 15, 1872, when the plaintiff directed the defendants to forward the glass; that the defendants on August 20 refused, because of the long delay and the plaintiff's neglect to make the full deposit of $1500, and claimed the right to apply the $400 to the subsequent purchases of the plaintiff. The Superior Court found that the plaintiff was not entitled to damages on the plate-glass contract. *Held*, on appeal to this court, that the judgment disclosed no error of law, from which an appeal would lie under the Gen. Sts. c. 112, § 11; that the facts would warrant a finding that the judgment below proceeded upon the inference of fact that a reasonable time had elapsed, and that the plaintiff had waived his rights under the contract.

COLT, J. The plaintiff seeks to recover damages for the defendants' failure to perform a written contract for the delivery of plate-glass, at a price named, and of a description which required its importation by the defendants after the order for it was given. The declaration also covers a sum due on account, of which there is no dispute. The case was submitted to the Superior Court on an agreed statement of facts, and the plain

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tiff appeals from the judgment of that c
tiff's right to recover damages on the plat

The terms of the contract are found in
ties written in August, 1871. In reply
to furnish the glass at a price stated with
date of the order, the plaintiff sent an o
ing that it would not be required before
ber. The order was accepted by the def
ber 17 informed the plaintiff of the arr
requested directions for its shipment. T
plied on November 8 that, owing to inte
for which the glass was wanted had not
was expected, and offering to make a dep
until the time required. The rights of
executory contract of sale thus became fix
bound, upon the defendants' offer of deliv
and the defendants were bound to deliver
plaintiff gave no instructions for the shipr
made no payment, and on December 9 th
the plaintiff that they would hold the g
when the plaintiff was ready for it, upon r
of $1500 on account, claiming that the gl
figure, and the amount would then be du
ered on its arrival. The plaintiff sent $
December 26, and promised after the first
ter. This remittance was acknowledged
credited to the plaintiff. After this, th
deal with each other, the plaintiff making
ing to more than the $400, which sum wa
but nothing was done on either side as to
tion, until August 15, when the plaintiff d
to forward the same by railroad, and pro
ance. This the defendants refused, beca
long delay in receiving the glass, and his f
payment or deposit demanded, and claim
the $400 to subsequent cash purchases.

The question whether the defendants w
fusal cannot, upon the facts agreed, be
question of law. The construction of th

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the letters of August is indeed a matter of law wholly, and there is no dispute as to its legal effect. The defendants were ready and offered to perform it, but an arrangement was made by which, instead of insisting on its performance, they agreed to hold the glass subject to order, upon receiving a certain sum named. No time was fixed for payment of this sum, and the rules of law required it to be paid within a reasonable time, if the plaintiff would secure his right to the proposed extension. The defendants were not bound to keep the glass for an indefinite period. The law implies a limit to the obligation assumed, and binds the defendants to give such time only as, under all the facts and circumstances, the course of dealing between the parties, the state of the market, and the uses to which the property is to be applied, may seem to be reasonable. As affecting this question, the alleged duty of the defendants to return the $400 is important, and that depends upon their right to appropriate it to subsequent cash purchases, and is affected by the state of the accounts and the evidence of acquiescence afforded by the lapse of time.

The case may have been decided by the Superior Court upon inferences of fact. It does not appear that there was any error of law in the judgment rendered, from which an appeal lies to this court. Gen. Sts. *c.* 112, § 11. *Fox* v. *Adams Express Co.* 116 Mass. 292. *Atlantic National Bank* v. *Harris*, 118 Mass. 147, 152. What is reasonable time, when the circumstances are equivocal, or when material facts are in dispute, is ordinarily a question of law and fact to be submitted to the jury. *Bassett* v. *Brown*, 105 Mass. 551, 557. And what amounts to a waiver of rights under a contract, when the facts are complicated or contradictory and depend upon the intent of the parties, must ordinarily be left to the determination of the jury. *Fox* v. *Harding*, 7 Cush. 516. The finding cannot be disturbed as erroneous in law, when there is any evidence to justify it.

Judgment affirmed.

O. W. Holmes, Jr. & *W. A. Munroe*, for the plaintiff.

D. E. Ware, for the defendants.

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MELVIN P. FREEMAN *vs.* GEOR

Suffolk. March 30. — June 23, 1876. DEV

One, to whom a mortgagee agreed to assign a note an gagee, by false representations as to its effect, to ind qualification. The mortgagee, upon learning the desired to qualify it, which the assignee would not gagee's objection, transferred the note before matur value. *Held*, that an action by the mortgagee ag version of the note would not lie.

An action of tort for inducing the promisee of a not transfer, by fraudulent representations as to the le cannot be sustained before actual payment by the i

TORT. Writ dated December 22, 187 leged that on July 16, 1873, James W. made a negotiable promissory note pay order in the sum of $3500, in two years mortgage of land in New Hampshire; 1873, the plaintiff and the defendant en in writing, a copy of which was annex substance that the defendant agreed to purchase a parcel of land in Boston, and assign to the defendant a certain mortg in New Hampshire for the sum of $350(on December 1, 1873; that on that da the mortgage mentioned to the defenda inadvertence on his part and through representations of the defendant he indo and that the defendant, upon request of allow him to qualify such indorsement tion of the plaintiff negotiated the same *bonâ fide* holder for value, and also trar him, and that he is held to pay the sam a general denial, and alleged that the p ment of the action had paid nothing a age by reason of such indorsement.

At the trial in the Superior Court, b a jury, it appeared that at the time c cember 1, 1873, the plaintiff also inte

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defendant the mortgage given to secure said note, and, by the same assignment, the note and the debt secured by the mortgage; that, before commencing his action, or at any time before said trial, the plaintiff had made no payment on account or by reason of the indorsement; that, before the commencement of this action and before the maturity of the note, the makers thereof had become bankrupts; that since the commencement a semi-annual instalment of interest had become due; that Tenney had caused the real estate to be sold by virtue of the power contained in the mortgage, had applied a part of the proceeds of the sale in liquidation of that interest, and, since the maturity of the note, had applied the balance of the proceeds in part payment of the note, and had commenced an action against the plaintiff to recover the balance of said note (due demand having been made and notice given) which action is now pending.

"Upon this evidence, the judge found that from the agreement of the parties the defendant was not entitled to have the personal liability of the plaintiff as indorser of the note, and that the plaintiff, through inadvertence and ignorance of the law and by the misdirection of the defendant, wrote his name so as to become an unqualified indorser of said note; that, as soon as the plaintiff became aware of the obligation he had thereby assumed, and, before the defendant had negotiated the note or altered his position in any way, the plaintiff demanded that the defendant should allow him to qualify his indorsement so that it should merely transfer the title according to the agreement, that the defendant refused, and thereupon the plaintiff forbade him to negotiate the note; but the defendant notwithstanding, and in defiance, immediately negotiated the note before maturity to a *bonâ fide* holder for value."

Upon the foregoing evidence and findings, the defendant requested the judge to rule that the plaintiff could not maintain his action, but, if he could, that he was entitled to recover only nominal damages. The judge declined so to rule, and held that, upon this evidence and these findings, the defendant was liable for the conversion of the note, and that the measure of the plaintiff's damages was the amount which the plaintiff was legally compellable to pay to the holder of the note, namely, the face of the note and interest, less the amount realized from the sale

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under the mortgage, treating the sam
and gave judgment for the sum of $
alleged exceptions.

G. D. Robinson, for the defendant.

I. D. Van Duzee, for the plaintiff.

COLT, J. It was found as matter of
trial without a jury, that the defendan
of the agreement, relied on by the pla
the declaration, entitled to hold the pl
of the Cox note; and that the plain
through inadvertence, ignorance of the
the defendant. The agreement, howeve
signment of the plaintiff's right and in
given to secure the note in question.
upon the evidence the defendant was li
of the note, and that the measure of da
which the plaintiff was legally liable to
namely, the amount due on the same, le
from the mortgage; and judgment was re

The difficulty with this ruling is, that u
there was no conversion of the note. By
ment, the defendant was entitled to an as
gage debt. The indorsement of the pl
legal title in the note to the person to wh
The gist of the action is the fraud of th
fully obtaining the unrestricted indorseme
afterwards, against his objection, negotiati
for value without notice. The plaintiff
ing could not impeach the defendant's
mortgage, or his right to transfer that
rule of damages for the conversion of a p
be applied to such an action. *Mercer* v
2 Greenl. Ev. § 649.

The further objection is, that treating
cover damages for an alleged fraud, the pl
ages sustained at the time his action wa
then uncertain and contingent whether h
on to pay the note. It was payable to th
two years, and was dated in July, 1873, s

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fer by his indorsement to the defendant. The liability of the plaintiff depended on the failure of the makers to pay and the giving of due notice to him as indorser. No payment has in fact ever been made by him. If the holder receives his pay from the makers through the mortgage security or otherwise, the plaintiff will have suffered no actionable wrong. There will have been no concurrence of damage with fraud, within the rule on which such actions are founded. And as there has been no invasion of the plaintiff's right, no breach of promise, and no interference with his property, there can be no recovery of even nominal damages in this action. *Pasley* v. *Freeman*, 3 T. R. 51. 2 Smith Lead. Cas. (6th Am. ed.) 157, and notes.

Exceptions sustained.

JOHN O'CONNOR *vs.* ISAAC ADAMS & another.

Suffolk. March 8. — June 24, 1876. AMES & MORTON, JJ., absent.

In an action of tort for injuries sustained while in the defendants' employ, there was evidence that the plaintiff was twenty years old, and unacquainted with machinery; that, after being employed in shovelling sugar in the warehouse of a sugar refinery, in which there was no machinery except an elevator, he was sent by his foreman into an adjoining room to work upon machines for the drying of sugar, he never having been in a similar employment before; that there were several machines in the room upon a platform raised above the floor; that each machine consisted of a stationary iron cylinder, within which revolved a copper vessel at such velocity as to appear perfectly still, the motion being controlled by a lever within reach of a man standing on the platform; that he was directed by the foreman of the room to go upon the platform and work upon the machines indiscriminately with the other men; that the foreman showed him how to start the machines, and told him to take the sugar out when it turned white, but gave him no other instructions; that he worked during the day upon the machines, but the next morning, having returned to his usual work, refused to go to work upon the machines at the request of the foreman of the machine room; that he was ordered to work upon the machines by the foreman of the warehouse, and did so, but received no new directions; that at the end of the day, having cleaned the machines, he was told by the foreman to go back and clean them again, as they were not half cleaned, and to clean the machines as another man was doing; that he tried so to do, and, while so at work, his arm was caught in one of the machines and torn off; that he was as careful as he could be, and had not been warned of any danger; that it was obvious that the inner cylinder revolved with great rapidity, and that he could see and know that the machines were set in motion by moving the lever in one way and stopped by moving it in the other; that when he returned to clean the ma-

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chines, the work of the day was over, and he wa stated, to do the cleansing while the copper ves cleansing could have been performed without put ger. *Held*, that the evidence tended to show that of peculiar danger, of which he had no knowledge ing him of the risks, or instructing him how to av submitted to the jury.

TORT for personal injuries.

At the trial in this court, before *Ame* fied that he was a native of Ireland, w employment, except in farming, and w any experience with machinery; that on after he landed in this country, he went the defendants' testator, Seth Adams, to and was hired to work in the warehou general agent or foreman of Adams; menced work in the warehouse under the warehouse, and continued to work th gust 6, 1869, except that for one day h the other warehouses of the refinery; t chinery in these two warehouses, except the only work which he did up to Augus and shovelling sugar in the warehouses; August 6, Austin came to him and said th man of an adjoining room, wished for a and work on the machines as he was shor him to go with McAuliffe into the roon were, and that he went accordingly; that there was an engine, and a platform raise the floor, upon which stood several centrifu ing sugar; that each centrifugal machine cylinder of wrought iron, being stationar within which was placed a revolving cop with holes; an iron shaft descended verti vessel, and each shaft was connected with the shaft and the vessel with great velocity from the moist sugar placed in the coppe perforated holes; that the velocity was suc sel was in full motion it appeared to be p the motion of each machine was controlled

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the machines, and that he did so; and havi
he was putting on his coat to go home whe
him and told him to go back, saying that t
half cleaned; that the machines were the
sugar in them which was not yet dry, and
him to do as one of the other men was doin
chines; that he returned to them and trie
man was doing, and, while so at work with
hand and arm were caught in one of the n
was torn off, leaving only a few inches of
from the socket; that at the time of the acc
ful as he could be; that he had not been w
about the machines by anybody, nor had he
tion as to his work, except as above stat
time of the accident he was aged twenty yea

Alexander Austin, called by the plaintiff,
the foreman of the warehouse at the time o
McAuliffe called upon him for a man to
room and work upon the machines, and that
because he was not so smart as the othe
thought it would be easier for him.

It was admitted by the defendants that t
owner of the sugar refinery at the time of t
then operating the same, and that McAul
his agents in the prosecution of his busines

It was shown that it was obvious and a
that the inner cylinder when the machine
volved with extreme rapidity. There was
washing required to be done by the plaintif
effectually done while the machinery was a
tiff had ample opportunity to see and knov
was set in motion by pulling a lever, and st
same lever in the other direction. The v
over, with the exception of the washing,
not directed or required, unless as herein st
ing while the inner cylinder was revolvi
could have been performed without puttin
of danger.

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JAMES MCDONALD *vs.* MASSACHUSETTS

Suffolk. March 13, 14. — June 26, 1876. A
sent.

A corporation, the object of which is to provide a ge
sane persons, having no capital stock nor provision fo
deriving its funds mainly from public and private
trust for the object of sustaining the hospital, cond
pose of administering to the comfort of the sick, wit
the part of those immediately interested in the corp
tion for their own benefit, is a public charitable insti
The facts that a corporation, established for the mainte
its rules requires of its patients payment for their bo
stances and the accommodation they receive; that
right to demand admission; and that the trustees o
are to be received; do not render it the less a public
A corporation, established for the maintenance of a pul
has exercised due care in the selection of its agents
patient caused by their negligence, nor for the unaut
the hospital attendants to act as a surgeon.

TORT for injuries sustained by reason
skilful surgical treatment of the plaintiff
vants. At the trial in the Superior Co
the plaintiff put in evidence tending t
facts:

The defendant was incorporated by th
The funds of the corporation have been d
vises, donations, bequests and subscriptio
property contributed by the Commonweal
sons, to be used and improved for the
maintenance of a general hospital for sic
according to the charter and acts in an
from profits of the Massachusetts Hospita
pany, paid over to the defendant, and also
of paying patients.

The plaintiff, on December 9, 1870, fe
which he was at work, and his thigh b
on the same day he was brought to the
ant, and there remained in one of the w
1871, when he voluntarily went away.
he had gratuitously the surgical and m

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and nursing which the hospital affords to its patients; he occupied a free bed, and all the expenses of his medical and surgical treatment and nursing, and of his shelter, warmth, food, washing and bedding, were borne as a charity by the defendant. The house pupil, appointed as provided in the by-laws, and who in the first instance set his fractured thigh bone, and continued, while the plaintiff was at the hospital, to attend to the plaintiff's case, under the direction of the attending surgeon, was a member of the Harvard Medical School, in the last of his three years of professional study, and received his degree of M. D. from Harvard College in the following June, 1871; the attending physicians and surgeons recommended him for his post, and the visiting surgeon, who had direct charge of the treatment of the fractured bone. and under whose direction and supervision the house pupil acted in his treatment of the plaintiff's fracture, was a man of the highest professional reputation and character; the said house pupil and attending surgeon treated the plaintiff's case gratuitously, and according to the regulations of the Massachusetts General Hospital. The treatment of all cases in the hospital is by the visiting physicians and surgeons, and the house pupils acting under their direction, each officer having the exclusive care and control of all patients assigned to them, and such physicians and surgeons act gratuitously, the defendant providing for patients without means, like the plaintiff, the hospital, nurses, bed, food, warmth and other comforts gratuitously; such visiting physicians and surgeons are practitioners in the city of Boston, outside of the hospital, and are selected by the trustees of the hospital to treat gratuitously patients who come to the hospital for gratuitous treatment; and this was the relation of the visiting surgeon to the defendant in this case.

The plaintiff offered evidence to prove that on the day he came to the hospital he objected to the house pupil doing anything to or with his fractured leg, and that he wanted and asked to be permitted to wait till the return of the resident physician, who was at the time absent. The plaintiff also offered evidence that previously to this time it had frequently happened that when a patient was brought in, having been injured by accident, the house pupils received him, and treated the case, if they so desired, without consulting any resident or visiting physician.

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The plaintiff offered other evidence whi
show that the fractured bone was not
either of the incompetency and negligc
or of the negligence of the attending su

The judge ruled that, even if the pla
the fractured bone was not properly s
incompetency of the house pupil, or the
attending surgeon, the plaintiff was not
the jury returned a verdict for the defen
cepted to this ruling, and the judge re
consideration of this court. Annexed t
of the by-laws and regulations of the
parts of which appear in the opinion.

L. M. Child, for the plaintiff.

D. E. Ware, for the defendant.

DEVENS, J. The ground upon which
maintain this action is that the defend
its agents and servants, to treat his broke
done so negligently and unskilfully that
jured. It does not become necessary t
defendant, as it contends, consented or
plaintiff a hospital bed, food and other
tendance of the house pupil and surgeon
that they had the direct and exclusive pr
patient, and are the only persons who ca
for any neglect or want of professional s
satisfied that, for other reasons, the plai
recover upon the case made by him.

The defendant was a public charitabl
laws of the Commonwealth. The object
porated was to provide a general hospi
persons. St. 1810, *c.* 94. Its funds are
donations made by the Commonwealth f
entitled to receive from the Massachuse
ance Company and other companies inc
monwealth, and from the grants, devises,
subscriptions of benevolent persons, and
ing patients. While the price of board
funds of the hospital will permit, patient

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are expected to pay as nearly as possible according to their own circumstances and to the accommodations they receive. In addition to the accommodations provided for such patients, a certain number of free beds are furnished from the general funds of the institution and from donations made especially for this object, the occupants of which are not expected to pay anything. Regulations of Hospital, *c.* 15, §§ 1–4. Of one of these beds the plaintiff was an occupant.

The corporation has no capital stock, no provision for making dividends or profits, and whatever it may receive from any source it holds in trust to be devoted to the object of sustaining the hospital and increasing its benefit to the public, by extending or improving its accommodations and diminishing its expenses. Its funds are derived mainly from public and private charity; its affairs are conducted for a great public purpose, that of administering to the comfort of the sick, without any expectation, on the part of those immediately interested in the corporation, of receiving any compensation which will enure to their own benefit, and without any right to receive such compensation. This establishes its character as a public charity. *Jackson* v. *Phillips*, 14 Allen, 539. The fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence. *Gooch* v. *Association for Relief of Aged Females*, 109 Mass. 558.

Nor does the fact that the trustees, through their agents, are themselves to determine who are to be the immediate objects of the charity, and that no person has individually a right to demand admission to its benefits, alter its character. All cannot participate in its benefits; the trustees are those to whom is confided the duty of selecting those who shall enjoy them, and prescribing the terms upon which they shall do so. If this trust is abused, the trustees are under the superintending power of this court as a court of equity, by virtue of its authority to correct all such abuse, and the interest of the public therein, that is to say, of the indefinite objects of the charity, may be represented by the attorney general. *Sanderson* v. *White*, 18 Pick. 328. *Attorney General* v. *Old South Society*, 13 Allen, 474.

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It might well be questioned whethe
inferred between the plaintiff and def
him freely those ministrations which, a
lic charity, it has been able to provid
has accepted them. It has no funds w
any judgment which he might recover
held subject to the trust of maintainin
ever, any contract can be inferred from
ties, it can be only on the part of the
use due and reasonable care in the
Where actions have been brought agai
lic works serving gratuitously, for negl
work, by which injury has occurred, it
were not liable if proper care had bee
ing those who were actually to perfor
St. Leonard's, 11 C. B. (N. S.) 192. T
ant corporation can extend no furthe
been no neglect on the part of those
and control its management, and if d
them in the selection of their inferior
occurred by the negligence of such a
responsible. The funds intrusted to it
by such casualties, if those immediate
done their whole duty in reference to
obtain the benefit of them. There wa
the trustees had in any respect fail
their duty. If they had made suitabl
proper persons to fill the position of
those persons neglected to perform t
other person, as the house pupil, not
surgeon, assumed without authority t
has thus resulted, the plaintiff has no
ration.

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JAMES SULLIVAN *vs.* JAMES H. LANGLEY & others.

Suffolk. March 17.—June 26, 1876. AMES & MORTON, JJ., absent.

Where a negotiable promissory note, obtained from the promisor by fraud, has been transferred to a third party before its maturity, the burden of proof is upon him to show that he purchased it for value in good faith; and, to determine this, all the attendant circumstances of the transaction are to be considered.

TORT against James H. Langley for fraudulently inducing the plaintiff to give him the plaintiff's promissory note and an assignment of a savings bank book; and against Jesse F. Alderman and Edgar S. Bristol, partners under the firm name of Alderman & Co., for aiding and abetting therein. Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The plaintiff put in evidence tending to show that Langley fraudulently obtained the plaintiff's note for $1000, on three months' time, and the transfer of his bank account, then amounting to $1120, by representing, among other things, that he was the treasurer of the Combination Needle Company, of America, a corporation with a large capital, having warerooms in Boston, in which he would place the plaintiff as overseer, on a salary of $1800 a year, if the plaintiff, in compliance with the rules of the corporation, would pay him $1000 for ten shares of the corporation's preferred stock, paying ten per cent. annual dividends; whereas there was no such business or corporation. The note and assignment were as follows:

"$1000. Boston, Feb. 11, 1874. Three months after date I promise to pay to Jas. Henry Langley, or order, one thousand dollars, for value received, I, James Sullivan, having deposited with this obligation as collateral security, with authority to sell the same without notice, either at public or private sale, or otherwise, at the option of the holder or holders hereof, on the nonperformance of this promise, he or they giving me credit for any balance of the net proceeds of such sale remaining after paying all sums due from me to the said holder or holders, or to his or their order, my interest and account in the Boston Five Cents Savings Bank, the same being transferred herewith by my book numbered 27,978. James Sullivan."

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"To the Treasurer of the Boston
Boston, Feb. 11, 1874. For value rec
knowledge, I assign to James H. Lang
to this date, on account of deposit bo
your by-laws as therein set forth.

"Attest, A. H. Evans."

The plaintiff's evidence also tende
agreed with the plaintiff not to transf
note and bank account, but he forthwit
assigned the bank account to Alderman
being the same in form, and being mad
tol was present at the latter transfer, ar
ask Langley if he knew what he was
this account had been transferred to hin
and was then assigned to another party,
would authorize Alderman & Co. to d
bank, which statement Bristol told to A
tiff was introduced to Langley by one N
ing an office opposite to Alderman & C
to which office the plaintiff was drawn
the newspaper by Niles, who brought La
him soon after the plaintiff's arrival; tha
mission of $150 in the transaction bet
Langley; that the plaintiff demanded the
of Alderman & Co. after the transfer t
three days afterward, demanded of Alde
book, and he said he knew nothing about
bank book, and refused to give it up or t
tiff; that about April 3 the plaintiff's w
at his office, asked him for her husband
note; he replied that he had the bank
and refused to give her the bank book, or
over and above the amount of the note;
of the note, Bristol asked at the plaintiff's
who was absent; that his wife saw Bris
Alderman wished the plaintiff to go to his
ance in bank, so that Langley could not
were taking such notes every day, and wer
This statement was denied by Bristol.

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Alderman testified that his business was the buying and selling of notes; that on February 11, 1874, Niles came to him, asked what he would lend $1000 for, on a note secured by a savings bank book, and said he had a party that was about selling some stock to a person who had the money in a savings bank, but did not want to draw it at that time, because if he did he would lose a dividend; that Niles asked if he would lend $1000 on said security for three months for $50; that Alderman said he would do it for less if it was all right; that Niles then went out, and in a few moments returned with Langley, whom he introduced as the party wishing to borrow the money; that Alderman told Langley he would lend him the money upon the bank book at one per cent. per month and brokerage of one fourth per cent. if he would have the bank book transferred to Alderman & Co.; that immediately upon this conversation Langley went out, and, after a few minutes, returned with the note and bank book, and said the bank account was transferred; that Alderman then examined the bank book and found that, although it was transferred, it was transferred to Langley and not to Alderman & Co.; that Alderman then informed Langley that he should not let him have the money until the bank book and account was transferred to Alderman & Co.; that Langley answered that he would transfer the book if Alderman would send some one to the savings bank with him; that Alderman sent his partner, Bristol, and Langley transferred at the bank the book and account to Alderman & Co., and returned to their office, and there indorsed to them the note; that Alderman & Co. gave Langley their check for $966.50, as payment for the note so secured by the bank book; that the check was paid at the bank of Alderman & Co.; that the transaction occurred between the hours of ten and two, February 11, 1874; and that Alderman & Co. sold the note to one Rindge, in the due course of business on the same day, for some ten dollars more than they paid for it, and indorsed it to him, but retained the bank book in their hands; that Alderman never knew or saw Langley until introduced to him by Niles, and had never seen him or had any transaction with him since; that he had had transactions before that time with Niles, but knew nothing against his character; that he did not usually take notes or securities at a less discount than that offered by the person applying.

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Bristol corroborated the testimony
transaction, and the conversations with
denied knowledge of the consideration
given to Langley, and of Langley's fra
firm took the note and account in the n
that he went to the bank with Langley
count transferred, and there heard the
by the bank officer, as before stated;
entered in the book of Alderman & Co
to Rindge on maturity of the note w
memorandum book; that he understood
had sold some stock or interest in some
and that he did not inquire or know or
was. The treasurer of the bank testifie
by the last assignment the right and ti
in Alderman & Co.; that by the assig
Langley, Langley obtained all the righ
the account. Alderman and Bristol bo
derstood they could draw the bank acco
transfer thereof to them.

When the evidence of both parties
asked the judge to rule that the plai
case against them, but the judge refus
ants then asked for the following instru

"1. That the plaintiff must have ha
possession of the note and bank book
this suit, to entitle him to recover.

"2. That if the note was indorsed t
by the payee, the burden was upon the
defendants did not take it in the due
they took it with the knowledge of the
the note, or took it under such circu
prudent man to make inquiries about
and that unless he should show one
fraud of Langley (if any is proved)
bank book from the plaintiff could no

"3. That the wording of the note
strument so far differing from the con
as to put the defendants on inquiry as
or the equities of the note.

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"4. That if the note was taken by the defendants from the payee under due, and in the due course of business, the burden is upon the plaintiff to show that it was taken by them with knowledge of the want of consideration for the note, or taken under such circumstances as should put a prudent man upon inquiry before the want of consideration can affect the defendants.

"5. That if the note and bank book were negotiable instruments, the form and wording of the note and transfer of the book, as security of the note, are not sufficient to put the party upon inquiry as to any fraud in the transaction between the payee and the payor; that if negotiable, the rule of *caveat emptor* does not apply."

The judge refused to give any of the instructions requested; but instructed the jury as follows: "If Langley obtained from the plaintiff an assignment of the savings bank book by fraud, and it passed immediately afterwards into the possession of Alderman and Bristol, their possession of the bank book would be affected by the fraud of Langley, unless they prove by a preponderance of evidence that they obtained such bank book in good faith, without knowledge or notice of Langley's fraud. The circumstance that Alderman and Bristol had no knowledge of Langley prior to receiving such bank book, or of his business or business schemes, or of any reputation which he had made, likely to excite the suspicions of persons dealing with him, or of any similar facts affecting Niles, who introduced Langley and his business to them; the disclosures made by Niles and Langley at the time of the negotiation and transaction with them; the fact that the transaction was in the usual course of business, and the rates of discount were not extraordinary and unusual; are circumstances tending to show good faith on the part of the defendants. Any circumstances of a contrary character, especially any proposal of Niles of a large and unusual discount, in view of the security offered, larger than the defendants were disposed to require; any unusual and extraordinary provisions of the plaintiff's note, and the security offered in connection with it, which would be likely to excite the suspicions of a person of the defendants' experience in business, and to lead to further inquiry, in relation to which the defendants, having the means of such inquiries, wholly neglected to prosecute them are circum

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stances tending to show an absence of Langley's fraud. But all the circum good faith of the defendants, or the c ered in a mass, in order justly to dete dence upon the question of good faith.

The judge added, in relation to the security, as a circumstance affecting and notice, the following: "That the ment of the bank book, taken in con of the note, authorized the defendant from the bank immediately upon the s standing the blank provided that the until the non-performance, but the wr property as a savings bank book, the tled to draw all the money at once and due, and that they might have used it, to pay it over upon the payment of the this state of the note might be consid question as to whether the note was usual as ought, under the circumstance put the defendants on inquiry before t instructed the jury to find for the pla in the value of said bank book at the Langley's fraud was proved, and the their good faith in receiving such bank interest on such value from the date of

Instructions were given, defining an plaintiff's dealing with Langley, in t plaintiff's note and bank book to him was taken by either party. The jury and the defendants alleged exceptions.

R. Lund & D. E. Richardson, for th

C. H. Hudson & C. Abbott, for the p

DEVENS, J. Whether the note, wh book, was sought to be recovered, wa note, as contended by the defendant cussed. While the court did not exp the instructions treated it as such, a which govern in reference to the tr

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There was ample evidence that the note and bank book were obtained by the fraud of Langley, and were fraudulently transferred by him through Niles to the defendants. Upon proof of this, even if the note were a negotiable promissory note, it was for the defendants to show that they took it in good faith for value before its maturity. The circumstances under which they took it, whether suspicious or otherwise, are of importance only as they bear upon this question. *Smith* v. *Livingston*, 111 Mass. 342, and cases cited. The fact, if shown, that the defendants took the note in the ordinary course of business and that the rate of discount was not unusual, was not, therefore, proof that they acted in good faith, but evidence only tending to prove it.

Nor do the instructions assume that any circumstances exist which are suspicious, but fairly submit the character of them to the consideration of the jury. It appeared that the note was upon time, and contained a stipulation that if not paid at maturity the promisee might sell without notice the promisor's interest and account in the Boston Five Cents Savings Bank. Accompanying this was the bank book, which itself contained a written assignment of all moneys due thereon to Langley, the promisee in the note. There was due on the bank book some two hundred dollars more than the amount of the note. By a transfer of the bank account to Langley, and then by Langley to themselves, the defendants were enabled at once, on purchasing the note, to place themselves, as they did, in a position to draw the money of the plaintiff before the maturity of his note. That the form of the note in connection with the security was unusual, and had some tendency to inform the purchaser that the note and security were transferred in fraud or violation of some agreement, might easily be maintained. The court only ruled, however, that if the rate of interest was unusual, or if the provisions of the note were extraordinary and unusual in view of the security offered, these would constitute circumstances bearing upon the question of the good faith of the defendants. Whether such circumstances existed, and what force should be given to them, was fairly submitted to the jury, who were instructed that all the circumstances tending to prove good faith on the part of the defendants, or the contrary, were to be considered together in order justly to determine their weight as evidence.

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The defendants contend that, upon th
should have ruled that there was not su
able the plaintiff to recover, but this is
When there was evidence of the fraud a
of the note and bank book by Langley,
fendants to show that they were not affe
sufficient evidence that they had purchase
good faith before its maturity.

WATERS' PATENT HEATER COMPANY & another.

Suffolk. March 21. — June 26, 1876. DEVE

To prove that the representations of the vendor of a
certain particulars were false, it is competent to show
made and sold by the same vendor, had upon trial h
particulars.

A machine was ordered by a person on an agreemen
specified time according to certain directions, and to p
to work as represented by the vendor. *Held*, that if
actual trial that machines exactly similar were nec
construction of doing what was promised for them, t
was not bound to put the particular one to the test of

CONTRACT upon the following agreeme
fendants:

"Boston, April 20, 1874. We order th
ters' Patent Heater Company, of West M
shipped to us by railroad, within ten or fi
Feed Water Heater, one hundred and tw
capacity, and agree within thirty days fro
the same to our works, as per printed dire
from the date of receipt of heater agree to
sum of four hundred and ten dollars, cas
with interest, unless the same fails to work
circular, in which case we have the privi
same at the end of said sixty days."

The declaration set forth the above agre
delivery of the article to the defendants

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before the date of the writ, and also the defendants' neglect and refusal to attach the heater to their works within thirty days after its receipt according to their agreement, in order to test it. The answer set up that the defendants were induced to enter into the contract "by the false and fraudulent representations of the plaintiffs as to the capabilities of the said heater;" that it did not work as was represented, and that they had offered to return it.

At the trial in the Superior Court, before *Pitman*, J., the plaintiff introduced the evidence of its president, one Wilcox, that some time in April, 1874, prior to the date of the contract, he called upon the defendants, and introduced to their notice, by means of certain circulars and wood cuts, a certain patent feed water heater, made and sold by the plaintiff; that he explained its peculiar advantages, and informed the defendants that if attached and operated according to the directions, it would keep boilers free from scale and sediment, and prevent the transmission of oil to boilers; that if any oil did reach their boilers from said heaters, it would be in such small quantities as not to produce injury thereto; that thereupon the defendants entered into and signed the contract.

The defendants admitted the due receipt of the heater, together with directions for setting and operating the same, and introduced evidence tending to show that prior to the time of entering into said contract they had been seriously troubled with oil in their boilers, and that they were induced to sign said contract solely on account of the plaintiff's representation that under no circumstances would its heater transmit oil to boilers; that they did not attach the same to their boiler, because they found upon inquiry, soon after signing said contract, that such representation was false. The defendants then proceeded to offer testimony that other like heaters, made and sold by the plaintiff to other parties, transmitted oil to and injured their boilers. To the admission of this testimony the plaintiff excepted, objecting to any evidence concerning any heater or heaters other than the one in question. But the judge admitted the testimony, and ruled that it was competent for the defendants to show that the plaintiff's other heaters, if the jury were satisfied they were identical in construction, necessarily transmitted

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oil to, and injured boilers. And the d troduced that and other testimony tend the making of the contract declared heaters transmitted oil to the boilers which was contested by Wilcox. Th the defendants under general instructio to; and the plaintiff alleged exception

J. R. M. Squire, for the plaintiff.

N. Morse, for the defendants.

AMES, J. Under the instructions verdict for the defendants imports, n which was sold to them was not such a but that they were misled and deceive The jury must have found that the pl formed the defendants, in substance, t and operated according to the printed tially prevent the transmission of oil the quality upon which its whole value assurance, as the defendants contende make the purchase. In order to pro was false, they were permitted to sho and sold by the plaintiff, identical i that which it had sold to the defend ted oil to the boilers in injurious qu fully guarded ruling of the court, the this failure in the operation of the me any defect or negligence in the setting merely accidental or of occasional re the necessary and inevitable result mechanism itself. If it had been asc heaters, exactly like the one which t ants, were incapable from their very was promised, and that they must o particular which had been urged an merit, there was no occasion for the the ceremony of putting that particu experiment. The jury must have fo that the plaintiff's agent made such were false, and that he knew them to

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The defendants' answer raised an issue of fraud, and upon that issue the evidence admitted was competent and appropriate. Such a fraud, if proved, would avoid the contract of sale. *Pike* v. *Fay*, 101 Mass. 134. In *Vale* v. *Butler*, 111 Mass. 55, relied upon by the plaintiff, the case raised the question of warranty only, and not of deceit. *Exceptions overruled.*

JOAN C. BLASDEL *vs.* SUSAN C. FOWLE & another.

Suffolk. March 22.— June 26, 1876. COLT & LORD, JJ., absent.

A secret agreement in fraud of creditors, under which a bankrupt is to pay the debt of his assignee in full, if he will assent to his discharge, is illegal at common law, and contrary to the provisions of the United States bankrupt act.

A note and mortgage on her separate property made and signed by the wife of a bankrupt, at his request, in pursuance of an agreement, under which the bankrupt was to pay the debt of his creditor and assignee in full, if he would assent to his discharge in bankruptcy, are without consideration and void; and it is immaterial that the note and mortgage were executed after the discharge, and that the wife did not know of the agreement.

All instruments made for the purpose of giving effect to an illegal agreement are tainted with the illegality, and cannot be enforced in a court of equity.

BILL IN EQUITY, by the holder of a mortgage upon a parcel of land, to redeem a prior mortgage thereon. Hearing, on the pleadings and an agreed statement of facts, before *Ames*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

H. L. Hazelton, for the plaintiff.

F. A. Brooks & F. Morison, for the defendants.

ENDICOTT, J. The material facts in this case may be briefly stated. The plaintiff derives her title to the mortgage, described in the bill, under the will of her husband, John C. Blasdel. He was assignee in bankruptcy, and one of the largest creditors, of Charles L. Fowle; and his vote in favor of Fowle's discharge was given upon an agreement with Fowle that his debt, less the dividend, should be paid in full by Fowle after his discharge, as if no discharge had been obtained. Fowle obtained his discharge, and Blasdel demanded payment. A note was made for

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the amount previously agreed upon, an
ant, Susan C. Fowle, wife of the bankı
mortgage on her separate property, wh
of this suit. She signed the note and
of her husband, with no consideration
the benefit of her property.

The agreement under which the bankr
of his creditor and assignee in full, if
discharge, was illegal at common law, a
visions of the bankrupt act. It was a se
of creditors, and cannot be enforced in a
U. S. Rev. Sts. § 5131. *Cockshott* v. *Benne*
v. *Thomas*, 6 Gray, 327. *Case* v. *Gerris*
v. *Blush*, 1 Cush. 564. *Partridge* v. *Mess*
ter v. *Snow*, 12 Cush. 594. *Downs* v. *Lew*
dell v. *Edgarton*, 8 Met. 227. *Smith* v.
and note.

The fact is not important that the not
mortgage securing it were made after
tained, as the only consideration of eithe
and fraudulent agreement between Blasd
it material whether the wife knew of the
when she made the note and mortgage; fc
illegal and void, all instruments made for
it effect are tainted with the illegality, an
by a court of equity.

The plaintiff in this case cannot stand in
her testator, and the entry must be

Bill

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FRANCIS M. JOHNSON & others *vs.* ARBA CAMPBELL & another.
ARBA CAMPBELL & another *vs.* FRANCIS M. JOHNSON & others.

Suffolk. March 30. — June 26, 1876. DEVENS & LORD, JJ., absent.

A letter issued by a firm of commission merchants, inviting consignments of goods and stating that they "will be covered by insurance as soon as received in store," does not import that they personally were to be the insurers of such goods, and is fulfilled by their obtaining reasonable and proper insurance against fire.

A consignee, who effects insurance upon goods consigned to him, in pursuance of an agreement that "all consignments will be covered by insurance as soon as received in store," is not required to effect the insurance in the name of the consignor, or place the policy in his possession or control.

Insurance effected by a consignee "on merchandise his own or held by him in trust, or on commission," is not limited merely to his proprietary interest, but enures to the benefit of the consignor.

A consignee, who has made advances upon goods consigned to him, and effected insurance for the benefit of the consignor, has, upon the destruction of the goods by fire without his fault, the same lien upon the insurance money that he had upon the goods themselves.

TWO ACTIONS OF CONTRACT. The first was brought by Francis M. Johnson, Horace Eaton and George A. Brackett, commission merchants and copartners, doing business in Boston under the firm name of Johnson, Eaton & Brackett, against Arba Campbell and Charles Campbell, manufacturers of leather and copartners, doing business at Owego, in the State of New York, under the firm name of A. Campbell & Co., to recover the difference between the amount of their advances on leather sent them by the defendants for sale, and the amount received by the plaintiffs from insurance companies, after the loss of the goods by fire.

The second action was brought to recover the full value of the goods destroyed. The declaration contained two counts, one count alleging that the defendants themselves assumed insurance of the plaintiffs' goods, and were liable to the plaintiffs for their value; and the other count, that the defendants agreed to effect insurance upon the plaintiffs' goods in suitable companies, in the name of the plaintiffs, or in such manner that the plaintiffs should be the owners of the policies, and entitled to control and recover upon the same, but had neglected so to do.

At the trial in the Superior Court, before *Colburn*, J., without a jury, it appeared that at the time of the great fire in Boston,

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November 9 and 10, 1872, Johnson & C
Boston, sheep-skins, consigned to them
Co., of the market value of $2346.70, t
vanced, up to the time of the fire, abou

At this time, Johnson & Co. had insu
ent companies on the stock of goods in t
of $165,000 in all, and all of the compa
good repute and condition, until affected
policies were taken in the name of Joh
of said policies a printed slip was used t
insurance, the material part of which w
——— "do insure Johnson, Eaton
legal representatives, dolla
cipally hides and leather, their own or h
on commission or sold but not removed
tained in," &c.

These policies contained no clause "
cern," nor any provision with reference
parties, unless such is the legal effect of

At the time of the fire, the value of th
insurance was substantially the amount o
of these goods had been consigned for sa
small part was the absolute property of
belonged to a great number of distinct co
no evidence to show whether any, or wha
tween them and Johnson & Co. as to insur
if any, had been made on their consignm
state of accounts between them and Jo
portion of the goods had been sold, but
building.

Many of these insurance companies w
by this fire, and the average amount re
was about sixty per cent. of the amount o
centages paid by the different companies
The amount of loss proved was about th
the goods in the store at the time of the fi
of Johnson & Co., of Campbell & Co., an
and the goods sold but not removed.

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Campbell & Co. had been in the practice of consigning goods for sale to Johnson & Thompson for many years prior to January, 1870, upon the agreement that the consignees should sell the goods for five per cent. commission, which should include guaranty, insurance, and all expenses except freight and cartage. The firm of Johnson, Eaton & Brackett was formed January 1, 1870, Johnson being a member of both firms. After the new firm was formed, one of the Campbells had a conversation with Johnson, and concluded to go on with the new firm on the same terms as with the old. In this conversation, Johnson stated to said Campbell that they always kept themselves well insured; that they were obliged to do so, as their interest in the goods was always much larger than that of the consignors; that they always kept fully insured for their own interest and that of the consignors.

On January 15, 1870, the firm of Johnson & Co. issued a circular letter, one of which was received by Campbell & Co., the material part of which was as follows: "Our charges for selling will be five per cent., which includes guaranty, insurance against fire, labor and storage. All consignments will be covered by insurance as soon as received in store."

The judge found that the goods of Campbell & Co. were consigned upon the terms stated in the above extract from the circular letter, and that no usage of trade or custom was shown to indicate that the terms of the letter were used in any special or in any other than their ordinary, natural sense, and that Campbell & Co. had never been informed, or inquired, from the beginning of their dealings with these firms until the correspondence after the loss, in what offices, in whose names, or in what manner insurance was effected by Johnson & Co., nor been informed or inquired to whom or for what paper their goods had been sold, but Johnson & Co. had always assumed the sales. All the goods of Campbell & Co. in the store at the time of the fire were destroyed, without fault or want of due care on the part of Johnson & Co.

Campbell & Co. requested the judge to rule as follows: "That, by the terms upon which they consigned their goods, Johnson & Co. were insurers, and responsible for the entire value of the goods.

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"That, if they were not themselve
to effect insurance in such manner
the legal owners of the policies, and
cover upon the same, and that the
not a compliance with their contract.

"That upon the evidence in the ca
entitled to limit the plaintiffs to an
shalling received from the insurers
owners of the goods.

"That Johnson & Co. were not en
ance to their own goods in store until
Co. on their goods lost are satisfied.

"That if the insurance effected wi
obligation, the amount received from
be divided between Campbell & Co.
portion to their interests in the stock,
Co. being the amount of their adv
Campbell & Co. being the value of the
and that that would close the account.

It appeared that the underwriters d
the agreed value of the goods of all
culate their dividends; and Johnson
cepted that method of settlement, an
accordingly, it appearing to be the m
out litigation; but Campbell & Co.
to the settlement, and asked the judg
be credited with the dividend of ins
the goods, unless the goods were paid

The judge declined to give these r
relation to the five per cent. deducti
& Co., having effected insurance, as h
loss having occurred without fault on
tled to recover of Campbell & Co.
amount of the advancements and th
from insurance, crediting Campbell &
allowed on the value, amounting to
ment accordingly for the plaintiffs i
damages, and for the defendants in
rulings, except as to the five per cent.

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alleged exceptions; and Johnson & Co. alleged exceptions to the ruling charging them with the five per cent. deduction allowed to the insurance companies.

R. R. Bishop, for Johnson & Co.

R. H. Dana, Jr. & F. Dabney, for Campbell & Co.

AMES, J. The circular issued by the firm of Johnson & Co., inviting consignments of goods, does not import that they personally were to be the insurers of such goods against fire. It is merely a promise that the goods shall be insured, or, in the language of the circular, "shall be covered by insurance as soon as received in store." A promise to insure is fulfilled by obtaining reasonable and proper security against a contingent loss. The commission which they were to charge upon sales was to compensate them for all their charges for guaranty, for effecting and maintaining insurance, and for certain incidental expenses and services attending the reception and care of the property that should be consigned to them.

There can be no doubt that the policy which they obtained purported to cover not only goods which belonged to them, but also such as they held in trust or on commission. That is, the insurance was not limited merely to their proprietary interest. It was to make good the damage to the goods, and would enure to the benefit of the consignor. Whatever the consignees might recover on such policies in excess of their own claims, they would hold in trust for the consignor. *Waters* v. *Monarch Assurance Co.* 5 El. & Bl. 870. *De Forest* v. *Fulton Fire Ins. Co.* 1 Hall, 84. *Stillwell* v. *Staples*, 19 N. Y. 401. It follows, therefore, that the consignors were in fact insured, and there is nothing in the contract that imports that the insurance was to be effected in their name, or that the policy should be in their possession or control. The consignees have only undertaken that the goods shall be stored, and kept insured, until they are sold and delivered, and this promise they have fulfilled.

We see nothing in the evidence reported to sustain the position that the consignees were confined to the goods themselves as the means of recovering their advances. To the owner of those goods they stood in the relation of creditors, and if from any cause, without their fault, the proceeds of the goods proved insufficient to repay their advances, they would have a valid claim

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against the consignors for the amount fc
ment. The insurance was general upon t
in which Johnson & Co. had any insural
tempt was made in any of the policies t
erty of Campbell & Co. from the rest.
Co. and the various insurance companies,
as if they were the owners of all the proj
all the world except the respective consig
erly be so considered. *De Forest* v. *Fu*
supra. As the insurance money fell short
cult to see any other mode in which the a
be equitably apportioned among the partie
which the consignees have adopted. The
Co., so long as they remained in the ha
were security for the advances made by th
goods were destroyed by fire, the amount
loss was substituted in their place, and w
same lien. The rulings at the trial upon
fore correct. The exceptions of Johnsc
waived, and the exceptions of Campbell &

GEORGE PUTNAM, JR., administrator, *vs.*

Suffolk. Nov. 18, 1875. — June 30, 1876. Co

A., the equitable owner of certain real estate held in
veyed, if the trust should not be revoked in his life
his will for the benefit of his wife and children, took a
a third person for his benefit, of certain mortgages to
ject, and which it was his duty to pay as the equitable
trust was not revoked in his lifetime, and by his wil
held in trust for him to B. in trust for the benefit of
that the mortgages had been extinguished by the as
administrator with the will annexed properly refused
mortgages in the Probate Court.

APPEAL by John H. Collamore from a
probate, allowing the account of George P
istrator *de bonis non*, with the will annexe

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lamore, the ground of appeal being that the administrator should have charged himself in his account with three mortgages on a certain parcel of land in Richmond Street, Boston.

At the hearing in this court, before *Wells*, J., the question, whether the administrator should so have charged himself, was reserved for the full court on a statement of facts, the material parts of which appear in the opinion.

C. A. Welch, for the appellant.

W. G. Russell & G. Putnam, Jr., for the appellee.

ENDICOTT, J. The transactions recited in this report are somewhat complicated, and a condensed statement of the facts, in the order of their occurrence, will render the case more intelligible.

In March, 1853, Elias W. Goddard, as the agent and for the benefit of George W. Collamore, the testator, purchased of David A. Dunbar an estate on Richmond Street and took a deed in his own name. The estate was then subject to a mortgage for $1000, given by a former owner to Willard W. Stevens. This mortgage was recited in the deed of Dunbar to Goddard, with an express stipulation that it should be assumed and paid by Goddard, as part of the consideration named in the deed. Goddard gave back a mortgage to Dunbar in the sum of $3000. Fifteen hundred dollars was also paid by Goddard to Dunbar, which sum was furnished by Collamore and was the purchase money of the estate over and above the two mortgages. Of the $1500 so furnished by Collamore, $900 was obtained from Daniel Copeland, for which Collamore gave his note to Copeland, which was secured by a third mortgage on the estate given by Goddard to Copeland at the request of Collamore. Collamore went at once into possession of the estate, and took the rents and profits until his death; and after his death they were received and accounted for by the trustee under his will. In November, 1853, Collamore paid the amount of the note secured by the first mortgage, and the mortgage was assigned to him by Stevens; and in June, 1854, he paid $900 to Copeland, and the third mortgage was assigned to him. He never recorded either of the assignments. The second mortgage, on which Collamore had paid $500, was assigned by Dunbar to Francis S. Carruth in March, 1855.

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On June 7, 1856, Goddard conve
the three mortgages, by deed to Ch
the same day Hubbard reconveyed t
uses and purposes set forth in Godd
even date. This declaration of trust i
sequent conveyance to John A. And
such a declaration, and that he cover
lamore died without revoking the t
estate to such person as Collamore
will, as trustee of his estate, for the
and children, upon request by such t

Carruth in March, 1860, assigned t
which $2500 was then due, to John A
the request of Collamore, who furni
At this time Collamore was the equ
estate, the legal title of which was he

In 1860, therefore, Goddard held th
trust for Collamore, to convey it, if n
his lifetime, to the trustee named in C
use and benefit of his wife and chil
mortgages had been assigned to Coll
gage stood in the name of Andrew i
had paid the money.

Collamore died in August, 1862,
dated June 11, 1856, in which Andre
and trustee, and he was duly appoi
the payment of his debts and givin
to sell such parts of his real estat
that purpose, he gives the rest and r
rest, residue and remainder of my e
scription, legal and equitable, includi
estate now held in trust for my use
drew, and all other property and est
which I may have any title legal or
decease, whether held in my name or
the disposition of which I may have
last will and testament, or by any c
thereof, I give, devise and bequeath
upon the trusts, uses and purpose

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named are mainly for the benefit of his wife and children. It is to be noticed that the will is dated but four days after the declaration of trust made by Goddard, June 7, 1856.

Goddard in February, 1866, upon the request of Andrew, conveyed the estate in Richmond Street to Andrew to hold upon the trusts declared in the will in relation to the rest and residue of Collamore's estate. In this conveyance Goddard recites the declaration of trust made by him June 7, 1856, and declares that the trust was not revoked by Collamore in his lifetime. The inventory, returned by Andrew, includes this real estate "as conveyed to Goddard in trust for Collamore;" but the mortgages were not included as assets of the testator in the inventory or account rendered by Andrew, or in the accounts rendered by the appellee, who was appointed administrator *de bonis non* upon the decease of Andrew.

The only question reported for decision and argued at the bar is whether the administrator *de bonis non* should have charged himself, in the account rendered by him, with these mortgages. We are of opinion that he should not, and that the judgment of the Probate Court must be affirmed.

The administrator can have no greater rights than his testator. Could Collamore then, at the time of his death, have enforced the payment of these notes from Goddard; or in default of payment, could he have foreclosed the mortgages as against Goddard, who then held the estate upon a trust revocable at Collamore's pleasure during life?

Collamore had advanced all the money paid for the purchase of the estate, and had paid all the notes secured by mortgages on the premises, and there were no incumbrances on the property, unless the two mortgages assigned directly to him, and the one assigned to Andrew for his benefit, can be treated as such.

The report expressly finds that, in making the purchase and in executing the mortgages, Goddard acted as the agent of Collamore, for his benefit and under his direction. Collamore at once went into possession and took the rents and profits. The subsequent declaration of trust, taken in connection with these facts, shows that Collamore was the equitable owner throughout the transaction.

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In the deed of Dunbar to Goddard i
dard should pay the Stevens mortgage
equitable owner, this obligation on tl
binding on Collamore, and it was his
forced against Goddard, as in *Braman*
Collamore would have been obliged to p
acting as his agent. If Goddard had p
signment, the mortgage would have be
authority of *Brown* v. *Lapham*, 3 Cush
is paid by one whose duty it is by contr
the mortgage, it is a release, though in
an assignment. The legal effect of a
the relations between the parties and th
son v. *Crehore*, 3 Pick. 475. *Kilborn* v.
McCabe v. *Swap*, 14 Allen, 188.

The effect of the assignment of the S
lamore was to extinguish it, as the dut
Collamore by reason of the obligation a
ing for him and as his agent. Nor doe
more had any intention of keeping the
intention to do so can be gathered fro
The form of the assignment does not in
tion, and the failure to record it, if entitl
tend to rebut such a presumption. But
immaterial, as it was his duty to pay, a
charged, whatever may have been his i
the conveyance from the mortgagee.

The same result must follow as to the
gages. They were made by Goddard, v
the instance of Collamore, and for his c
The debts they secured it was the dut
By paying them and causing one mort
himself, and the other to Andrew for his
were extinguished.

Other objections are urged against tl
the appellee. But we have not consider
previously stated is sufficient for the deci

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HYANNIS SAVINGS BANK *vs.* JOHN B. MOORS.
BARNSTABLE SAVINGS BANK *vs.* SAME.

Barnstable. Jan. 25. — June 26, 1876. ENDICOTT & DEVENS, JJ., absent.

Land upon which a block of houses was in process of building was conveyed in mortgage, and a third person agreed in writing with the mortgagee to cause the houses to be fully completed without unnecessary delay, guaranteeing that they and all things appurtenant thereto should be fully completed to the acceptance of the mortgagee. At the time of this agreement the houses, which were built upon marsh land upon piles of the usual length for that territory, were all finished except the painting, papering and the like. They had then settled somewhat, to the knowledge of both parties, but no objection to the foundations was known by either party to exist. After they had been finished they settled further, and it became necessary for the mortgagee, to protect himself, to raise them and substitute new and longer piles. *Held*, that the third person was not liable on the guaranty for the insufficiency of the foundations.

Land on which a house was in process of building was conveyed in mortgage to a savings bank, and a third person agreed in writing with the mortgagee that the house should be without delay completely finished, and the lot graded, and the whole premises completed in every respect, and made clear and free from all liens and attachments whatsoever, and guaranteed to hold the bank harmless from all loss, costs and damages by reason of any neglect on his part to keep and perform all things contained in the agreement. *Held*, on the non-performance of the agreement, that the bank could finish the house and recover the expense thereof of the guarantor, although the mortgagor was solvent.

THE FIRST CASE was an action of contract on the following agreement signed by the defendant, and dated August 17, 1871:

"In consideration of one dollar to me paid by the Hyannis Savings Bank, a corporation in Barnstable, doing business under the laws of the Commonwealth of Massachusetts, the receipt whereof is hereby acknowledged, I hereby agree, to and with said bank, to cause to be fully completed, without unnecessary delay, the several houses this day mortgaged to said bank by Ezra D. Winslow, situate in Boston, in the state aforesaid, on the southwest side of Westminster Street, hereby guaranteeing to said bank that said houses and all things appurtenant thereto, standing on the land mortgaged to said bank, shall be fully completed and finished as aforesaid to the acceptance of said bank."

The case was submitted to this court on the following agreed facts: "The defendant executed said agreement on the day of its date. The houses referred to were in one block, and were built and plastered at the time of said agreement, but were not

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finished inside in respect of painting, p
the like; these things were all done
ber, 1871. The houses were built upo
the piles being the usual length for th
execution of the defendant's agreemer
somewhat, but for the purposes of thi
objection was then known to exist to
houses were finished according to the
unless the nature of the foundations,
it necessary to raise said houses and s
piles, is a defect in said houses or
thereto, which the defendant is bound
edy. After the finishing, as above state
ther, and about two months thereafter
defendant that the houses had settled a
isfied with the foundations, and that
defendant to complete them. The defe
thing more, alleging that his contract ha
The foundations of a house are a part
statement is made subject to all legal
effect or admissibility for the purpose
struction of this agreement. If upon
the plaintiff is entitled to recover, the cas
to assess the damages; otherwise, judgm
the defendant."

THE SECOND CASE was an action of con
contained four counts. The first and se
agreement signed by the defendant, and d

"In consideration of one dollar to me
Savings Bank, a corporation in Barnstable
the laws of the Commonwealth of Mass
whereof is hereby acknowledged, I herel
said bank, to cause to be fully completed
delay, the several houses this day mortg
George W. Meserve, Patrick McAtear a
situate in Boston, in the state aforesaid, on
Westminster Street, hereby guaranteeing t
houses and all things appurtenant thereto,
mortgaged to said bank, shall be fully com
aforesaid to the acceptance of said bank."

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The third and fourth counts were on the following agreement signed by the defendant, and dated October 21, 1871: "Whereas, Albert C. Pond has mortgaged to the Barnstable Savings Bank, by a mortgage dated October 2d, 1871, and recorded this day in Suffolk Registry of Deeds, for the consideration of seven thousand dollars, which mortgage is on premises situate on the southeast side of Westminster Street, and fully described in said mortgage, and upon the land, as in said mortgage described, now stands a house in process of erection or finishing. Now, therefore, know ye, that I, Joseph B. Moors, of Boston, in the State of Massachusetts, banker, for the consideration of one dollar, to me paid by the said Barnstable Savings Bank, the receipt whereof is hereby acknowledged, do hereby agree, to and with said bank, that said house shall without delay be completely finished, and the lot graded, and the whole premises completed in every respect, and made clear and free from all liens and attachments whatsoever, and I hereby guarantee to hold said bank harmless from all loss, costs and damage by reason of any neglect on my part to keep and perform all things contained in this agreement, loss by fire excepted."

The case was submitted to this court on the following agreed facts: "The defendant executed said agreements on the days of their respective dates. The houses referred to were in one block, and were built and plastered at the time of said agreements, but were not finished inside in respect of painting, papering, bell-hanging and the like; these things were all done, except as to the Pond house, before the end of September, 1871. The houses were built upon piles upon marsh land, the piles being the usual length for that territory. Before the execution of the defendant's agreements the houses had settled somewhat, but for the purposes of this case it is agreed that no objection was then known to exist to the foundations. All the houses, except the Pond house, were finished according to the defendant's undertaking, unless the nature of the foundations, which subsequently made it necessary to raise said houses and substitute new and longer piles, is a defect in said houses or the things appurtenant thereto, which the defendant is bound by his agreement to remedy. After the finishing, as above stated, the houses settled further, and about two months thereafter the plaintiffs notified the

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defendant that the houses had settled and
isfied with the foundations, and that the
defendant to complete them. The defend
thing more, alleging that his contract had
The foundations of a house are a part o
statement is made subject to all objections
admissibility for the purpose of controllin
the agreements. It is agreed with refere
that the maker of the mortgage note was
question is submitted whether under the
fendant is liable to pay more than nominal
the case is to go to an assessor to assess the
judgment is to be entered for the plaintiff
on that agreement. If on the facts and p
is entitled to recover as to any of the oth
Pond house, the case is to go to an asses
ages; otherwise, judgment for the defend
the agreement as to said other houses."

G. Marston, for the Hyannis Savings B
ant undertook that the houses should be c
that any deficiency should be supplied.
and incomplete in their foundations. The
is part of the house; it is useless withou
and a house is of no value without a prope

2. If the construction of the contract is
construed most strongly against the defe
Smee, 6 Bing. 244; *S. C.* 3 Moore & P. 5
3 Moore & P. 130. *Bell* v. *Bruen*, 17 Pet.
contracts as surety or guarantor for the mo
the mortgage security. In cases of contra
tion of an entire work at a stipulated su
same, if any casualty occurs, which increas
penditure of the contractor, the loss falls
to do the work. *Boyle* v. *Agawam Canal*

3. The case finds that when the contract
fendant "the houses had settled somewhat
fraud it is immaterial that "no objectio
exist to the foundations." Chit. Con. (
Adams v. *Nichols*, 19 Pick. 275, and cas

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Bancroft, 10 Allen, 346. *Drake* v. *White*, 117 Mass. 10. *Wareham Bank* v. *Burt*, 5 Allen, 113.

J. M. Day, for the Barnstable Savings Bank.

G. O. Shattuck & O. W. Holmes, Jr., for the defendant.

AMES, J. The subject matter of the contract was certain houses which had been begun and were in part finished. So far as appearances went the finishing that remained to be carried out was "the inside painting, papering, bell-hanging and the like." We must assume that the plaintiffs made such examination of the buildings as they saw fit; that they must have seen what kind of houses they were intended to be, must have understood what parts of them appeared to be finished, and were content to lend their money upon a mortgage upon them, provided security should be given that they should be finished as they had been begun. The contract of the defendant was merely that they should be so finished, to the acceptance of the bank. The builder thereupon proceeded to finish the houses, in all the items and particulars in which they were apparently and confessedly unfinished, so that they were then, and for about two months continued to be, to all appearance, in the condition required by the defendant's contract. That is to say, the original design and plan of construction had been carried out, and the houses were finished as they had been begun. There can be no doubt that, at the date of the contract, both parties supposed that this was all that was required.

The construction which the plaintiffs put upon this contract is that it requires of the defendant not only to supply this "inside painting, papering, bell-hanging and the like," but also to guarantee the sufficiency and good quality of the materials and workmanship in all that had been done upon the houses before he incurred any responsibility in the matter. We think his contract will bear no such construction. It does not appear that his attention was called to the security of the foundation, or that he had any means of knowledge in relation to it, that the plaintiffs did not also have. Whatever might have been his liability if the houses had been destroyed by fire or tempest before they were completed, his responsibility terminated when they were completed by his supplying the unfinished items. The argument of the plaintiffs would require him not merely to finish the

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work that had been begun, but to put in
tion, and possibly to reconstruct the entir
to correct all that might be found defec
his contract took a much wider range
tended, both in amount and duration.

It is true that his guaranty was that the
the acceptance of the bank. But it is ob
lation cannot enlarge the list of the things
make him responsible for deficiencies in v
rial, in matters not included in his contr
culty in the case, and the whole of the
from the insufficiency of the foundation, a
he was not responsible. *Judgmen*

In the case of the Barnstable Savings Ba
the agreed facts, the result as to the first an
be the same as in the case just considere
built by Albert C. Pond, the inside finishi
fendant's liability was limited by our decisi
Hyannis Savings Bank, has not been suppli
contract as to that house is not a mere guar
finish it, but is an absolute promise that it
finished without unnecessary delay. If th
bank has been put to the expense of supp
and finishing what remained unfinished upo
ing to the rule laid down in the case of th
would be entitled to recover the amount rea
faith so expended, with interest. Having le
a mortgage security, and not upon the mer
the borrower, the plaintiffs, as trustees an
funds of their depositors, were bound to se
should be made and kept good. The exp
doing might not be recoverable of the bor
continued solvency would furnish no reason
should be relieved of his liability. Accordi
the reservation, therefore, the case is to go to

Assessment of damages to

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JOSEPH R. JOHNSON *vs.* EMMA J. JOHNSON, executrix.

Bristol. Oct. 28, 1875. — Sept. 20, 1876. MORTON & LORD, JJ., absent.

The amount found due to a *cestui que trust* for income from the trust fund, by the final account of the trustee duly filed and allowed, is recoverable in an action at law by the *cestui que trust* against the trustee.

CONTRACT. The declaration contained five counts, and an amended count was subsequently filed. The defendant demurred. The case was reserved by *Gray*, C. J., on the declaration and demurrer, for the consideration of the full court, and appears in the opinion.

T. M. Stetson, for the defendant.

H. M. Knowlton, for the plaintiff.

ENDICOTT, J. The facts of this case, as stated in the declaration and admitted by the demurrer, are as follows: The defendant's testator and Richard C. Johnson were trustees, under the will of Richard Johnson, to pay over to the plaintiff in quarterly payments during his natural life one fourth part of the income of the estate of Richard Johnson. The trustees entered upon the execution of the trust, and upon the death of Richard C. Johnson the defendant's testator continued as surviving trustee, until his own death in 1870. During the whole time, the defendant's testator managed the trust estate and collected the rents, profits and income, but wholly failed to pay over to the plaintiff his share of the income, and upon his death the defendant was appointed executrix of his will.

As the plaintiff does not rely upon the first, second and fifth counts, the only questions to be considered arise on the third and fourth counts and the amended count. The count, added to the plaintiff's declaration by amendment, must be considered as a substitution for the third count, and alleges that the defendant owes the plaintiff $1244.66 and interest thereon for money had and received by the defendant's testator for the use of the plaintiff, the same being the balance found and appearing to be due by the final account of the trustees under the will of Richard Johnson, rendered by the defendant as executrix of her testator and allowed in the Probate Court.

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All these facts are admitted by the d
that the principal fund which, by the w
was put into the hands of trustees, is
count as due to the plaintiff, but only th
also to be assumed that all proper ch
and services have been allowed in the
We are of opinion that this action can
amended count.

It is well settled that a *cestui que trust*
at law against a trustee to recover for
while the trust is still open; but when th
and settled, the amount due the *cestui qu*
made certain, and nothing remains to b
money, such an action may be maintained

In *Roper* v. *Holland*, 3 A. & E. 99, the
trust to pay £50 annually to the plaintif
residue, after deducting repairs, taxes an
penses, to the plaintiff. The defendant no
he would pay him £10, on his giving a re
ceipt was not given, but the plaintiff brou
£10, and it was held that he could recov
the defendant had admitted that he had
could not set up in defence that he was tru
ciple was recognized in *Case* v. *Roberts*, H
Edwards v. *Bates*, 7 Man. & Gr. 590. It
case that as something remained to be don
the specific sum due the plaintiff not ha
the action for money had and received cou
See *Dias* v. *Brunell*, 24 Wend. 9; *Allen* v.

In *Arms* v. *Ashley*, 4 Pick. 71, the hol
recovered judgment of the promisor, and le
profits of his land for a term of years, mad
the plaintiff in writing that he would pay
profits which he should receive after the de
him the use of the land after such paym
that this was a sufficient declaration of tru
having been paid in the lifetime of the t
by his heir under color of descent, might
plaintiff in an action for money had and re

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In *Buttrick* v. *King*, 7 Met. 20, the testator gave to his wife, who was appointed executrix, the use and improvement of all his property during her life, and on her death the property to be divided among his children. Under a power in the will, she disposed of certain lands and took notes for the price. After her decease, these notes were paid to King, her administrator, and Buttrick, the administrator *de bonis non* with the will annexed of the husband, was allowed to recover the money so paid to King in an action for money had and received. The money was held by the widow in trust, and Buttrick was successor in that trust, and entitled to administer it under the will; and it is said in the opinion: "If it consisted in stocks or specific property other than money, a bill in equity might be necessary to enable the administrator to recover it. But when it remains wholly in money, in the hands of the defendant as administrator of the widow, an action for money had and received — which is in the nature of a bill in equity — when nothing remains to be done but the payment of money, may be maintained."

In *Rogers* v. *Daniell*, 8 Allen, 343, a testator directed the trustees of a certain fund to pay over to each of his children a certain sum, after deducting from each child's share any legal debts due the estate from such child. The trustees contended that certain notes, signed by the plaintiff with her husband, and payable to the testator, were legal debts and should be deducted from her share; and that, as the trust was not executed and no final account settled, an action for money had and received could not be maintained. But the court held that the notes were not legal debts of the plaintiff, and that she could maintain the action. See *Lovering* v. *Minot*, 9 Cush. 151; *Gould* v. *Emerson*, 99 Mass. 154, 157; *Baker* v. *Biddle*, Baldw. 394, 422.

The fourth count is to recover income received by the executrix after the death of her testator. It is not altogether clear whether the sum alleged to be due in this count is not included in the sum named in the amended count. If it is not, the fact may be tried whether the sum named in the fourth count is due as alleged, and if the plaintiff brings himself by his evidence within the rule here laid down as necessary to enable a party to maintain an action against a trustee for money had and received,

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he may recover. We cannot say th
demurrer which admits the sum allege

Demurrer overruled as to the c
count.

STEPHEN DODD & others *vs.* GLOUC
INSURANCE COM

Essex. Nov. 5, 1875; Jan. 24, 2

The by-laws of a mutual insurance company provi
furnish vessels to be insured, the amount of insu
seven eighths of the amount of stock subscribed
to comply with this requirement, he should be h
mium on such sum as should make the require
for insurance shall be made in writing and signe
such application, and shall specify the amount on
insurance to commence on the date of the applicat
parties until action is taken upon said applicati
meeting, and until the expiration of the policy, un
at that meeting, notice of such disapproval to be gi
after such action;" and that "the policy of any ves
the non-arrival of such vessel November 30, at 12
until her arrival at G. Application for the extensi
the parties insured, the directors to decide how
charged and paid for such extension." On Decem
sured a vessel and outfits on a voyage, the risk to
The vessel arrived at G. in January, 1872, and on N
age, on which she was afterwards lost. In an action
of the vessel, the declaration contained a count alle
the defendant insured the vessel until her return to
policy of December 2, 1871, with an allegation that
1872, the vessel being absent, agreed to treat that
ending that day, with the right to have it extended
and did extend it and continue the risk until the ve
evidence of the plaintiff tended to show that in the
the secretary of the defendant had an interview wi
what vessels he had out, and was told that this vess
.ng that it was insured on a season policy expiring t
duced the policy of December 2, 1871, on the back
Nov. 30, 1872," but did not open the policy; the s
the policy extended, and the plaintiff replied that
the amount insured until the vessel came home, or
secretary said that he would attend to it, and see th
effected. A few days after this the secretary told

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sured, and in December the president of the company told him the vessel being out prevented the settlement of the business of the year, which closed November 30; but in January, the president told the plaintiff that on examination he found that the vessel was not insured. A printed form of application, on which was also a list of the directors printed, on the application book of the company, was signed by the secretary on November 30, 1872, in behalf of the plaintiff, and the blanks for the date and name of the vessel filled; but the other blanks, left for the value of the vessel and the amount insured, were not filled. The amount of insurance which the plaintiff was entitled to, under his subscription to the stock, was not exhausted on November 30, 1872, and enough remained to insure the vessel until her return to port. *Held*, that on this evidence the jury would be warranted in inferring that a valid contract of insurance existed between the plaintiff and the defendant at the time of the loss.

CONTRACT. The declaration contained two counts. The first count alleged that the defendant, on November 30, 1872, insured the plaintiffs on their schooner, the W. J. Dale, on a fishing voyage, until her return to port. The second count alleged that the defendant had, on December 2, 1871, made a policy of insurance upon that vessel, on a fishing voyage, to terminate on her arrival in port; that she had arrived in port, sailed again on a fishing voyage in October, 1872, and, being absent, the defendant, on November 30, 1872, agreed to treat that policy as a policy for the fishing season ending November 30, 1872, with the right to have it extended until the return of the vessel, and did on that day extend and continue the contract until the vessel should return to port. Trial in the Superior Court, before *Allen*, J., who ordered a verdict for the defendant, and reported the case to this court in substance as follows:

James G. Tarr, one of the plaintiffs, testified that his firm had been in the fishing business since 1859, and had been members of the defendant corporation every year since that date; that in the forenoon of November 30, 1872, Cyrus Story, the secretary of the defendant, called at the counting room of the plaintiffs and asked how many vessels they had out at that time; that the witness replied that there were out, the E. K. Parker, the B. D. Haskins and the W. J. Dale; that Story asked where they were, and the witness told him where each was at the last intelligence, the Dale being at Newfoundland for herring; that the witness stepped to the safe, took out their file of policies, selected the three for the vessels named and laid them on the desk before Story, folded; that on the back of the policy issued December

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2, 1871, was the printed indorseme
1872," and this was exposed to view
and filed; that the policies were not
that Story asked the witness, "Do
extended?" and the witness replied,
tended; we want these amounts insure
or words to that effect or substance; t
part of his business, that he would
entries made and insurance effected;
memoranda in a small book, which the
in the latter part of December, 1872, c
he met Mr. Proctor, president of the
the street, and that Proctor inquired i
about the W. J. Dale, to which he repl
Proctor said he was sorry, as the offic
settlement with the stockholders open c

On cross-examination, the witness sai
scribed for $40,000 of stock for the ye
their notes with sureties as required;
company is closed, or supposed to be cl
vember of each year, except in regard to
that there was enough of the subscriptic
W. J. Dale if need be, or could be, so
returned from her Newfoundland trip
she sailed again and returned in the s
and returned in October, in which mo
Newfoundland, for herring; that she
voyage specified in the policy of Decem
her cargo to Gloucester; that, at the t
with Story, he supposed and had always
was insured, by the season, by an annual
vessel of the plaintiffs was so insured f
vember 30, 1872; that he understood
applying for an extension on the Dale,
as an extension of the existing policies;
ance for the voyage which she was on
mium for that.

On reëxamination, the counsel for the
ask the witness, "Had you any other

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to be insured for the season, and not for the trip, excepting the indorsement on the back of the policy?" To which he replied: "Because of her employment and of the practice of the company, and the indorsement, no doubt, led to my not opening and examining the policies."

Stephen Dodd, another of the plaintiffs, testified that soon after November 30, 1872, he went to the defendant's office, looked over the application book, and saw that the applications for the three vessels had been entered on November 30, but did not notice their phraseology as to extension; that after that he met both Story and Proctor, at different times, and each asked if the Dale had been heard from, and said that they wished to close the office; that after the middle of January, Proctor came to his house, and informed him that upon examination he had found that the Dale was not insured; that the witness said they considered her insured, and Proctor said the company would dispute it.

It appeared that the plaintiffs, before November 30, 1872, had subscribed for $25,000 stock for the year 1872–1873, and given their notes as required; that in the course of the year they took insurance to the full amount by applications subsequent to November 30, 1872.

David Tarr, another of the plaintiffs, testified that a day or two after November 30, he called at the defendant's office, and asked Story if the Dale was insured, and Story replied, "All right, she is insured;" that subsequently, on two occasions, Proctor told him that all the other vessels insured by them had been heard from, except the Dale, and wished to know where she was, as they desired to close up the business of the office, and, on one of those occasions, he asked the witness to telegraph to a certain point, to inquire for her.

It was admitted, if competent, that Story and Proctor, at various times between November 30, 1872, and January 15, 1873, informed other members of the company that the non-arrival of the Dale delayed the adjustment of the business of the company for the year ending November 30, 1872, and that these statements were made in answer to inquiries by persons interested.

It did not appear that anything was done between the plaintiffs and the defendant, between November 30 and the notice to

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the plaintiffs, after January 15, as to f
to applying the alleged insurance to ar
of stock.

All the evidence of conversations and
ted against the objection of the defenda

The declaration and answer, the appli
cember 2, 1871, the application of Nov
applications and policies for the schoon
D. Haskins, and the by-laws, were made

The application of December 2, 1871,

"No. 43. Vessel $5,000. Outfits $500
day makes application to have fifty hun
7-8 of the schooner W. J. Dale, 69.72 to
old, whereof is master. Employe
foundland. Whole vessel valued at
Also, on outfits, five hundred dollars.
"Dodd, T
"Gloucester, Dec. 2, 1871."

[Then followed the names in print of
nine other directors, with the word "Yes
tor's name.]

The policy dated December 2, 1871, for
cent., insured the plaintiffs fifty hundred
W. J. Dale, and five hundred dollars on
age from Gloucester to Newfoundland,
of discharge of cargo of herring at some
Henry, and thence back to Gloucester.'
day, and terminating *on arrival of vessel*
said. And to be insured in the manner
laws, and to be subject to all the restraints
set forth." The words printed in italics
policy written above the printed words,
November next, at noon," and these print
The policy also contained the printed cl
non-arrival of the vessel November 30th,
tinued on application to the directors, and
paid for such continuance being agreed up

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The application of November 30, 1872, was as follows:

"*No.* ——. The undersigned this day makes application to have extension of policy of the schooner W. J. Dale, tons burthen years old, whereof is master. Employed in the Whole vessel valued at hundred dollars. Also, on outfits, hundred dollars.

"Dodd, Tarr & Co. pr C. S.

"Gloucester, Nov. 30, 1872."

[Then followed, in print, the names of the ten directors of the defendant company.]

This application was a printed form, and all was in print except the date, the words "extension of the policy," the name of the vessel and the signature.

The applications for insurance and for the extension of the insurance on the other two vessels were similar to those in the case of the W. J. Dale, the blanks in the applications for extension not being filled out. The policy issued on the E. K. Parker was dated April 6, 1872, and terminated "the 30th day of November next, at noon." The policy issued on the B. D. Haskins was dated December 20, 1871, and terminated "the 30th day of November next, at noon."

The by-laws of the defendant company, so far as material, are printed in the margin.*

* Article 1. This company shall be governed by a board of ten directors to be chosen at the annual meeting, from the stockholders, one of which shall be chosen by the directors, to act as president, and another to act (in absence of the president) as vice president, whose duties shall be to preside at all meetings of the board, or of the stockholders, and to perform such other duties as may be required of them. The directors shall have power to appoint a secretary and a treasurer, and fix the amount of salary to be paid to each.

Article 2. The president and directors shall superintend the concerns of the company, and have the management and direction of all things not otherwise herein provided for.

Article 3. The secretary shall keep the books and accounts, shall collect and receive all moneys, and pay the same over to the treasurer as soon as received; shall fill up and record all policies and orders, notify meetings, and perform such other duties of the office as the president and directors may require.

Article 6. All applications for insurance shall be made in writing and signed by the person or agent making such application, and shall specify the amount

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If, upon so much of the foregoing evide
deem competent, the plaintiffs were enti

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on the vessel and outfits separately, insurance to c
application, and shall be binding on both parties
said application by the directors at their next me
tion of the policy, unless disapproved by the dire
tice of such disapproval to be given to the applic
action.

Article 8. The stock of this company shall be
sand dollars each; for each of which shares a note
dred dollars, payable on demand when required
to be assessed in such sums as may from time to
stockholder shall give such security to the company
the directors.

Article 9. All stock notes shall be signed and in
tion for insurance can be received.

Article 10. Any responsible person may take on
company who has property to the amount of one
sured, and one share for every additional thousa
sured; and for the accommodation of the smaller in
may be taken upon the same principle.

Article 11. After the closing of the stock book,
the company or cease to be a member thereof, but
the business of the company for the year shall be s

Article 12. Rates of premium and all other mat
ment of the company shall be decided by the direct
are not instructed by the stockholders at a regularly

Article 22. Each and every stockholder shall fu
the amount of insurance of which shall be at least s
of stock subscribed by him; should he fail to comp
ment, he shall be held to pay the lowest rate of pre
make the required amount.

Article 31. The rates of premium for the curre
the date of the application,) shall be as follows:

From November 20 to November 30 of the nex
From December 14 to November 30 of the nex
From January 1 to November 30 of the same
From January 15 to November 30 of the same
From February 1 to November 30 of the same
From March 1 to November 30 of the same ye
From April 1 to November 30 of the same yea
From May 15 to November 30 of the same yea
From July 1 to November 30 of the same year,

Two per cent. extra to be added to the premium
the Newfoundland fisheries between the 20th of

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the verdict was to be set aside; otherwise, judgment for the defendant.

The case was argued in November, 1875, and reargued in January, 1876.

R. H. Dana, Jr. & C. P. Thompson, for the plaintiffs.

S. B. Ives, Jr. & F. Goodwin, for the defendant. 1. The policy on the W. J. Dale having expired long before November 30, 1872, the acts done on that day cannot be construed to extend the old risk, irrespectively of the inability of the secretary and president to bind the company by such acts. This furnishes a good illustration of an impossible contract, of which instances are many. See Leake on Contracts, 356, 360. That which does not exist cannot be extended.

2. The officers had no power apart from the impossibility. This is a mutual company, and whatever power they had was derived from the by-laws. The only by-law touching the matter is the 34th. This provides that "the policy of any vessel insured in this office, however, in case of the non-arrival of such vessel, November 30, at 12 o'clock, noon, may be continued until her arrival in Gloucester. Application for the extension of such policy being made by the parties insured, the directors to decide how much extra premium shall be charged and paid by the in-

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March next ensuing, when insured by the season, but the directors may insure vessels so employed by the trip or voyage, and for such trip or voyage a premium of five per cent. shall be charged; one half of one per cent. for all vessels employed in the Bay of Islands fishery, and sailing from Gloucester on or after October 1, at 12 o'clock, noon; and one half of one per cent. for any vessel engaged in the Bay of St. Lawrence fisheries, Seal Island or any fisheries east of Cape Sable, which have not arrived in Gloucester Harbor on or before October 15, at 12 o'clock, noon, or for any vessel engaged in George's fishing after October 15, at 12 o'clock, noon; and one half of one per cent. extra premium on any vessel sailing on a fishing voyage to Seal Island grounds, or any fishing grounds easterly from Cape Sable, between October 31 and November 10, at 12 o'clock, noon; but no vessel shall be held, under the above rates, to pay more than one per cent. extra premium between October 1 and November 30. The policy of any vessel insured in this office, however, in case of the non-arrival of such vessel November 30, at 12 o'clock, noon, may be continued until her arrival in Gloucester. Application for the extension of such policy being made by the parties insured, the directors to decide how much extra premium shall be charged and paid by the insured for such extension.

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sured for such extension." As this ves
this office " in November, 1872, and ha
since the preceding January, this by-l
the president or secretary, or both, to
new any policy that had expired. The
plate the extension of any but an existi
such power upon the president or sec
laws would be to impose upon the mem
pany a burden those members had not
rectors to impose, and a kind of a risk
entering the company, had not engag
No such power inheres in the officers of
ever may be the case with a stock comp
Ins. Co. 14 Gray, 203. *Baxter* v. *Chel*
Hale v. *Mechanics' Ins. Co.* 6 Gray,
Ins. Co. 3 Allen, 360. *Mulrey* v. *Shaw*
Evans v. *Trimountain Ins. Co.* 9 Allen,
in the fact that the policy contained
phrase, "Expires Nov. 30, 1872," as th
printed in the body of the policy, and

3. The matters relied upon by the
strued to be a contract for new insura
ments enough to authorize a jury to
insurance, such contract cannot bind
No terms were agreed upon. If the
the secretary is the evidence of the
inadequate. It contains or specifies
of premium, or amount of insurance.

The policy is a policy on a freight
voyage, insuring the vessel for a voyag
foundland, from thence to a port of
ring at some point north of Cape H
Gloucester, whereas the voyage that
lost was a fishing voyage. Even if a
would insure the vessel upon the voya
no contract was made to insure her
pursuing when lost.

There was no meeting of minds. I
misapprehension of facts. If there

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thing, it was on the part of both to extend the old policy. Neither intended to make a new insurance. The old policy they could not extend. Moreover, each erroneously believed the old policy to be still in force. *Goddard* v. *Monitor Ins. Co.* 108 Mass. 56.

There was no consideration for any new contract. There was no agreement made for any premium. If the actions of the secretary or president or both be regarded as evidence of a promise or contract to insure, certainly no benefit appears to them or to the company, and no detriment to these plaintiffs, the promisees.

But even if there were elements enough to authorize a jury to find a contract for new insurance, such contract cannot bind the defendant company, because the president and secretary had no power to bind the company. See the 6th by-law.

This by-law neither the president nor the secretary, nor both, can depart from. It specifies the way in which the subscribers in this mutual company had agreed to contract with one another; and the president and secretary, who were merely their servants, cannot improvise or constitute any new way of their own. Their duty and obligation were to follow the by-laws; and their employers, who insured each other in this company, established a way in which they agreed to do it. This principle is fully established. See *Brewer* v. *Chelsea Ins. Co.* 14 Gray, 203.

The 6th by-law contemplates the action of the directors as an essential element to be contemplated in contracting for new insurance. Here the directors had taken no action whatever, nor could they take any, because no application was ever made to them or presented to them. This by-law contemplates an application, one to be made for the directors' approval, and the issue thereupon of a policy of insurance. But this transaction contemplated no action of the directors and the issue of no policy.

LORD, J. We think that, upon the evidence in this case, if believed, the jury would be authorized to find that the parties' minds were in accord in these particulars: the subject matter, the risk insured against, the amount, the duration of the risk and the premium. We think they would be authorized further to find that the parties did not contemplate anything further to be done by the plaintiffs: there was no note to be given, nor cash to be paid, as a condition precedent to the attaching of the

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insurance proposed; nor was there, on th
any policy to be made or delivered; in
contemplation of either party any further
nor any other thing further to be done
order to make the contract of insurance

It is said, however, by the defendant, t
had when both parties were laboring un
and the defendant contends that such r
being made in consequence of it, preve
being effectual. It therefore becomes in
what the mistake, thus alleged by the def
There was no mistake between the parties
ter; that being the schooner W. J. Dale
the risk, both parties understanding that
Dale was that she was at Newfoundland f
none as to the amount, both parties und
the sum of fifty-five hundred dollars; th
duration of the risk, both understanding t
her arrival at Gloucester; there was non
both parties understanding that to be pr
laws of the company. The mistake, as cor
party supposed that a previous risk, whic
assumed, was to expire on that day, whe
had expired several months before. If
each party was equally at fault with the ot
means of detecting it. The policy whic
issued lay before the company; upon the
were the words, printed in conspicuous l
30th, 1872." If the plaintiffs had opened
have appeared that the risk had terminat
fore. Had the defendant referred to its b
edge would have been imparted. The j
warranted in finding further that both par
lief, and both parties acted on the convictio
insured until the middle of January, 1873,
plaintiffs were informed by an officer of th
that upon examination he had found tha
insured.

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Although the jury would be warranted in finding these facts, we do not see that they would be required to find them precisely as contended for by the defendant. It is the province of the jury not only to consider the actual facts proved by direct evidence, but all the facts which may be properly and legitimately inferred from such as are thus proved. It is to be observed that the only reported evidence, competent or incompetent, tending to show that the defendant was under a mistake in reference to the matter, is that of the plaintiff Dodd, who testifies that after January 15, 1873, the president of the company came to his (Dodd's) house and said that "upon examination he had found that the Dale was not insured." How far such evidence is competent to prove the fact, it is not necessary to consider; for, assuming it to be competent, and assuming it to have a tendency to prove the fact, it is to be taken in connection with all the other evidence in the case. There was evidence also tending to show that the secretary of the company was to attend to the matter and "see the entries made and the insurance effected." The jury would have been authorized to find that this was done, and that attention to the matter disclosed the facts as they existed. The evidence tends also to show that the application of November 30 was countersigned by each of the ten directors. It is true that the names were printed and were on the application at the time when made, (which is also true of the original application,) but they may be presumed to be there for some purpose. Upon the evidence as it stands, in connection with the by-law, we think the jury would be authorized to find that the directors' names were there *de bene*, and that unless notice was given according to the by-laws, within a reasonable time, their approval was to be inferred, and the signatures thus attached were then to be taken as evidence of such approval.

We think the jury would have been warranted in finding that the directors had done their duty, and that in doing it they necessarily became acquainted with the facts as they actually existed. One of the duties incumbent upon them by the by-laws was "to decide how much extra premium shall be charged and paid by the assured for such extension." If the jury should draw the inference that in the discharge of their duty the directors became acquainted with the facts, it would be competent for

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them also to find that good faith upon the reasonable notice to the plaintiffs as the or acquiescence in the arrangement made l and the plaintiffs. Fraud would not b escence might be; and acquiescence woul ferred, if non-acquiescence might sugge It is not necessarily the case of an execut pany attempting to do an act in conflict w the action of the entire board of director "shall superintend the concerns of the c management and direction of all things provided for." There is nothing in the b insurance, under the sanction of the di against the risk insured against, either b by extension of existing insurance.

There are other facts appearing whicl the jury, might have an important beari The association is a peculiar one; one o unusual, is, that every member of the c effect insurance, under the penalty of bei premium, though he has no insurance. with it the right to have insurance upon as should be concurred in by the subscr directors. There is evidence tending to s on November 30, 1872, had not exhauste their subscription was such as to entitle t applied for by them. These considerati the jury, might have had weight with mining not to disapprove the application light, as a new insurance, or as an exten ance.

We see no evidence which would forbi that, when the subject came before the di in the ordinary and proper performance c cided that, although it was evident that th ing under a mistake, they, the directors, n an unimportant and immaterial one, and, pose of the plaintiffs was to have the ves have thought it unnecessary to take any

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esce in deeming the contract complete and the insurance effectual. In that case, we think the plaintiffs would clearly be entitled to recover, and it would be immaterial whether under the one form of new insurance, or under the other as adopting the language upon the back of the policy as continuing the former risk to that time and extending it. Without, however, discussing the evidence minutely, we are of opinion that the facts proved, with such inferences from the facts as the jury would be justified, in the absence of all other evidence, in drawing, would warrant the jury in finding that a contract of insurance existed between the parties. We do not mean to say that the jury would be required to find such a contract, but that it is a question of fact to be found by them.

Although a considerable portion of the argument of counsel on both sides was based upon the assumption of a mutual mistake as to the time when the former policy expired, we do not deem it necessary to decide whether, as matter of law, such mistake would avoid the contract, because it is hardly probable that, when the whole evidence shall be before the jury, the same question will be presented, except as modified, qualified or controlled either by the conduct or duty of the defendant. The verdict, which was ordered upon the plaintiffs' evidence alone, must therefore be set aside and a *New trial granted.*

WILLIAM H. McNEIL *vs.* SAMUEL T. AMES & others.

Suffolk. March 24. — Sept. 1, 1876. DEVENS & LORD, JJ., absent.

A purchaser at a sale on execution of a leasehold estate stands in the position of an assignee in law of such estate, with substantially the same rights as if it had been voluntarily assigned to him by the lessee; and an assignment and sub-leases made subsequently by the lessee are void, and do not constitute a cloud upon the title affording ground for relief in equity.

This court will not take jurisdiction in equity to compel a lessee, whose term for years has been sold under an execution, to deliver up to the purchaser the counterparts of his lease and sub-leases which are recorded.

This court has no jurisdiction under the Gen. Sts. c. 113, § 2, *cl.* 6, of a bill in equity, by an assignee in law of a leasehold estate, against the lessee, who claims the rent of a tenant, if it appears that a judgment at law in favor of the plaintiff will be conclusive and afford him the same relief as a suit in equity.

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BILL IN EQUITY, filed December 30, Ames, Lucy Ann Harris, James B. A Henry P. Bambauer, Arnold Kendall a alleging as follows:

That Lucy Ann Harris leased to Sa separate indentures, two lots of land in Street and the other on Lincoln Street September 24, 1866, and being for the from January 1, 1867, at a rent of $2700 payable quarterly; that the lessee built Street lot, covering that or a part of that covering also the rear part of the Lincoln store on a part of the Lincoln Street lot, a passageway, and another piece of the buildings, vacant, it being done at an ex by Ames; that said Ames, in 1873, gave the store on Summer Street, to Kendall other, of the store on Lincoln Street, to rent reserved to Ames of $7000 and $1 underleases being each for the balance of the original leases, the lease to Kendall knowledged and recorded, the other not.

That the Lancaster National Bank le leasehold estates or terms of years held b cution in its favor against him, and cause and conveyed thereon, the seizure being 1875, and the sale duly made November purchasing one, and conveying the same a and the plaintiff purchasing the other, taki the sheriff; that they respectively entere offered to pay rent to the original lessor, a other covenants of the leases from Lucy the sub-lessees and Jacob Bambauer, wh the Lincoln Street building as tenant, of th rent of them; that Ames did not lease an leases all of the estates; that the origin plaintiff to procure $10,000 insurance, as p lease, payable to her in case of loss; and faction and acceptance; that Ames recogn

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levy, and by his procurement and consent the judgment creditor paid, after the levy and before the sale, rent due and accruing to the original lessor, and the plaintiff was induced to buy in reliance upon Ames's said conduct, and his statement or assurance that the levy was valid, and the sale would be effectual to pass the leasehold estates.

That Ames afterwards conspired and confederated with Kendall & Barrows, Jacob Bambauer, and his son, James B. Ames, to deprive the plaintiff of the benefit of his purchases and as assignee in law of the leasehold estates; that he retains and withholds, after notice and a demand for the counterparts of the leases and sub-leases, and refuses to deliver them to the plaintiff; declines to give up the leasehold premises, or recognize any rights of the plaintiff therein; proceeds to execute and deliver an assignment of the sub-leases and the original leases to his son, ostensibly for the benefit of his creditors, but really in fraud of the plaintiff's rights, and in pursuance of said fraudulent combination; and he and his son claim a right to collect the rents of Kendall & Barrows under the lease to them, and Kendall & Barrows refuse to recognize the plaintiff as entitled to the rent, and insist upon paying to Ames and his son, by virtue of the pretended assignment; that they do not pay Lucy Ann Harris her rent due, subjecting the leases to forfeiture; that after the levy was made and the parties knew of it, Samuel T. Ames proceeded to make and give fraudulently to Jacob Bambauer a new lease of the Lincoln Street store, dating it back to August 2, 1875, so as to make it appear to have been given before the levy, with a rent reduced to $1000 a year, with taxes, which new lease was in turn given up and another given in its place in November, 1875, antedating it to August 2, 1875, and with a rent reserved of $1000 a year, without taxes; that this was fraudulent, and done in pursuance of said fraudulent combination; that said Ames, then pretending that this last named lease was given before the levy, as stated, assigned the same under seal to the plaintiff, making no claim to that portion of the lands covered by the same, recognizing and acknowledging his rights as assignee in law to this sub-lease; that this was done to deceive the plaintiff and to defraud him, giving Jacob Bambauer the demised premises at a reduced rent; that the sub-lease to Henry P. Bambauer

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was never surrendered or cancelled, but w
lessee thereunder is willing to and has
thereunder to pay rent to the plaintiff
Samuel T. Ames, under said combination
he got, of Jacob Bambauer, the rent due
store in advance to January 1, 1876, and
to April 1, 1876; that said parties clai
operated and were in fact assignments of
and not sub-leases, and passed all of the
so that there was no property subject to
execution; whereas the plaintiff claims tha
and did not pass all of the property and
and that he became assignee in law of th
terms of years created under the original
the sub-leases as incident thereto.

That the lease to Jacob Bambauer a
James B. Ames are fraudulent, and put a
tiff's title, and serve to embarrass the sam
his rights, and that they should be set aside
son should be restrained from interfering
the sub-tenants, and from collecting any
leases; that Lucy Ann Harris should be c
the plaintiff and receive rents from him as
hold estates under her leases, and the plai
pay the rent due her, and perform the other
in the leases to prevent a forfeiture; that A
deliver to the plaintiff the counterparts of
leases, and the sub-tenants, Kendall & Barr
bauer and Jacob Bambauer should be comp
assignee, and pay rents to the plaintiff unde
desist from paying to the said Ames and
them, and should be compelled to account
rents which have accrued since the levy wa
sub-leases are operative as assignments, A
one of them, are liable to pay to Lucy Ann
tion, a part of the rent to be paid her on
lease, and that this be determined in the alte

The bill contained a prayer to this effect
tion, and for general relief. Copies of the

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the sub-leases, as alleged, to Kendall & Barrows and H. P. Bambauer, were annexed to the bill. These are omitted as immaterial under the opinion of the court.

Henry P. Bambauer answered, admitting all the material allegations of the bill; and the other defendants demurred for want of equity.

Hearing before *Gray*, C. J., who reserved the case, at the request of the parties, upon the bill, and the answer of Henry P. Bambauer, and the demurrers of the other defendants, for the determination of the full court.

J. L. Thorndike, for Harris.

J. B. Ames, for the other defendants.

A. A. Ranney, for the plaintiff.

MORTON, J. The only ground upon which the plaintiff can maintain an action, either at law or in equity, is that at the time of the levy of the execution in favor of the Lancaster National Bank, Samuel T. Ames held terms for years or leasehold estates in the premises in controversy, which were duly seized and sold under said execution. Assuming this to be so, the plaintiff stands in the position of an assignee in law of the terms for years, with substantially the same rights as if they had been voluntarily assigned to him by Ames. His remedy at law to enforce his rights as such assignee is plain, adequate and complete. He can compel the under-lessees to pay the rent agreed to him, and can enforce the performance of the covenants of the lessor in her leases. *Howland* v. *Coffin*, 9 Pick. 52. *Shelton* v. *Codman*, 3 Cush. 318. *Patten* v. *Deshon*, 1 Gray, 325. *Hunt* v. *Thompson*, 2 Allen, 341.

If then we assume, as contended by the plaintiff, that the deeds from Ames to Kendall & Barrows and to Bambauer operated as under-leases and not as assignments, the plaintiff has a complete remedy at law against the under-lessees. The fact that Ames has made other sub-leases and an assignment to his son since the plaintiff's title accrued, does not affect the question. If the plaintiff's claim is well founded, such sub-leases and assignment are null and void, and they cannot embarrass the plaintiff in the prosecution of his legal remedies. They do not constitute a cloud upon his title so as to give the court jurisdiction in equity upon that ground. *Commonwealth* v. *Smith*,

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10 Allen, 448. *Nickerson* v. *Loud*, 11
Pond, 5 Allen, 59. *Clouston* v. *Shearer*
will the court entertain jurisdiction in e
the ground that Ames refuses to deliver th
possession of the leases from Harris to h
lease to Kendall & Barrows. The bill a
are recorded, and copies are annexed to
themselves are not necessary as evidence o
and the retention by Ames of his counter
impair the plaintiff's remedies at law.

The plaintiff contends that the court has
this is a case in which "there are more tha
distinct rights or interests which cannot be
decided and adjusted in one action at the
Sts. *c.* 113, § 2, *cl.* 6. But the fact that th
both claim the rent of the tenant does no
the right to maintain a suit in equity. It m
could maintain a bill in equity in the natu
pleader. A judgment against him at the su
of Ames might not protect him against th
and therefore his remedy at law might be i
plaintiff's rights are fully protected by a su
ment in his favor for the rent would be c
afford him the same relief that he can obtai

We are of opinion upon the whole case th
states a case in which he has a plain, ade
remedy at law. As, therefore, we have n
case, we have not considered the question
leases by Ames operated as an assignment
interest in the premises leased to him.

Demurrer sustained,

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WILLIAM L. BLANCHARD *vs.* CYRUS H. ILSLEY.

Suffolk. Nov. 12, 1875.—Sept. 6, 1876. ENDICOTT & LORD, JJ., absent.

At the trial of an action for seduction, it appeared that the injured girl, who was the sister of the plaintiff's wife, was, at the time of the seduction, taking care of the plaintiff's household, without paying board, during the sickness of the plaintiff's wife, upon an understanding with the plaintiff, but with no agreement with her father or herself as to the payment of wages or for any definite period of service. *Held*, that this did not establish the relation of master and servant so as to give a right of action to the plaintiff.

A guardian cannot, as such, maintain an action for the seduction of his ward.

TORT for seducing a girl under twenty-one years of age, alleged to be the plaintiff's servant. At the trial in the Superior Court, before *Allen*, J., there was evidence tending to prove the following facts:

The girl was born July 13, 1855. In 1868 she came to live with the plaintiff and his wife, who was the girl's sister, at Jamaica Plain, and thereafter, with the exception of her absence at school or on visits, continued to live in the plaintiff's house as her home. There was no evidence of any intention on her part to return to live with her father, or of any intention on his part to invite her to return or to claim her services.

The father of the girl kept house with his wife and daughters in Waltham in 1862. In May, 1862, he broke up housekeeping and went alone to Newbern, North Carolina, where he was engaged in business till 1872. In the latter year he returned to Boston, and since then has resided there, boarding at different places. He was in the habit frequently of visiting at the plaintiff's house. After the father's removal to North Carolina, his wife and her daughters boarded together till 1863, when the wife died. Thereafter the daughters lived in Roxbury with their aunt and grandmother until 1867. In that year, the girl went to Pembroke and remained a year on a visit. At the expiration of that visit she came to the plaintiff's house at Jamaica Plain, as above stated. The father paid his family expenses until 1867, since which time he has been unable so to do, and has done nothing towards such expenses.

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From 1868 to September, 1871, the
Jamaica Plain. During the vacations, s
at home, she assisted her sister in the c
dren and of the house. No money was
her board. Her grandmother furnished
for her clothing and her personal expens
mother was appointed her guardian, and
small amount of property. In March,
died, and the plaintiff was appointed gu
ment he still holds. In September, 1
school at Norton, and remained there ti
the exception of vacations, of which ther
amounting in all to about two months
penses of this schooling were paid by t
girl spent the vacations at the plaintiff's
the same service as before.

In June, 1873, the plaintiff's wife bec
moved to a hospital, and the plaintiff, in a
removal to the hospital in June, sent for
mediately from school. She at once left
the plaintiff's house, arriving there June
to the wife's removal. The school term en
15, the plaintiff and the girl had a convers
hold arrangements, and it was then agre
tiff and the girl that the latter should a
house and of the plaintiff's children, and
sisted by a nurse. An additional servan
ployed prior to that time, was discharged
days afterwards. Subsequently to June 15
the house, doing the necessary work, excep
parlors and chambers, assisted the nurse a
and took the entire charge of the oldest c
years old. After the plaintiff's wife's retu
the girl continued to render the same servi
servant was then obtained to help her.

The father visited at the plaintiff's ho
June 15, 1873, knew of the service which
ing, and acquiesced, without saying anythi
way of assent or dissent.

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In August, 1873, the girl made a visit of about three weeks, taking with her the plaintiff's oldest child, of whom she had the sole care during her visit. She went on this visit because, as she testified, she was run down by reason of her impaired condition of health. For the same reason, she afterwards made visits in 1874.

There was evidence tending to prove that about June 1, 1873, while attending school at Norton, and subsequently while at the plaintiff's home, during the sickness of his wife, the girl was seduced by the defendant; that prior to 1873, she was strong and well, and of gay, cheerful spirits; and that subsequently to June, 1873, her physical health became impaired, she became very nervous and irritable, lost interest in her ordinary occupations, and was unable to work as before.

Upon this evidence, the presiding judge ruled that the action could not be maintained, and directed the jury to return a verdict for the defendant. The plaintiff alleged exceptions.

R. M. Morse, Jr., for the plaintiff.

W. C. Loring, (*C. R. Train* with him,) for the defendant.

COLT, J. Actual loss of service by the wrongful act of the defendant is the technical foundation of the plaintiff's action. Such loss of service will be presumed in favor of the father who has not parted with his right, where the daughter is under age and resides with him; *Hewitt* v. *Prime*, 21 Wend. 79; and, according to the more recent American cases, where he retains the legal right to claim her service, although she resides and is temporarily employed elsewhere. It results from the legal obligation imposed upon him to provide for her support and education, which gives him the right to the profits of her labor. *Kennedy* v. *Shea*, 110 Mass. 147, and cases cited. *Furman* v. *Van Sise*, 56 N. Y. 435, 444. *Emery* v. *Gowen*, 4 Greenl. 33. *Clinton* v. *York*, 26 Maine, 167. *Griffiths* v. *Teetgen*, 15 C. B. 344. See also note to *Martin* v. *Payne*, in Bigelow Lead. Cas. Torts, 286. The father's inability or failure to support his children does not alone deprive him of this right. *Benson* v. *Remington*, 2 Mass. 113.

In the case at bar, the evidence fails to justify a finding by the jury that the father had permanently or temporarily parted with his right to his daughter's services, or that he had waived

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his right for any definite or indefinite
the plaintiff, permission granted to the
fails to show a case of concurrent servic
exist, can exist only when it is the resu
which an infant daughter cannot be the
same time. *Hedges* v. *Tagg*, L. R. 7
was nothing to show emancipation or int
The fact that he knew where she was liv
she was rendering, "and acquiesced, with
way of assent or dissent," is not enough
evidence can be said to prove is that, upo
tween the plaintiff and the injured girl, w
wife, the latter, with no agreement with
for the payment of wages, or for any defi
assumed the care of the plaintiff's househo
disabled by sickness, and sustained that re
board, at the time of the alleged seduction.
lish the relation of master and servant, s
action to the plaintiff, to the exclusion of,
the father.

The fact that the plaintiff was also the l
dian carries with it no right to the servic
obligation to support her, except to the e
belonging to her which came to his hand
§ 19. *E*

CHRISTOPHER SMITH *vs.* BOSTON AND

Suffolk. Nov. 15, 1875. — Sept. 7, 1876. E
absent.

One who travels on the Lord's day to ascertain whether
and into which he intends to move the next day, ha
ling from necessity or charity, and cannot maintain an
at a railroad crossing, through the negligence of the
poration

TORT for personal injuries sustained by
the negligence of the defendant's servants.

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At the trial in the Superior Court, before *Putnam*, J., the plaintiff testified that he was a machinist in the employ of the defendant corporation during week days, his business being the repair of their locomotives; that he had been at work all the week previous to the accident, and on Sunday, August 23, 1873, in the afternoon, having attended church in the morning, he walked from his residence in Leverett Street, Boston, to Charlestown, to see if a person of whom he had hired a house during the previous week, and to which he was to move on the following Monday, had got the house cleaned; that he saw the person, and on his return, while passing along Austin Street, over which the railroad ran, and while standing on the Charlestown side of the gate, he was hit by one of the gates, which was struck and broken by a locomotive engine passing at the time, as the gate was being swung across the street by the servants of the corporation, and sustained the injury complained of.

The wife of the plaintiff testified that her husband and herself were boarding at that time with her mother in Boston; that her mother had told her during the previous week that she wanted their room for another person, and she had told her mother that they would leave their room on Monday; that her mother had let it to her son, who was to take it the following Tuesday; that they had engaged the room in Charlestown for Monday, and had their goods all packed up on Saturday; that her husband, the plaintiff, walked over to Charlestown on Sunday, as stated by him, and was assisted home by two men, severely injured; and that on the following Monday they moved to Charlestown, as they had proposed to do.

The defendant contended that it appeared upon this evidence that the plaintiff was travelling on the Lord's day, not "from necessity or charity," and so was not entitled to maintain this action. The judge so ruled, and ordered a verdict for the defendant. The plaintiff alleged exceptions.

S. B. Allen, for the plaintiff.

C. F. Choate, for the defendant.

COLT, J. The plaintiff walked from his home in Boston to Charlestown on the Lord's day, for the purpose of ascertaining, from the person of whom he had hired a house, whether it had been cleaned, so that he could move into it with his family the

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next day; on his return, he received th
through the alleged carelessness of the
the defendant corporation. The questior
of the injury, he was unlawfully travelli
of the statute which subjects to punish
travels on the Lord's day, except from
Gen. Sts. *c.* 84, § 2; because, if he was
tended the law will afford him no rem
seems to have been conceded at the trial
was in this case a cause directly contrib
injury.

The question is settled by the previous
In *Bosworth* v. *Swansey*, 10 Met. 363, it
son travelling on the Lord's day could n
received from a defect in the highway, unl
he was travelling from necessity or charit
was on him to bring himself within the ex
Jones v. *Andover*, 10 Allen, 18. In *Hela*
407, it was held that a person driving acro
faster than a walk could not recover for a
a hole in the floor, into which the horse st
Metropolitan Railroad, 14 Allen, 485, one
Sunday in a horse car from one city to an
of visiting a stranger, and who did not s
one of necessity or charity, was held to be
of the law, and not entitled to redress in
an injury which he would not have recei
tion. In *Bennett* v. *Brooks*, 9 Allen, 118,
the purpose of the statute to prevent all a
belonging to or connected with ordinary
worldly affairs, although they might not
the daily business or occupation in which
be employed. And, in the line of these de
held that one who travels on Sunday by w
way, for the purpose of seeing his employe
change his hours of labor, in order that h
not travelling from necessity or charity, so
tain an action against the town for an i
the highway. *Connolly* v. *Boston*, 117
McGrath v. *Merwin*, 112 Mass. 467.

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A majority of the court think that the case is governed by these decisions, and that they compel us to the conclusion that the plaintiff, on the facts stated, does not bring himself within the clause protecting those who travel from necessity or charity; and that the illegal act of travelling on the Lord's day might properly be treated as a cause directly contributing to the injury of which he complains.

It is not easy to define as a matter of law what state of facts will make travelling an act of necessity or charity, within the exception in the Lord's day act, or when the plaintiff's own illegal conduct can be said to be a direct, rather than a remote, cause contributing to the injury. The first of these questions is to be determined to a great extent by considerations of moral fitness and propriety; the last by the evidence in each case bearing upon the complicated relations of cause and effect. In most cases, both questions should be submitted to the jury, with proper instructions. *Feital* v. *Middlesex Railroad*, 109 Mass. 398. But in the present case, in the light of the cases cited, there is no evidence which would justify a verdict for the plaintiff.

Exceptions overruled.

DENNIS CADIGAN & another *vs.* LEVI BROWN & another.

Suffolk. Nov. 17, 1875. — Sept. 7, 1876. COLT & LORD, JJ., absent.

This court has jurisdiction in equity, under the Gen. Sts. c. 113, § 2, cl. 9, to abate a private nuisance, which threatens a continuous and permanent injury to a right of way.

The owners of several lots of land may join in a bill in equity to restrain a private nuisance which threatens a continuous and permanent injury to a passageway, in which they have a right of way in common, as appurtenant to their several estates.

MORTON, J. This is a bill in equity alleging that each of the plaintiffs is the owner of a lot of land abutting on a passageway five feet wide, and, as appurtenant thereto, has a right of way over said passageway in common with others; that the defendants have commenced to build a house at one end of the passageway, so as to narrow the width of the entrance to about four feet, and have raised the grade and filled up a part of the pas-

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sageway so as to injure the access to t
The prayer is that the defendants be
the house, that the said obstructions n
general relief. The defendants demur,
the plaintiffs are improperly joined, and
case which entitles them to relief in equ
quate and complete remedy at law.

1. The case stated is that the defenda
tions of the plaintiffs' right of way, of
This is a private nuisance, which entitle
in equity, unless they have a plain, adeq
edy at law. Gen. Sts. *c.* 113, § 2, *cl.*
Brick Co. 103 Mass. 514. *Fall River*
Colony Railroad, 5 Allen, 221. *Hartsho*
Allen, 501. The injury to the plaintiffs
tinuous, and a judgment for damages w
adequate relief. It is true that, in an act
sance, they might also obtain a judgmen
abated and removed. Gen. Sts. *c.* 139.
court of law can go no further than to
while a decree of a court of equity may r
or repetition of the nuisance, and may in
ified and adapted to the case so as to sec
parties. *Boston Water Power Co.* v. *Bos*
road, 16 Pick. 512. The remedy at law, t
efficacious, and does not defeat the juris
this court in suits concerning nuisances.

2. The other ground of demurrer is tha
properly joined. The bill shows that eac
a lot abutting on the passageway, by a sep
title. They derive their titles from di
doubtedly, in a suit at law for the nuisanc
erly join. But the rule in equity as to t
more elastic. Generally, when several p
interest in the subject matter of the bill,
the same remedy against the defendant,
joined as plaintiffs. Thus in *Parker* v.
341, the plaintiffs, being several owner
Place, each lot being held subject to t

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buildings should be erected thereon except for dwelling-houses, joined in a suit to restrain the defendants from violating the restriction. So in *Ballou* v. *Hopkinton*, 4 Gray, 324, several owners of mills upon a stream joined as plaintiffs in a bill in equity to restrain the defendant from diverting and wasting the water of a reservoir, and to equalize the flow of water in the stream. Indeed, in the latter case the court assign, as one of the reasons for holding jurisdiction in equity, that at law each owner must bring a separate action to obtain a remedy for his particular injury, and thus the remedy in equity prevents a multiplicity of suits.

In the case at bar, the plaintiffs, though they hold their rights under separate titles, have a common interest in the subject of the bill. They are affected in the same way by the acts of the defendants, and seek the same remedy against them. There is no danger of confusion in the trial, or of injustice to the defendants, from the joinder of the plaintiffs; but the rights of all parties can be adjusted in one decree, and a multiplicity of suits is prevented. We are therefore of opinion that this ground of demurrer cannot be sustained. The same rule was held by Chancellor Walworth in *Murray* v. *Hay*, 1 Barb. Ch. 59, which cannot be distinguished in principle from the case at bar.

Demurrer overruled.

C. Robinson, Jr., for the defendants.

J. A. Maxwell, for the plaintiffs.

COMMONWEALTH, by Insurance Commissioner, *vs.* MECHANICS' MUTUAL FIRE INSURANCE COMPANY. Samuel G. Reed, petitioner.

Suffolk. March 30. — Sept. 7, 1876. DEVENS & LORD, JJ., absent.

A person insured made an oral agreement with a mutual fire insurance company to renew his policies when they expired on October 1, 1872. The new policies were made, signed and entered upon the company's books as of that date, and remained in its office until after the great fire of November 9 and 10, 1872. The insured on November 14, 1872, called at the company's office, paid the premiums, gave the deposit notes dated October 1, 1872, and accepted the policies of the same date. The secretary of the company, in answer to his inquiries, said that in his opin-

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ion the company had a large surplus, was soun
November 23, 1872, the company was enjoined
The directors of the company voted to collect
assessment on all policies outstanding on Nov
petition in equity to compel the receivers to re
them from collecting the deposit notes and th
that, by his agreement and acceptance of the p
policy holder stood in the same position and with
taken his policies on that day. *Held, also,* that
were merely the expression of an opinion, and n

PETITION IN EQUITY by Samuel G
Sandford and Solomon Hovey, receive
poration, praying that they might be
miums received by the company upon c
be restrained from collecting assessme
and the deposit notes given on the sam
ton, J., who reported the case for the
court in substance as follows:

The petitioner had several policies in
pired on October 1, 1872, and on or b
tioner and the company mutually agree
policies should be renewed in a larger su
insured. The company thereupon made
policies, and entered them upon their
mained in the office until after the gr
and 10, 1872. The company notified R
a by-law, and in performance of their es
did not pay the premiums and take the
ber 20, the policies would be cancelled;
14, called at the office of the company, w
tary; and, in pursuance of the agreemen
the premiums, gave the deposit notes, da
the policies from him. The secretary sa
titioner's inquiries, that the company, in
a surplus of $700,000; that the office, i
and good, and would go on. The petiti
cies from the secretary, and paid him th
the deposit notes as aforesaid. The pe
this amounted to fraud in matter of la
to take the policies, on November 14,

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representations as aforesaid, made by the secretary of the company. The judge found, upon the evidence, that no such false and fraudulent representations were made. Both the petitioner and company understood that the petitioner was insured after October 1, 1872, by the oral renewal of his policies.

On November 9 and 10, 1872, the company met with losses by the great fire, amounting to $1,324,574.14. The absolute assets of the company at the time, including deposit notes, were $1,115,938.72, and the statute liability of members was $985,424.12. The company was enjoined from going on with its business, November 23, 1872. On November 18, 1872, the directors, for the purpose of paying these losses, voted that all premium notes held by the company should be paid immediately; and the receivers have sued the petitioner, under this vote, upon his notes given as above. On April 23, 1873, the directors voted "that an assessment of fifty per cent. of premium and deposit be laid on all policies outstanding on November 9 and 10, 1873," for the purpose of paying the above mentioned losses. The receivers contend that the petitioner is liable to assessment under this vote, and have sued to collect the same.

Upon these facts, being of opinion that the petitioner was liable to the said assessment and upon his premium notes, the judge ordered a decree to be entered that the petition be dismissed; from which decree the petitioner appealed.

O. W. Holmes, Jr., for the petitioner.

A. A. Ranney, for the receivers.

AMES, J. The petitioner, with full knowledge of the fact that the insurance company had suffered heavily by the fire, came to the conclusion to accept the new policies which had been prepared for him upon his application, upon or before the first day of the previous October. The meaning of his application was that he desired to renew and continue his former insurance. After making such inquiry as he saw fit, he paid the premiums and gave the deposit notes dated October 1, 1872, and accepted the policies of the same date. The effect of this arrangement, *primâ facie*, and if not explained or rebutted, would be that he fully consented to stand in the same relation to the company as if the entire transaction had occurred upon the day

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of the date of the policies and the
necessarily carried with it the continge
and he must be considered as consen
should date back to that day. It was n
or original insurance, beginning then
for continuous insurance to take effect
previous policies. It is true that his ne
ally outstanding at the date of the assess
applied for them. The agreement, tha
ered to him, they should be considered a
date, and should be treated as if they ha
date, was one which he had a perfect
necessary result or incident of such agr
so accepted should be included in the
quently to that date.

It is true that in accepting the policie
formation as he had obtained from the s
But it is not charged that in giving suc
tary was guilty of any intentional or fr
tion. We find nothing in the facts re
constructive fraud, or fraud as matter o
pressed his opinion or belief that the c
to go on with its business, was sound an
However mistaken this belief has pro
ground for holding that it was utterly
was a belief which a slight examination
corrected. *Western Bank of Scotland*
Sc. 145. It had none of the qualities of
the assertion of a matter of fact, and did
thing more than the expression of an exp
A mere estimate of this sort made in g
representation of a matter of fact as to
valid claim against the receivers. See *Le*
11 Eq. 398.

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JOHN McCORMICK *vs.* CITY OF BOSTON.

Suffolk. March 7. — Sept. 8, 1876. AMES & MORTON, JJ., absent.

If a person is employed by the proper officers of a town to repair its highways, his right to maintain an action against the town, to recover compensation for his work, is not affected by the fact that the officers of the town acted from improper motives.

Where no assignment of the limits and divisions of the ways of a town is made to each highway surveyor under the Gen. Sts. c. 44, § 6, the surveyors may nevertheless act together, or by a majority of the whole board.

Two highway surveyors of a town, there having been no assignment of a particular district to each surveyor, employed men to repair a way within the town without the concurrence or knowledge of the other three surveyors, who, upon learning of the work, directed it to be stopped. The bills for the work were afterwards approved by the whole board, and did not appear to be in excess of the appropriations. Held, in an action by one of the workmen against the town, for compensation for the work done, that it was a question for the jury whether the employment was by due authority, or whether it was subsequently ratified by the whole board of surveyors.

CONTRACT for labor done in making repairs upon a highway. Trial in the Superior Court, before *Wilkinson*, J., who ordered a verdict for the defendant; and the plaintiff alleged exceptions, the substance of which appears in the opinion.

E. F. Hodges & J. W. Keith, for the plaintiff.

C. F. Kittredge, for the defendant.

COLT, J. The work for which the plaintiff claims pay was done in making ordinary repairs reasonably required upon Centre Street, in that part of the city of Boston formerly West Roxbury, which was annexed under the St. of 1873, *c.* 314. The only question is whether there was evidence to justify the jury in finding that the work of repairing the road was done by the plaintiff under a contract of employment made with agents of the town, by which West Roxbury, before its annexation, became responsible to him for it. If so, then the plaintiff is entitled to recover, and his right is not affected by the fact that the officers of the town, some or all, may have acted from improper motives. *Bay State Brick Co.* v. *Foster*, 115 Mass. 431.

It is objected that in the year 1873, when this work was done, no assignment in writing of highway districts had been made by the selectmen to the highway surveyors, as required by Gen. Sts. *c.* 44, § 6. But, in the view we take, this objection becomes immaterial, because, where no highway districts are assigned, the

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surveyors may act together, or by the v
the whole body, so as to bind the tow
charge of its public duty in this respect.
Pick. 418, 426. For the year 1873, the
chosen selectmen and highway surveyors
the discharge of their respective duties
made, that the offices are incompatible.
15 Gray, 486. *Bay State Brick Co.* v.
ing as a board of highway surveyors,
public officers and agents of the town,
repair of the highways. There was evid
was so employed by two members of the
work faithfully; that the three other me
work done for the town by directing its
and that the bills rendered for it were app
among its last official acts. If the jury
plaintiff was employed, or that his previou
ified by the whole board, his claim for co
defeated by the failure of the selectmen
signment of highway districts.

It is further objected that the highway
thority to bind the town for the plaintiff's
because the sum granted by the town for
for the year 1873 had been previously exp
tended that there was any neglect on the
vote a sufficient sum of money for the r
any occasion for the exercise of the powe
Sts. *c.* 44, § 14. But the facts reported
amount claimed is in excess of the appropr
ways, whether the account be made up wit
as they had existed in previous years, acc
tionment of the selectmen, March 13, 187
town as constituting only one district, in the
ten assignment "of the limits and division
kept in repair by each surveyor; and this
tion, without considering whether the vot
annual meeting, authorizing the treasurer,
of the selectmen, to transfer any unexpend
balance to any department where needed,"
be sufficient answer to it.

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Upon the whole case, it could not be properly ruled, as matter of law, that the plaintiff could not maintain his action.

Exceptions sustained.

GEORGE A. GUERNSEY *vs.* JAMES P. COOK.

Suffolk. March 10. — September 8, 1876. AMES & MORTON, JJ., absent.

A contract, by which a shareholder in a corporation, in consideration of the purchase of a part of his stock at a price named, agrees to secure to the purchaser the office of treasurer of the corporation, with a fixed salary, and in case of his removal to repurchase the stock at par, is void as against public policy, and as a fraud on the other members of the corporation, in the absence of evidence that the transaction was not for the private benefit of the shareholder, or that it was consented to by the other members of the corporation.

COLT, J. The contract declared on has been held to be the personal contract of the defendant. 117 Mass. 548. It provided in substance on the part of the defendant and Mr. Beebe, who together owned a majority of the stock of the India Company, that the plaintiff should be made treasurer of that company at a stipulated salary; the plaintiff on his part agreeing to take part of their stock at par, with an agreement that it should be taken back and an allowance made for interest, "in case it should be desirable for any reason to dispense with the plaintiff's service as treasurer." The question is whether such a contract is void as being against public policy. Its decision depends upon the construction which must be fairly given to the terms of the contract.

In consideration of the purchase of a part of their stock at a price named, two of the stockholders agree to secure to the purchaser the treasurership of the corporation, of which they are members, and to secure to him also a sum named, as the annual salary of the office. The purchase of the defendant's stock and the agreement relating to the office are incorporated into the contract as part of one transaction; and each agreement is the valuable consideration of the other. The contract, if reasonably susceptible of two meanings, one legal and the other not, must indeed receive an interpretation which will support rather than

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defeat it, and the presumption is in
this contract necessarily implies tha
derive, and the plaintiff intended to
tage, not shared by the other stock
his election as treasurer. And there
closed at the trial to show that such
of the transaction, or that the agreem
and consented to by the other membe

It was the purpose and effect of t
defendant, in the decision of a que
rights of others, by considerations for
promisee was placed under direct in
duties to other members of the corp
demand his disinterested action in th
cers. He was in a relation of trust
quired him to look only to the best i
fluenced by private gain. The contra
his associates.

In *Fuller* v. *Dame*, 18 Pick. 472, a
contrary to public policy, and to oper
which tended injuriously to affect the i
of which the promisee was a member
case of a composition deed where all
common debtor upon the payment of
where a stipulation for a separate and
to be a fraud on other creditors an
15 Pick. 49. Upon the same princip
against each other at a public auction,
the employment of underbidders and
fraud upon the bidders at the sale, a
policy. So contracts with brokers or
tion founded on violations of duty to
Smith v. *Townsend*, 109 Mass. 500.
Met. 384. *Gibbs* v. *Smith*, 115 Mass
wall, 114 Mass. 187. See also *Waldo*
Marshall v. *Baltimore & Ohio Railroa*
v. *Richardson*, L. R. 5 C. P. 744.

Upon the facts disclosed, this action,
but in direct affirmance of the contrac

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White v. *Franklin Bank*, 22 Pick. 181. The objection that the contract is illegal, although it comes with no good grace from the defendant, is allowed to prevail, not as a protection to him, but for the sake of the public good, and because the court will not lend its aid to enforce an illegal contract. *Myers* v. *Meinrath*, 101 Mass. 366. *Taylor* v. *Chester*, L. R. 4 Q. B. 309.

Judgment for the defendant.

J. G. Abbott & B. Dean, for the plaintiff.

B. F. Butler & J. A. Gillis, for the defendant.

CHARLOTTE E. MORRIS *vs.* PENN MUTUAL LIFE INSURANCE COMPANY.

Suffolk. March 14. — Sept. 8, 1876. AMES & MORTON, JJ., absent.

The St. of 1861, *c.* 186, relating to the forfeiture of policies of life insurance, applies, by force of the St. of 1872, *c.* 325, § 7, to foreign as well as to domestic insurance companies.

CONTRACT on a policy of insurance upon the life of Lysander R. E. Morris, payable to the plaintiff, his wife. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on an agreed statement of facts in substance as follows:

The defendant corporation is a mutual life insurance company incorporated by the laws of the Commonwealth of Pennsylvania, and having its usual place of business in Philadelphia. On January 31, 1873, the corporation issued from its office in Philadelphia a policy of insurance on the life of Lysander R. E. Morris, a citizen of Boston, Massachusetts, for three thousand dollars, payable to the plaintiff within sixty days after due notice and proof of the death of the said Lysander; the corporation at that time transacting business in this Commonwealth by an agency established in conformity with the laws thereof, through which agency the application for this policy was made.

The consideration of this policy was an annual premium of $95.91, payable on or before January 31 in each and every year

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during the continuance of the policy
$95.91 was paid February 15, 1873.

On January 31, 1874, the policy laps
sured to pay the annual premium then
the request of the assured, and upon h
amination by the medical examiner of
sured's expense, the policy was reinsta
the premium was changed from an annu
ment, and on March 17, 1874, a payme
No other premium was paid. Lysande
January 3, 1875, and due notice and
given to the defendant. The defendant
policy.

It is further agreed that the facts, as th
ment, are such as to make the defendan
according to the provisions of the non-f
chusetts, St. of 1861, *c.* 186, provided
under subsequent legislation, applicable
such case judgment shall be entered for th
with interest from April 11, 1875; other
for the defendant.

G. G. Hubbard & A. D. Chandler, for
A. Russ, for the plaintiff.

LORD, J. The only question in this c
of 1861, *c.* 186, applies to insurance com
as are "chartered by the authority of
The St. of 1872, *c.* 325, § 7, in amendme
tion for, the St. of 1870, *c.* 349, § 5, is in

"All corporations, associations, partn
doing business in this state under any ch
ment, or statute of this or any other state
ance, guaranty, contract or pledge for the
or endowments, or for the payment of m
representatives of policy or certificate hold
be considered and deemed to be life insura
the meaning of the laws relating to life i
state, and shall not make any such insuranc
or pledge therein, or to or with any citize
state, which shall not distinctly state therei

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life benefits, the manner of payment, the period of the continuance thereof, and the amount of the annual, semiannual or quarterly premium, or by which the payment of the life benefit assured shall be contingent upon the payment of assessments made upon surviving members, nor except in accordance with, and under the conditions and restrictions of the statutes now or hereafter regulating the business of life insurance: *Provided*, that nothing in this section shall be held to conflict with the provisions of chapter one hundred and eighty-six of the acts of eighteen hundred and sixty-one." And the question arises upon the meaning of this proviso.

The defendant contends that this provision of the St. of 1872 simply means to exempt foreign corporations, &c., from the provisions of the St. of 1861. If this had been the purpose of the Legislature, it could have been aptly, clearly and definitely expressed by the use of the words, "except the act of 1861, *c.* 186," instead of the much more inapt and cumbrous language of the proviso.

The very language of the proviso, that nothing in this section shall be held to conflict with the provisions of *c.* 186 of the acts of 1861, imports that the principle which is enunciated by that act is not to be invaded. It may be said, that this object would have been accomplished by the omission of the proviso. It is perhaps true that such would have been the meaning; still, by way of greater caution, it may have been inserted. It was said in the argument, that the laws of different states have different provisions upon the subject of forfeiture, and that different insurers make different provisions in their policies upon that subject. The Legislature may perhaps have had doubt whether the phrase "regulating the business of insurance" applied to anything more than the mode of entering upon the contract of insurance, and whether, if left alone, it would extend to those provisions of law which are designed to affect the parties after the termination of the contract. The very fact that the laws of different states make different provisions, and that different insurers insert different rules in relation to forfeitures by reason of non-payment of premium, may have been the reason why the Legislature chose to declare, in explicit terms, that, whatever may be the provisions of the policy relating to forfeiture, the

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rule adopted by Massachusetts shall
that nothing shall be held to be in co

It is not to be presumed, unless
compels us thus to hold, that the Leg
citizens paid money to a corporation
this Commonwealth, it should not be
upon the happening of a certain co
a foreign company, it should, upon
contingency, be absolutely lost and
is an act confined to corporations ch
Massachusetts; the provisions of the
to determine the value of a policy an
to it, when the contract has been ter
ment; and the most rational constru
the proviso is, that it is the provision
islature meant to secure in relation to

To limit the language of the pro
"except the St. of 1861, *c.* 186," wo
constrained construction to language
vious meaning. Whether the non-fo
or unwise, whether or not it receives
of insurers and insured, we must reco
fact that the Legislature has taken
of this Commonwealth to all contract
that there shall be nothing in their
the provision of that act. It being
sions of the St. of 1861 are applica
plaintiff is entitled to recover, there

Ju

* By the St. of 1877, *c.* 61, passed Marc
upon its passage, it is provided that the pro
"shall not apply to life insurance compan
states or countries, legally transacting busine

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WILLIAM B. FRUE *vs.* ELISHA T. LORING.

Suffolk. March 22. — Sept. 9, 1876. DEVENS & LORD, JJ., absent.

A bill in equity alleged an agreement between the plaintiff and defendant that the plaintiff's shares of stock, allotted to him on the formation of certain mining companies, should be issued to the defendant as trustee, to be held by him until the assessments, to become due from the plaintiff thereon, should be paid; that the plaintiff had paid more than was due on his shares, as shown by an account annexed to the bill; that the defendant had sold the shares and appropriated the proceeds; and prayed for an account, for the balance due on the over-payment of the assessments, and for payment of the highest value of the stock since the plaintiff became entitled to it. *Held*, on demurrer, that the plaintiff had a plain, adequate and complete remedy at law.

BILL IN EQUITY. The defendant demurred for want of equity, and on the ground that the plaintiff had a plain, adequate and complete remedy at law. The case was heard on the bill and demurrer by *Wells*, J., and reserved for the consideration of the full court. The material allegations of the bill appear in the opinion.

C. A. Welch, for the defendant.

B. F. Thomas, for the plaintiff, cited *Hobart* v. *Andrews*, 21 Pick. 526, 533; *Raynham Congregational Society* v. *Trustees of Fund in Raynham*, 23 Pick. 148, 153; *Burlingame* v. *Hobbs*, 12 Gray, 367; *Safford* v. *Rantoul*, 12 Pick. 233; *Bryant* v. *Russell*, 23 Pick. 508, 521; *Ward* v. *Lewis*, 4 Pick. 518; *Wright* v. *Dame*, 22 Pick. 55; *Bowditch* v. *Banuelos*, 1 Gray, 220, 229; *Fowle* v. *Lawrason*, 5 Pet. 495, 503.

COLT, J. The equity jurisdiction of this court, by the terms of the statute, embraces suits and proceedings for enforcing and regulating the execution of trusts, whether the trusts relate to real or personal estate, subject to the general provision which excludes such jurisdiction where the parties have a plain, adequate and complete remedy at common law. Gen. Sts. *c.* 113, § 2.

The plaintiff seeks to charge the defendant as trustee for the appropriation to his own use of certain shares of stock held in trust. The bill alleges an agreement between the parties and certain other persons named for the purchase of mining lands on Lake Superior and the formation of mining corporations; the

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subsequent formation of two compa
them of the land purchased; the all
proprietors; and the agreement be
defendant that the plaintiff's share
fendant as trustee, to be held by hi
become due from the plaintiff there
leges the plaintiff's payment of more
referring to annexed exhibits for th
charges the defendant with the wron
the appropriation of the proceeds.
fendant's oath to his answer and seek
to the relief. The prayer is for an a
balance due over the assessments p
highest value of the stock since the p
it with all dividends, and for genera
whether the bill shows a case in whi
effectual remedy at law.

It is plain, from the allegations in th
ter in controversy is the plaintiff's title
question, and his right to claim that t
their value good to him. He does not
of trust property in the possession of
that it has been sold, and we assume t
purchaser by good title, discharged of
reduced to a claim for compensation in
sion of property of which he claims to
right will be determined by settling hi
He seeks no discovery, and there is not
that his right to compensation may not
and that his title may not be as comple
forced at law as in equity. The jurisdic
it is said, equally to express and impl
Dame, 22 Pick. 55; and yet it has never
embraced all such cases of implied trust
tions created by a pledge or mortgage of
transfer of choses in action, or shares in a
as collateral security for the payment of
arise between principal and agent, or betw
unless there were facts alleged showing ei

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covery in support of the bill, or relief in some form peculiar to courts of equity. In none of the cases cited by the plaintiff, in which the objection has been taken by demurrer, will be found a clear departure from this rule. In most of them an account of the trust, or a discovery, or a delivery of trust property, was prayed for. *Hobart* v. *Andrews*, 21 Pick. 526. *Raynham Congregational Society* v. *Trustees of Fund in Raynham*, 23 Pick. 148. *Burlingame* v. *Hobbs*, 12 Gray, 367.

The rule of damages in equity cannot be more favorable than at law to the plaintiff, when he asks compensation only for the conversion of his property.

Nor can this bill be maintained under the jurisdiction given to this court in suits upon accounts, when the nature of the account is such that it cannot be conveniently and properly adjusted and settled in an action at law. It is not shown by sufficiently distinct allegations that there is any peculiar difficulty in ascertaining the true state of the account between the parties. It is not charged that there has been any refusal to render an account; the charge is rather that the defendant refused to account for the proceeds of the stock sold. The elements and means of stating the account appear to be accessible to the plaintiff, for he annexes to his bill a full statement of its items. The real question is of the ownership of the stock, and that question does not appear by the bill to depend upon "long, complicated and cross accounts." It is said that courts of equity will decline to take jurisdiction under this head where the accounts are all on one side; or where there is a single matter on the side of the plaintiff and mere set-offs on the other side, and no discovery is sought. 1 Story Eq. Jur. § 459, note and cases cited. Adams Eq. 222. See also *Locke* v. *Bennett*, 7 Cush. 445, 449; *Foley* v. *Hill*, 2 H. L. Cas. 28.

The construction, which we here give to the general clause restricting jurisdiction to cases where the remedy is imperfect at law, is that which has been in many cases recently given under other heads of equity jurisdiction. Thus a bill to redeem a mortgage of personal property was dismissed because it did not show that, from the nature of the property, the peculiar relations of the parties, or the difficulty of ascertaining the amount to be paid or tendered, the mode of redemption pointed out by

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the statute was not sufficient to pro
Gordon v. *Clapp*, 111 Mass. 22; alt
taining such averments, was maintain
Iron Works v. *Montague*, 108 Mass.
hall, 115 Mass. 244, the court refu
favor of the vendor for the specific
when all that remained to be done w
by the defendant; and in *Suter* v.
it was declared that there was no con
of fraud where there is a plain and
See also *Ward* v. *Peck*, 114 Mass. 1

ALBERT E. PATRICK & another

Suffolk. March 20. — September 8, 1876

The St. of 1872, c. 318, § 2, providing that the st
150, § 5, to be filed with the clerk of a city or
shall set forth in addition to its present provis
performed or furnished," does not apply to a
labor only.

At the trial of a petition to enforce a lien under
statement filed in the office of the city clerk a
a block of seven houses, situated on the corner
the city of Boston, supposed to belong to Dr.
said buildings were situated measuring about
Tremont Street, and bounded northwesterly o
on Kendall Street; that such labor was perfo
and by virtue of an agreement with a person
procure the same to be done. *Held*, that the
ownership of the land, and described the wor
partners; that the name of the owner was s
petitioners knew; and that the authority und
stated.

PETITION to enforce a lien under t
performed, in the construction of a b
The petition averred that said buildi
they were situated, were owned by t
petitioners performed and furnished
consent of the owner of said buildings

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one George A. Patrick, a person having authority from said owner to procure the same to be done. The answer contained a denial that the petitioners had any contract with Patrick to do any such work, and that Patrick had no right or authority to procure such labor to be done.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the petitioners put in evidence the following statement, signed and sworn to, by David D. Lord, and filed with the city clerk according to law:

"The undersigned, David D. Lord, on behalf of himself and Albert E. Patrick, on oath deposes and says: That they have performed labor on a block of seven houses, situated on the corner of Tremont and Kendall Streets, in the city of Boston, supposed to belong to Dr. T. H. Smith, — the land on which said buildings are situated measuring about one hundred and fifty feet on said Tremont Street; that said labor was performed by consent of the said Smith, and by virtue of an agreement with a person having authority from said Smith to procure the same to be done; and that the following is a true statement of the labor so done and performed, with all credits upon the same, viz.:

Laying 21,500 face brick, at twelve dollars a thousand .	$258 00
By cash at two several times, viz. $50 and $20 . .	70 00
	$188 00

and that we claim a lien upon said land and buildings for the said sum of one hundred and eighty-eight dollars. Said land is bounded northwesterly on Tremont Street, and northeasterly on said Kendall Street; that said labor commenced September 18, 1873, and ended on October 18, 1873."

The petitioners then put in evidence a contract in writing between the respondent and George A. Patrick, dated September, 1873, by which it appeared that Patrick agreed to furnish the staging and lay all the bricks in the erection of the block of buildings in question for a price therein agreed upon; and also evidence of a verbal agreement made by them with Patrick in September, 1873, to lay all the face brick for said building at $12.50 per thousand; and that the petitioners laid said brick under and by virtue of said verbal agreement. To all this evidence the respondent objected, because neither the said state-

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ment nor the petition con
or of either of them ; but

The petitioners admitte
saw the respondent nearly
brick ; that they at that t
respondent then, and also a
owned the land on which sa
was admitted by the respond
petitioners admitted that the
labor, have stated the numbe
ing said brick. It also appea
printed in full, "Timothy H.
of the year 1872, and that the
in Boston, who so appeared i
Lord testified that he believed
did not know that T. was Tim
testified that he supposed he mi
Timothy. The other petitioner
testify on this point.

The respondent asked the judg
ment was informal, and insufficie

"1. That it contained no state
the land, and no proper statement
the building. 2. That it did not
tioners performed said labor jointl
were interested, and was not sufficie
executed. 3. That said land was n
That it does not state the number of
as required by the St. of 1872, c. 31
contain any statement that the labor
tion,' 'alteration,' or 'repair' of said

But the judge ruled that said state
respects, and found for the petitioners.
exceptions.

J. B. Richardson, for the respondent.

B. D. Washburn, for the petitioners.

AMES, J. The St. of 1872, c. 318, up
grounds one branch of his defence, is no
The purpose of that statute was merely

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case where the claim is made up of labor and materials furnished, and the lien for the materials fails to attach for want of the notice required by Gen. Sts. *c.* 150, § 2, the lien for the labor performed shall nevertheless be preserved, provided it can be distinctly shown what the labor was worth. In such a case the statute also requires that the number of days of labor performed or furnished, and the value of the same, shall be specified in the statement filed with the clerk of the city or town. But the contract under which the petitioners' claim arises was for labor only, and therefore there was no necessity to specify the number of the days of labor as a separate item.

The remaining objections urged by the respondent against the petitioners' right of action are also untenable. In the absence of any evidence tending to show that the owner of the building was not also the owner of the land upon which it stands, the averment in the written claim filed with the city clerk, that the block of buildings was supposed to belong to the respondent, may be considered as applicable to the land under and adjoining the building. The averment that "they" performed the labor, and the manner in which the labor is charged, amount to an averment that they performed it jointly and as partners. The description of the land upon which the buildings stood was a sufficient identification for the purposes of this process. The name of the owner was given by the terms of the written statement as T. H. Smith, and it appeared that at the time when that statement was filed, this was all that the petitioner, Lord, by whom it was filed, knew as to the defendant's name. See *Kelly* v. *Laws*, 109 Mass. 395. Gen. Sts. 150, § 5. And the description of the work done, as given in the statement, is sufficient to show that it was done in constructing, altering or repairing the respondent's building within the meaning of the statute. The petition contains a sufficient averment of the contract under which the work was done, and the statute does not require any more particular account of the authority of George A. Patrick, the original contractor, to employ the petitioners to do the work.

Exceptions overruled.

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HARVEY KING *vs.* JOSIAH

Suffolk. March 21. — September 8, 187(

In an action brought by a mortgagee against property by a removal of fixtures, evidence injury and before the action was brought, un the mortgaged premises for more than enou cumbrances, is admissible in mitigation of dan

TORT for breaking and entering t moving certain fixtures therefrom. two counts. At the trial in the Supe C. J., the jury returned a verdict for exceptions was allowed, the material the opinion.

G. W. Park, for the defendants.

J. F. Pickering, for the plaintiff.

COLT, J. Both counts in the plai trespass to real estate, and allege the of the fixtures and other parts of a dwe ing. The plaintiff at the trial claimed for the injury to his security. The de that after the injury complained of, an begun, the plaintiff, under the power sold the premises for more than enoug prior incumbrances, and conveyed the The defendants' answer was a general was then made or is now made as to the dence under the pleadings. The judge of damages was the actual amount of building, and excluded the evidence. this evidence upon the question of dam cluded.

A mortgagee, if there is anything due in possession or not, may maintain an ac the full value of fixtures wrongfully remo his security has been thereby diminished the right to recover does not depend on p of the security; because, until the whole

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gagee has a right to the whole security pledged, and, if deprived of any part of it, he is entitled to full redress therefor. A mortgagor in possession may also recover for the same injury in an action of trespass, by way of aggravation. It does not follow however, that the defendant is compelled to pay full damages to each successively, because he may escape the claim of the latter by showing that he has settled with one having superior right; and, satisfaction so made, discharges the claims of all. When the action is trespass for a breach of the close, damages for the removal of the fixtures are incidental to the action and separable from it. But, in whatever form recovered, they arise out of and pertain to the estate, and, when recovered by a mortgagee, must be applied by him in payment of the mortgage debt. It was accordingly held in *Gooding* v. *Shea*, 103 Mass. 360, that a mortgagee could recover the full amount of the damages caused to the estate by the removal of the fixtures, without regard to the sufficiency of the security, and although the mortgagor in possession had sued the defendant for the same acts. See, also, *Byrom* v. *Chapin*, 113 Mass. 308. The rule which prevails in New York is otherwise, and the plaintiff is required in such case to show the insufficiency of the security. *Lane* v. *Hitchcock*, 14 Johns. 213. *Gardner* v. *Heartt*, 3 Denio, 232.

In the case at bar, evidence of the payment of the plaintiff's mortgage and the termination of his interest in the mortgaged estate was offered by the defendant. The general rule is that damages must be precisely commensurate with the injury which the plaintiff suffers by the act of wrong at the time it was committed; but under this rule the defendant is constantly permitted to give in evidence the plaintiff's subsequent change of relation to the property, for the purpose of showing that the damages, to which he would otherwise have been entitled, have been thereby diminished. Thus, if he has only a special property, or a qualified interest, subject to which the defendant has acquired title, and the plaintiff can be indemnified by a sum less than the full value, that sum is the measure of damages. *Chamberlin* v. *Shaw*, 18 Pick. 278. So when in trover the property has been restored to the plaintiff, or been applied to the payment of his debts, or otherwise come to his use, the fact may be shown in mitigation of damages. *Pierce* v. *Benjamin*, 14 Pick.

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356. *Kaley* v. *Shed*, 10 Met. 317.
551. And in no case can a party
interest recover damages beyond the
cept as he is trustee, and responsible
Jarvis v. *Rogers*, 15 Mass. 389. If
here to recover full damages, he woul
no responsibility over, or he would be
mediately to the owner of the equity
and who then had a right of action
land subject to the mortgage is the
offered, who appears to have suffered
removal of the fixtures; and there *is*
vents the defendant from showing that
the plaintiff's claim for damages at lea

CHARLES GREENWOOD *vs.* ELOUISE M
trix.

Suffolk. March 21. — May 6, 1876. Sept.
LORD, JJ., absent.

An action against an administrator was referred by
returned his award in favor of the plaintiff. The a
ings in the Probate Court, represented the estate
were appointed by that court to receive and exam
Held, that the plaintiff was entitled to judgment on
tion for his costs against the administrator personall
damages awarded must be stayed to await the determ
the Probate Court. *Held*, also, that, on the motion fo
court of law could not try the question of the validity
estate, in order to determine whether the estate was o

CONTRACT against the administratrix of
Writ dated October 28, 1872. Trial in thi
C. J., who reported the case to the full co
follows:

The defendant having obtained leave from
to adjust this suit by arbitration, upon agree
it was referred by rule of court, October 21,

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aree returned his award in favor of the plaintiff on January 15, 1876.

On February 10, 1876, the defendant filed a supplemental answer, alleging that she had represented the estate insolvent, and commissioners had been appointed by the Probate Court, and moving for a continuance of the suit to await the proceedings in the Probate Court. The plaintiff moved for judgment upon the award.

At the hearing upon these motions, the following facts were admitted: On September 25, 1871, the defendant was appointed administratrix, and gave bond for $25,000. At about the same time, it was intimated to her by a third party that the plaintiff intended to make a claim against the estate, and on March 17, 1872, he himself informed her verbally that he had such a claim, and in August, 1872, she received written notice from the plaintiff of his demand, in which were stated the several claims involved in this suit, amounting in all to $17,852.88. On September 27, 1873, the defendant made and obtained leave to file in the Probate Court an affidavit that she gave notice of her appointment within three months from September 25, 1871. On February 7, 1876, she filed in the Probate Court the statement of debts and representation of insolvency, and commissioners were appointed to receive and examine the claims of creditors. The first and only appraisal of the estate was made February 8, 1876, by appraisers appointed February 7, 1876, and the defendant's only inventory was filed February 9, 1876, and which included nothing besides property and the proceeds and income from property within the defendant's control and knowledge at the commencement of her administration of the estate.

Copies of the statement of debts, representation of insolvency, and the appraisement of the estate were annexed to the report. The statement of debts showed debts due persons other than the plaintiff amounting to $18,600, and stated that the "administratrix, believing no other debts to exist and that the said estate was solvent, paid, within a year or thereabouts after the decease of said McGilvray, all the above mentioned debts." The statement then set forth the award in the present case, that the damages and costs therein amounted to over twelve thousand dollars; that the estate not having sufficient cash assets to pay the

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first above mentioned debts, the a
time, advanced to said estate money
and had reimbursed herself, from t
the assets of the estate; that the s
named debts, with the expenses an
amounted to more than the whole
hands as administratrix; and that
the award was sustained.

The representation of insolvency s
due from the estate to the amount of
$150, and charges of administrati
$34,750; and the assets: real esta
$19,000, making in all $29,000; tha
insolvent, and praying for the appoint

The appraisement stated the real es
and the personal at $18,460.

It was ruled that the plaintiff was
the award, but not to execution there
served, at the plaintiff's request, for th
court, such judgment or order to be
may require.

T. H. Sweetser & W. H. Drury, for t
T. H. Russell & C. T. Russell, Jr.,
not called upon.

ENDICOTT, J. The statutes of this
that the distribution of the estate of
insolvent, shall be made in the Probate
When, on the representation of an ex
it appears that the estate in his hands
for the payment of the debts of the dec
bate may appoint commissioners to r
claims, and return a list of those laid be
they have allowed. The St. of 1873,
judge of probate to receive, examine an
stead of appointing commissioners, has
case, as commissioners were appointed.

Before appointing commissioners, the
called upon to pass upon the validity o
he is only to ascertain whether, upon th

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"it appears that the estate of the deceased will probably be insufficient for the payment of his debts." Such appointment does not settle or determine whether the claims are just claims, or that the estate is in fact insolvent. The commissioners thus appointed are sworn officers, to whom the duty is delegated of determining what claims shall be allowed as debts; and as they decide upon the claims laid before them, and make return thereof, the question of insolvency is decided. Any person whose claim is disallowed in whole or in part, or any executor or administrator, dissatisfied with the allowance of any claim, may appeal, and the claim shall be determined at common law in this court or the Superior Court, according to its amount; and the case shall be tried as if the supposed creditor had brought his action against the executor or administrator. Gen. Sts. *c.* 99, § 8. This section has been amended by adding that any heir, legatee, devisee or creditor of the estate may appeal from the allowance of any claim by the commissioners. St. 1865, *c.* 258.

When the commissioners make their return, the judge of probate does not pass thereon. If it appears that the debts allowed do not exceed the assets, the estate must be settled as if no representation had been made. If they do exceed the assets, and an appeal is not taken within thirty days, the return of the commissioners is conclusive, and the estate must be distributed accordingly. If there is an appeal, the settlement of the estate must await the decision of the appeal.

The appeal is to be prosecuted as in actions at law, except that no execution shall be awarded against the executor or administrator for a debt found due the claimant. But the final judgment so obtained is conclusive, and the list of debts found by the commissioners shall be altered, if necessary, to conform thereto. Gen. Sts. *c.* 99, § 10. If an action is pending at the time the estate is represented to be insolvent, the action may be discontinued, in which case the creditor may prove his claim before the commissioners; or if it is disputed, it may be tried, and judgment rendered "in the same manner and with the same effect as is provided in the case of an appeal from the award of commissioners," (in which case the judgment is conclusive, but no execution can issue,) or it may be continued until it appears

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that the estate is insolvent, and, if r
ecuted as if no representation of insc
The same section also provides th
tained by a creditor after an estate
vent, unless for a demand entitled t
assets prove more than sufficient to
the commissioners.

It is obvious from this review of
intended to establish a complete syst
bate Court for the equal distribution
person among all his creditors in the
confer upon the Probate Court exclu
such distribution after the debts due
determined, and the fact of insolvency

In the case at bar, the representat
appointment of commissioners were n
returned, and before judgment was e
within the provisions of § 20, and whil
be entered, the presiding judge proper
tion to issue.

As before stated, the order of the ju
commissioners does not establish the
volve any decision as to the validity o
by the administrator to have been made
questions have been delegated to commi
designated by the statute to determin
which the plaintiff contends cannot nov
estate, are allowed by the commissioners
peal determine their validity; St. 1865
and the estate does not appear to be in
execution. To try, in an action at law p
when a representation of insolvency is n
or more claims pending before the com
defeat the obvious intent of the statute.

If the plaintiff's view is correct, whe
of insolvency by an executor or admin
have been appointed by the Probate Cou
tried in every suit then pending against
or all the claims so sent to commissioner

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be lawfully allowed by them. It is evident that such a course might result in several trials of the same questions before different tribunals, with different results, and great confusion and embarrassment might ensue; and we are of opinion that the course pointed out by the statutes must be followed by the plaintiff, and that he cannot try those questions in this case.

The case does not fall within the principle laid down in numerous decisions of this court, some of which are cited by the plaintiff, that where the Probate Court exceeds its powers, or does an act prohibited by law, its decree may be avoided, not only by appeal, but in collateral proceedings.

Judgment for the plaintiff, and execution stayed.

The plaintiff subsequently filed a motion that an order be made that execution for costs issue against the defendant.

W. H. Drury, for the plaintiff.

C. T. Russell & T. H. Russell, for the defendant.

ENDICOTT, J. At the former argument, the question was not presented, whether an execution for costs could issue while the execution for the debt is stayed.

When a judgment is entered for debt or damages against an executor, the costs, as in other cases, follow the judgment; and the statute provides that two executions may issue: one for the debt, against the goods and estate of the deceased in the hands of the executor; and another for the costs, against the goods, estate and body of the executor, as if for his own debt. Gen. Sts. *c.* 128, §§ 6–8. The execution for the debt may be stayed by proceeding in insolvency; Gen. Sts. *c.* 99, § 10; but there is no provision for staying the execution for the costs.

The first execution cannot issue, because the Gen. Sts. *c.* 99, § 10, provide that the judgment for the amount of the debt shall not be satisfied on execution, when commissioners have been appointed, but may be satisfied, in whole or in part, in the Probate Court. Ordinarily, the execution for costs against the executor would not precede the execution for the debt against the estate; but when, in case of insolvency, the judgment for the debt must be paid in another way, an execution for costs may issue, although no execution can issue for the debt. The words "another execution for the costs," in *c.* 128, § 8, mean a different or

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separate execution, and the right to tak
the execution for the debt is stayed.
upon the executrix in this case may b
in the Probate Court, if there was rea
fence of the suit. *Exec*

SENECA PETTEE *vs.* JOHN W

Suffolk. March 31. — Sept. 8, 1876. DEV

On the trial of a writ of entry, it appeared in evidenc
the land in question as the property of A. on June
levied thereon; that A. derived title from B., the
the land was subject to a mortgage from B. to C., w
for the deed, was to assume and pay "as his own del
indemnified therefrom; that A., on June 27, 1871, w
will of D., to whom C. had assigned the mortgage
attachment, A., as executor, entered upon the mortg
condition, assigned the mortgage for full value to t
ceeds to pay legacies; that A. included the mortg
estate, and, in his final account, charged himself with
tory. *Held*, that a ruling that, as matter of law, the
ified, was incorrect.

WRIT OF ENTRY to recover a parcel of l
nul disseisin. Trial in the Superior Cou
without a jury, who found for the demanda
of exceptions, the substance of which appe

A. A. Ranney & D. F. Crane, for the te

W. F. Slocum, for the demandant.

COLT, J. The demandant claimed the d
levy on execution against one Appleton. T
on the writ against him on June 28, 1871,
title related back to that date.

The premises were originally subject to
been conveyed by Blanchard to Appleton
recital that the land was subject to this mo
which the grantee, in part consideration for
sume and pay "as his own debt," and save
and indemnified therefrom.

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On June 27, 1871, Appleton was appointed executor of the will of Elizabeth Batterman, the owner of the mortgage at the time of her death. In the inventory returned by him he included this mortgage as among the assets of the estate, and in his final account charged himself with the full amount of the inventory. After the demandant's attachment of the premises, Appleton, as executor, entered upon the land for breach of condition and assigned the mortgage to the tenant in this action, who offered evidence to prove that he paid full value for it, and that the proceeds were used by the executor to pay legacies.

The case was tried without a jury, and the court ruled, as matter of law upon these facts, that the mortgage was paid and discharged. The demandant contends that the acceptance of the deed above stated made Appleton responsible for the payment of the mortgage; *Pike* v. *Brown*, 7 Cush. 133; and that his subsequent appointment as executor, with the inventory and account rendered by him, operated as a payment of the mortgage. He seeks to apply the familiar rule which charges an executor or administrator with all debts due from him to the testator or intestate at the time of his appointment. *Ipswich Manuf. Co.* v. *Story*, 5 Met. 310, 313. *Chenery* v. *Davis*, 16 Gray, 89. *Leland* v. *Felton*, 1 Allen, 531. *Hazelton* v. *Valentine*, 113 Mass. 472. *Commonwealth* v. *Gould*, 118 Mass. 300.

But this case does not come within that rule. In the cases cited, the debt was directly due to the testator or the intestate from the executor or administrator; the same hand was required both to pay and to receive the money; a suit to recover it would make the same person both plaintiff and defendant. Here there was no debt at any time existing from Appleton to Elizabeth Batterman, the testatrix; her claim was solely against Blanchard, the mortgagor; and Appleton's agreement to pay and indemnify was only with Blanchard, who, if the mortgage should be paid by the land without resort to his personal liability, would have no claim against any one. It was a promise which Blanchard alone could enforce; there was no privity between Appleton and the mortgagee. *Mellen* v. *Whipple*, 1 Gray, 317. *Exchange Bank* v. *Rice*, 107 Mass. 37, 41. It was rightly inventoried as personal assets in the hands of the executor, who might maintain an action in his own name as executor

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directly against the mortgagor, or p
enforce its payment, and who is ex
mortgaged real estate, at any time b
the right of redemption, in the same
of a person deceased. Gen. Sts. c.
realized is of course rightly to be ren

The rule of constructive payment
substantial injustice, will not be ap
brought strictly within it, as illustrate
Ensign, 18 Pick. 232, where this cou
favor of the purchaser of an equity of r
as in that, if the rule were permitted to
probably be to deprive the tenant of h
faith by the assignment of the mortgage
the estate, or to charge the sureties o
amount, giving the whole benefit to
tached the estate as the property of the
hold it relieved from the Blanchard mor

Upon the facts reported, the Blancha
declared paid and satisfied as matter of l

JOSHUA M. SEARS *vs.* ALPHEUS H

Suffolk. March 22, 23. — 29, 1876. June 2
DEVENS & LORD, JJ., abs

ALPHEUS HARDY & another, trustees, *vs*
& others.

June 20. — September 8, 1876. DEVENS &

On a bill in equity against a trustee under a will to estab
bulk of the estate, the court will order persons, who ma
que trust under the will, to be made parties defendant.

A testator, by his will, after various bequests to his relati
poses, gave the "rest, residue and remainder" of his "e
to hold, invest and manage the same. Then followed
heir of $30,000, to be paid him at the age of twenty-o

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cluded with the following clauses: "All such parts of the income of my estate which may be necessary for the support and education of my son I direct to be used for that purpose, and when he shall be twenty-one years old I direct that four thousand dollars be paid to him annually, when he shall be twenty-five years old six thousand per year, and ten thousand dollars per year when he shall be thirty years old. And in case of the death of my son before he arrives to the age of twenty-one years, then I direct that ten thousand dollars be paid to said town of Y. for the purpose of a library and six thousand dollars for free lectures in said town. And the residue and remainder of said estate I direct to be paid and divided, one third thereof to my brother C., one third to my brother W., and one third to the children of my brother T." Specific bequests to the town and to persons named in the last clause had been made in the first part of the will. After the payment of debts and legacies, the estate of the testator amounted to nearly a million and a half of dollars; and, when the son was twenty-one years of age, the estate had increased to over four millions of dollars. *Held*, that the bequest to the brothers under the last clause of the will was contingent on the son's dying before arriving at the age of twenty-one years. *Held, also*, that the provision for the support and education of the son ceased on his arriving at the age of twenty-one years. *Held, also*, that the annuities to be paid to the son were by way of substitution, and not cumulative. *Held, also*, that on the son's reaching the age of twenty-one years, he was entitled, by way of resulting trust, to so much of the residue of the estate as was not needed to produce the net income of ten thousand dollars.

THE FIRST CASE was a bill in equity by the heir at law of Joshua Sears against the trustees under his will, to enforce a resulting trust in the residue of his estate. The bill alleged the following facts:

That Joshua Sears died on February 7, 1857, leaving the plaintiff his only child and sole heir, then a minor, and a will, dated February 5, 1857, and duly admitted to probate, as follows:

"Know all men by these presents, that I Joshua Sears, of Yarmouth in the Commonwealth of Massachusetts, merchant, do make and publish this my last will and testament as follows, to wit: I give to my brother Charles Sears of said Yarmouth twenty-five thousand dollars. I give to my brother Willard Sears of New Bedford in said Commonwealth twenty-five thousand dollars. I give, devise and bequeath to my nieces Hannah Sears and Catherine Sears, daughters of my brother Charles Sears, the house in said Yarmouth now occupied by said Charles Sears, the stable and Register office with the land under and around them, being the same premises which said Charles Sears conveyed to me. It being understood that my brother Charles

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shall with his wife occupy the same d
of the survivor of them, they paying
premises in repair. I give to my nie
thousand dollars in full for services re
render to my son Joshua Montgomer
five years old. I give to my nephew
ten thousand dollars. I give to my n
thousand dollars, to be paid to him fi
he shall be twenty-five years old, and f
he shall be thirty-five years old, the in
payment of the principal is to be paid
tees to said Cyrus or his guardian. I
Myrick fifteen hundred dollars to set hi
to the other children of Isaac and Lu
dollars to each. I give to my nieces, t
Sally Crocker, fifteen hundred dollars to
children of my sister Hannah Hamblin
each. I order and direct my executors a
sister Hannah Hamblin the income of fi
ing her life. I give to my executors and
dollars, in trust to pay the income to m
during her life, and after her decease sai
to go to her heirs. I give to the town o
town, fifteen thousand dollars, for the
school on the North side of Yarmouth f
and kindred sciences.

"I give to the Boston Seamans Friend
dollars.

"I nominate and appoint Alpheus H
said Commonwealth, merchant, to be th
Joshua Montgomery Sears.

"I nominate and appoint Alpheus Ha
ratio Harris of Roxbury, merchants, and
Boston, counsellor at law, all of said Co
executors of and the trustees under this
will and I request that my said executors
be required to give any other or greater
probate than said judge shall under all th
case in his discretion think best.

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"All the rest, residue and remainder of my estate I give to said Alpheus Hardy, Horatio Harris and Hugh Montgomery, their heirs and assigns, as joint tenants, in trust to hold, invest, manage and take care of the same according to their best knowledge and discretion, and I wish them to invest one half part of my estate in favorable purchases of real productive estate, stores to be preferred, looking well to the value and titles thereof.

"And I wish them to invest one half part of said estate in bottom mortgages on estates which shall be considered of twice the value of the money loaned thereon, the titles of such estates to be well examined.

"I give to my son Joshua M Sears the sum of thirty thousand dollars to be paid to him at the age of twenty-one years.

"All such parts of the income of my estate which may be necessary for the support and education of my son I order to be used for that purpose, and, when he shall be twenty-one years old, I direct that four thousand dollars be paid to him annually, when he shall be twenty-five years old six thousand per year, and ten thousand dollars per year when he shall be thirty years old.

"And in case of the death of my son before he arrives to the age of twenty-one years, then I direct that ten thousand dollars be paid to the said town of Yarmouth for the purpose of a library and six thousand dollars for free lectures in said town.* And the residue and remainder of said estate I direct to be paid and divided, one third thereof to my brother Charles, one third to my brother Willard, and one third to the children of my brother Thomas W. Sears."

That Alexander Pomeroy Sears, Cyrus A. Sears and Olivia R. Sears, mentioned in the will, are the children of the testator's deceased brother Thomas W. Sears.

That the persons named as executors and trustees were duly appointed, and had, as executors, fulfilled their trust, and by their final account, which had been allowed by the Probate

* It appeared by a fac-simile of the will, which was before the court, that each paragraph began at the very beginning of a line; that the word "town" came to the end of the last line on the third page, and that the word "And" began the first line of the fourth page. At the argument, it was in dispute whether the word "And" began a new paragraph or not.

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Court, there was in their hands, c
count as executors, nearly a millio
which they charged themselves as
stituted the rest, residue and rem
Joshua Sears, after payment of his
the will, and the charges of admin
about three fourths were invested i
fourth in personal property.

That the plaintiff arrived at the
December 25, 1875; and that the de
arrived at the age of twenty-one ye
of the income of the trust estate in t
said will, as was necessary for his su

That the defendants have invested,
income of said trust estate in thei
charges and expenses of the trust, an
the same as was necessary for the sup
plaintiff; and that the value of the tr
of the defendants as trustees under
lions of dollars, invested in real esta
and the annual income thereof exceed
dollars.

That said Joshua Sears, by his saic
the death of the plaintiff before he arr
one years, that ten thousand dollars be
mouth for a public library, and six tho
in said town, and the residue and rem
directed to be paid and divided, one thi
Sears, one third to his brother Willard
the children of his brother Thomas W.

That in the event of the plaintiff
twenty-one years, said Joshua Sears, in
made no disposition whatever of any pa
and residue and remainder of his estate s
set forth, to the defendants as trustees, o
thereof, beyond the sum of thirty thousa
the plaintiff when he should arrive at
years, and the payment of four thousand
plaintiff until he should be twenty-five y

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of six thousand dollars annually until he should be thirty years old, and the sum of ten thousand dollars when he should be thirty years old.

That the plaintiff, having arrived at the age of twenty-one years, and being the sole heir of the said Joshua Sears, as such heir is entitled to so much of the trust estate in the hands of the defendants, and of the income thereof, as is not required for the payment of said thirty thousand dollars, and the payment of said sums of four thousand dollars, six thousand dollars, and ten thousand dollars.

The bill then alleged payment by the trustees to the plaintiff of the sum of $30,000, and a demand and refusal to pay so much of the rest as was not required to pay the annuities in question.

The prayer of the bill was that the defendants be ordered to convey to the plaintiff so much of the estate in their hands as trustees, and the surplus income thereof, as was not required for the payment of the annuities; and for further relief.

The answer admitted the allegations of the bill, except as to the construction of the will; suggested that, by the last clause of the will, the residue of the estate, after providing for the annuities, should be paid to the brothers of the testator and the children of a deceased brother; and submitted the questions arising on the will to the judgment of the court.

The case was reserved by *Gray*, C. J., on the bill and answer, for the consideration of the full court. Horatio Harris afterwards died, and his death was suggested of record, and the suit proceeded against the surviving trustees.

H. C. Hutchins & A. S. Wheeler, for the plaintiff.

C. T. Russell, (*T. H. Russell* with him,) for the defendants.

GRAY, C. J. The question which lies at the threshold of the investigation of this case, and the only one which the court has yet considered, is whether all the parties, who are interested in the subject matter of the suit and may be affected by the decree, are before the court, so that complete justice may be done and future litigation avoided.

Who shall be made parties to a suit in equity cannot always be determined by definite rules, but rests to some degree in the discretion of the court. Generally speaking, however, to a suit against trustees to enforce the execution of a trust, *cestuis que*

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trust, claiming present interests dir
plaintiff, should be made parties, i
the opportunity themselves to defe
obliged to rely upon the defence ma
sort to a subsequent suit against the
to take the risk of being bound by a
sence. Story Eq. Pl. §§ 72, 76*c*, 18
Hopkins v. *Hopkins*, West Ch. 606, (
Holland v. *Baker*, 3 Hare, 68, 72.
552, 557. *Caldwell* v. *Taggart*, 4 Pet
burn, 8 Wall. 318. *Michigan State*
305, 308.

In a common suit for a debt or a le
sufficiently represent the estate. St
And if the present suit were brought
plication of part of the income of the
and education of the plaintiff, it might
as parties those who might claim to be
dridge v. *Washington*, 2 Pet. 370. Bu
much wider, and affects the bulk of the

Both parties admit that the legal ti
testator's property, after the payment
vested in the trustees. Both parties rec
struction of the will, that, the plaintiff h
of twenty-one, no disposition is made of
part of the income, (except the very
latter required for the payment of an a
amount,) unless such disposition is mad
the will, directing "the residue and rema
paid and divided" to and among the test
and Willard and the children of his brot
gested, though not confidently urged, by
clause may give all the principal and inc
posed of, to those relations of the testato
it is contended for the plaintiff that this
limited, by the clause next preceding, to
under twenty-one, and has therefore no ap
principal and income not disposed of must
of resulting trust, to him as the heir at la

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In that aspect of the case, the question will be whether, by the true construction of the will, the beneficial interest in so much of the property, as is not required for the security and payment of the annuity to the plaintiff, belongs to the plaintiff as the testator's son and heir at law, or to the testator's brothers and nephews as residuary devisees.

Upon this question, justice requires that the latter should have an opportunity to be heard. Their claim, being in direct opposition to the right asserted by the plaintiff, could not be tried by joining them as co-plaintiffs with him in this bill. *Cholmondeley* v. *Clinton*, 2 J. & W. 1, 135–137; 4 Bligh, 1, 81, 123; Turn. & Russ. 107, 116. *Fulham* v. *McCarthy*, 1 H. L. Cas. 703. *Bartlett* v. *Parks*, 1 Cush. 82, 86. But we have grave doubts whether they are not necessary parties defendant to this suit, and whether, if they are not necessary parties, a decree in favor of the plaintiff would be conclusive upon them so as to prevent their hereafter bringing suit against him or against the trustees; and we are satisfied that it is at least within the discretion of the court to allow them to be made parties, and to decline to enter upon the consideration of the merits of the plaintiff's claim until they have had an opportunity to be heard, either by summoning them in as defendants in this case, or by the trustees filing a bill for instructions in the execution of their trust, to which all possible claimants of the residue of the estate may be made parties. See *Armstrong* v. *Lear*, 8 Pet. 52; *Gordon* v. *Green*, 113 Mass. 259.

Ordered accordingly.

The bill was then amended by making Willard Sears, the only surviving brother of the testator, and the descendants of the other brothers, parties defendant. They appeared and filed an answer admitting the allegations of the bill, but contending that by the true construction of the will they were entitled to so much of the residue of the estate as was not needed to pay the annuities. The answer also alleged that after the will was first drawn, and before it was signed, the clause giving thirty thousand dollars, on the son arriving at the age of twenty-one years, was interlined; and that, at the same time, the annuities to the son, which were originally written "two thousand," "four thousand" and "eight thousand," respectively, were changed to the sums as they now appear.

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THE SECOND CASE was a bill in the surviving trustees under the Joshua M. Sears, Willard Sears, a Sears and of Thomas W. Sears, stated in the first case, and prayin court upon the following points:

"First. Whether they may or c such parts of the income of said tru for the support and education, or bo gomery Sears during his natural life and to what extent they may so use t support or education, or both, ought accordance with the large amount of and whether the amount so to be use trustees.

"Second. Whether the annuities of dollars are cumulative upon or substit

"Third. Whether the said Charles the children of Thomas W. Sears, or t have any claim to or any right, title o fund and property, or any portion the the trustees as aforesaid, or in or to the portion of the income thereof.

"Fourth. Whether or not the trust convey any portion of the principal f them to said Joshua Montgomery Sears pay over or convey, then what proportic

"Fifth. Whether or not the trustee convey to said Joshua Montgomery S has heretofore accumulated in their han be received and remain from year to yea erty, after paying said annuities, and fo cation of said Joshua Montgomery Sea expenses of the trust; and if they ough cumulated and surplus income, or any po portion of said accumulated and surplu ought they so to pay him, and how ofte so paid over to him.

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"Sixth. Whether or not the plaintiffs, as surviving joint tenants of said rest and residue, are not now seised and entitled to the same, and all income thereof, or the reversion, legal or equitable, thereof, absolutely and in their own right, subject only to the charges thereon for the support and education of said Joshua Montgomery Sears, and the aforesaid annuities payable to him as aforesaid."

Both cases were reserved by *Gray*, C. J., on the bill and answers, for the consideration of the full court.

H. C. Hutchins & A. S. Wheeler, for Joshua M. Sears.

C. T. Russell, for the trustees.

B. F. Thomas, (*G. A. King* with him,) for Willard Sears and the descendants of the other brothers of the testator. 1. In ascertaining the intent of the testator, we start with the presumption of law that a man making a will does not mean to die intestate as to the bulk of his property. This presumption is greatly strengthened when it appears that careful provision is made for the heir. It gains additional force when it appears that in any contingency the will covers the entire estate. It may also be fairly presumed that the testator, having an only child and heir at law, his disposing mind and memory would be turned to the child, and that he would be especially careful to provide for him. It does not follow that he would desire to give a son the entire estate or the principal part of it; as to the wisdom or policy of such disposition, he might use his own judgment and discretion, and it is enough if it appears he has used them.

The will shows that the subject matter of providing for his son was several times under the testator's consideration. He gives a legacy to a niece for the care of the son till he is five years old. He appoints an esteemed friend his guardian. Having given certain legacies to other relatives and to charities, and created trusts for still other relatives and appointed trustees, he provides that, of the estate not theretofore disposed of, a trust fund should be created, and directs the mode of its investment. That this trust fund was not intended to include the trusts created for Cyrus A. Sears, Hannah Hamblin and Olivia R. Sears is plain from two considerations: 1. If included in this trust the income might be used for the support and education of the son,

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and thus the trusts defeated. 2. And
conclusive on this point, upon the de
mediately after that of the testator, th
uary devisees, and so the trusts be def

The trust fund being created, the te
the income as may be necessary for the
his son to be used for that purpose, ma
had the provisions for his son dire
These provisions cover the period of hi
be done for him at and after his majo
the testator's consideration, and he p
twenty-one he shall have $2000 paid h
twenty-five, $4000; when he is thirt
eight and sixteen thousand now. The
whole life of the son, and are seemingl
other gifts to Yarmouth, if his son shou
He then makes a residuary clause cov
mainder of the estate which has been t
by the will, including, as is submitted, a
the trusts created for his sister and nep
and the will is complete for the time be
tention is, however, again drawn to the s
be made for him is for the sixth time th
tion, and upon this revision and reconsi
to add to the former provision a gift of $
.e is twenty-one years of age, and to incr
two to four thousand, from four to six an
expressing, as clearly as would be possib
tion, that he did not intend his son sho
further sum from his estate than, after co
sideration, he had provided in his will.

The claim of the son is that the testa
sumes to have understood the legal effect
at the time he was settling and revising t
to his son after he was twenty-one, under
he would receive an income of from two
dred thousand dollars a year, and that, v
after a second consideration concluded to
principal and limited that to $30,000, he

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same moment he would have $3,000,000 or $4,000,000. Such a claim is without reason. Nor is it more rational to suppose that the disposition of the residue of his estate escaped the testator's attention. It is conceded that its disposition in one contingency was the subject of his consideration, to wit, the death of his son before twenty-one, and this could not have failed to suggest the other contingency. It is plain that the other contingency of the son and heir at law living to be twenty-one had been fully considered and provided for. All the gifts to him rest upon that contingency. It also is plain that the residuary clause is broad enough in its terms to give the residue to the brothers and the children of the deceased brother, unless it is linked with and made to depend upon the clause of the will immediately preceding.

The question is not to be settled by assuming that the residuary clause is but an appendage to a small gift to the town of Yarmouth; it must be settled upon such construction as shall, if possible, make the whole instrument fulfil its purpose as a will and be consistent with itself. It is said the rest and residue of said estate is the rest and residue after the new gifts to Yarmouth are deducted, and as they were not to take effect unless the son died before twenty-one, the residuary clause was not to take effect except in the same contingency. Upon the just construction of the whole will, the terms "said estate" in the residuary clause have their usual scope and meaning, and that is the entire estate which has been the subject of disposition by all the previous clauses of the will, and not merely the next preceding clause. "The residue and remainder of said estate," therefore, refer to and include the remainder of the trust to Cyrus A. Sears, if dying before thirty-five, and the principal of the trust fund for Hannah Hamblin; otherwise these are not disposed of, it being plain, for the reasons before stated, that they could not make part of the trust fund whose income was to be used for the son. The words therefore are made to do the usual office of a residuary clause and gather in any remainders or lapsed legacies from the whole estate, and the "indissoluble link," which is said to bind it to the preceding clause, is severed.

The suggestion of two residuary clauses creates confusion only, by adhering to the letter and forgetting the spirit and

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meaning. The devise to the trust their appointment is not in substa clause. What is meant by the term ' is that which remains after the prec trusts established.

Not much importance can be atta the provisions follow each other in t There is no natural order. For exam the son after he is twenty-one goes be for support and education before he place for a residuary clause is at the nects itself with the previous clause but by subject matter. If it were ins will it would not necessarily vary t clause in this will has its usual plac graph. The whole confusion as to t not removed, by assuming to connect the clause containing the new gift to dependent upon it. Assuming that and dependent, the word "then" is existence of such connection being t and opposed to the general tenor an The connection of the new gifts to Ya clause making provision for his son is I give so much income to my son at tw before he is twenty-one, so much more

The intent to make his brothers an residuary legatees is not negatived b to them specific legacies. Nothing make specific gifts to legatees, and th residuary legatees. The objection greater force to the son. *Mutato nom* testator would not have limited with to be received by his son, so much a twenty-five, so much at thirty, when h he would have the principal of millio dreds of thousands; and still more, t ters in this form when brought to co should be done for him.

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The only plausible ground on which the argument for the son can be put is that he forgot or overlooked the bulk of his property, and after consideration and reconsideration went to a point and there stopped; an assumption which would seem to stultify testator and scrivener. It is plain that the testator has not given to his son anything except provision for his support and education, the $30,000 and the annuities. What he would give him he had considered and determined. There was no reason in the mind of the testator to make the residuary clause to his next of kin contingent upon his son's dying before twenty-one, as he did not intend he should have the residue of his property whether he survived or not. The idea that the testator reasoned that if his son died before twenty-one he would not leave issue, and therefore the collateral heirs would take, is mere conjecture. If such were his purpose and intent, there was no occasion for a will to give them effect, for the son, dying before twenty-one, could make no will, and the collateral heirs would take under the statute of distributions. The argument against this residuary devise having the most moral force is the improbability that a father would leave to an only son so small a portion of his estate. This consideration cannot have weight in direct opposition to known facts offered in proof. If it were a question of the probate of the will, the comparatively small amount given to his son might have some possible, though very slight, weight upon the question of the testator's competency. But the will having been admitted to probate, the only question is, What does it say? It is too late to inquire what it should have said; and little or no weight can be given to suggestions, however ingenious, of what was the course of reasoning in the mind of the testator: if you get into this vein, it is just as reasonable to say he meant to give his son enough for an honorable support and not enough to spoil him.

2. If any part of the estate goes to the son by implication or resulting trust, it is the entire income until he is twenty-one; so much as is necessary for his support and education is to be used and the rest kept by the trustees until he is twenty-one; when twenty-one, he takes the balance of income, $30,000 of the principal, and so much more as is necessary to produce the annuities, and the balance of the principal goes to the residuary

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legatees. It will be observed that t
used the word "estate" as including
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MORTON, J. These two cases prese
may be considered together.

The first question is as to the cons
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and remainder of said estate I direct to be paid and divided, one third thereof to my brother Charles, one third to my brother Willard, and one third to the children of my brother Thomas W. Sears." It is contended that the latter clause of this paragraph is to be construed independently of the first part, and as a general residuary clause, intended by the testator to dispose of all his estate, not otherwise disposed of by his will, absolutely and without any contingency. But we are unable to give it this construction. Upon reading the whole will, the natural impression produced upon the mind is that the testator intended, by the clause in question, to make provision only for the contingency of his son's death before he was twenty-one years old. In the former parts of his will he makes bequests to several legatees, including the relatives named in the last clause, and then, in the language commonly used in general residuary clauses, devises and bequeaths "all the rest, residue and remainder of my estate to said Alpheus Hardy, Horatio Harris and Hugh Montgomery, their heirs and assigns" in trust to support and educate his son until he reaches the age of twenty-one years, to pay him thirty thousand dollars when he reaches that age, and afterwards to pay him an annuity during his life. In these provisions the testator had in view the probable contingency of his son's reaching the age of twenty-one years, and he disposes, so far as the legal title is concerned, of all his estate. His mind then turns to the possible contingency of the death of his son before he is twenty-one years old, and he gives sixteen thousand dollars to the town of Yarmouth, and the residue of his estate to his brothers and nephews, who became in that contingency his nearest relatives. Such seems to be the intention as gathered from the whole scope of the will, and the language used, in its natural construction, expresses that intention. It is too clear to admit of any question that the gift, in the clause under consideration, of sixteen thousand dollars to the town of Yarmouth was only to take effect in case of the death of the son before he arrived at the age of twenty-one years. The gift over of the residue is connected with this by the copulative "and," indicating that it was a part of the same scheme of disposition and intended to be dependent upon the same contingency. We cannot give it the construction contended for without wrenching it from its posi-

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tion and connection in the will
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there is nothing in this clause or in the other parts of the will to show an intention that the annuity of six thousand dollars should be in addition to the four thousand dollars, or that the annuity of ten thousand dollars should be in addition to the six thousand dollars.

Under the construction, which we have put upon this will, the result is that the trustees hold all the residue of the testator's estate, which, by their skilful management, has come to be very large, upon the sole trust to pay to the son an annuity which at no time can exceed ten thousand dollars. The will contains no express disposition of the rest of the income during the son's life nor of the principal after his death in the contingency which has happened, and no provisions from which any such disposition can be implied. In other words, the son having arrived at twenty-one years of age, most of the income of the trust fund and the whole of the principal is undisposed of by the will.

The rule is well settled that if a will fails to dispose of the whole of the testator's property, real or personal, the whole of the undisposed of interest, whether legal or equitable, devolves to the person on whom the law, in the absence of any disposition, casts that species of property. 1 Jarman on Wills, 502. The trustees took no beneficial interest in the residue devised to them. They took the legal estate, and it was necessary that they should hold it until the son became of age, because in the event of his dying before arriving at the age of twenty-one years, the trust fund was to be divided between the town of Yarmouth and the collateral relatives of the testator, under the last clause of the will. But the son having arrived at the age of twenty-one years, the whole beneficial interest in the estate not disposed of by the will devolved to him by way of resulting trust. *Easterbrooks* v. *Tillinghast*, 5 Gray, 17. Thus he alone is beneficially interested in the whole of the principal and income of the residue of his father's estate now held by the trustees, and the only remaining question is whether the trustees shall continue to hold the whole estate, paying him the whole income, or shall transfer to him the balance of the estate beyond what is sufficient to support the only trust declared by the will. It is conceded by all parties that in order to carry out the plain intention of the testator to secure to the son an honorable sup-

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devised to the trustees except the annuity given to the son during his life, it follows that the disposition made by the testator will be carried into effect, and his intentions, so far as he has manifested them, regarded, if a sum is set aside and retained in trust by the trustees which shall in any event be sufficient to produce the largest annuity provided for. If the income of this fund should from year to year exceed the annuity payable, the excess would go annually to the son, who is alone beneficially interested in the estate.

The result of the whole case therefore is that the trustees are to retain sufficient of the property in their hands to produce a net income of ten thousand dollars, and the balance of the property is to be transferred to Joshua M. Sears. The terms and details of the decree will be settled before a single justice.

Decree accordingly.

HANNAH B. CLARK *vs.* WILLIAM D. MARTIN.

Suffolk. March 8. — Sept. 9, 1876. AMES & MORTON, JJ., absent.

In replevin the plaintiff may, without alleging special damages, recover such damages for the detention of the property as the jury, upon all the evidence, may be satisfied that the use of the property, considering its nature and character, was worth to him during the time of detention.

In replevin against an officer, who justified under an attachment on mesne process against the plaintiff's vendor, the issue was whether the sale was in fraud of creditors, and the jury were instructed that the defendant must reasonably satisfy them that the attaching party had at least a probable cause of action. *Held*, that the defendant had no ground of exception.

REPLEVIN of a horse, buggy and harness attached by the defendant, as a deputy of the sheriff of Suffolk, on a writ against J. E. Goodwin, in favor of S. J. Elder.

At the trial in the Superior Court, before *Bacon*, J., it appeared by the return of the officer in the last named suit that the attachment was made on June 13, 1874, and that the property was replevied from him on the same day; and it further appeared, from the return indorsed on the replevin writ, that the property was delivered to the plaintiff on June 16, 1874.

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It was in evidence that the prop plaintiff a few days before the attac and that before the attachment she w horse, carriage and harness nearly other evidence of their value, or of w was worth.

The defendant asked the judge to i plaintiff claimed special damages for erty, she must allege and prove them were the subject of a special action.

But the judge declined to give this the jury that if they found for the the declaration, award her such dam upon all the evidence, they should property was worth to her during the ering the nature and character of the

It appeared from the testimony of fendant, that the plaintiff had purcha win a short time before by a sale w the parties, and the principal questior or not this sale was fraudulent as Goodwin, and whether the creditors that ground.

Upon this point the judge instruct the defendant to impeach that sale up fraudulent as against creditors, he n jury that the plaintiff in the suit in tached had at least a probable cause o

The jury found for the plaintiff, an sum of twelve dollars; and the defen

G. W. Morse, for the defendant.

T. S. Harlow, for the plaintiff.

LORD, J. Two exceptions were ta which can be sustained. The ruling correct upon the question of damag reported for the purpose of showing entitled to other than nominal damag property, and the rule laid down by one.

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The property replevied had been conveyed to the plaintiff. Her title to it was good as against every person except a creditor of Goodwin. It was only as a creditor of Goodwin that Elder could direct the officer to attach it, and the ruling that the defendant must show that Elder had a probable cause of action against Goodwin was as favorable to the defendant as he had a right to ask. If Elder was not a creditor of Goodwin, he had no right to question the validity of the conveyance by Goodwin to Clark. It is not the case of an officer attaching the property of the person named in his precept. Had this property been Goodwin's, the officer would have been justified in obeying his precept and attaching it, though the event might show that Elder had no cause of action; but as he took property which Goodwin had conveyed, he must justify the taking by at least as much evidence as was required of him.

Exceptions overruled.

EDWARD M. CASWELL *vs.* HIRAM B. CROSS.

Suffolk. March 17. — Sept. 9, 1876. AMES & MORTON, JJ., absent.

One, who employs a firm of collecting agents, in response to an advertising card, in which they announce that they will treat his debtors "with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended," giving no special instructions, authorizes them to use such means as they see fit to adopt, in the prosecution of his business for his benefit, and is responsible therefor.

TORT for an arrest and false imprisonment. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts, in substance as follows:

The defendant employed J. E. Cupples & Co. to collect a bill in his favor against the plaintiff, amounting to twelve dollars and accrued interest. Cupples & Co. advertise and hold themselves out to the public as a "Law and Collection Bureau," and have their place of business on School Street, in Boston. They are not regularly admitted attorneys, but they sue out writs upon claims placed in their hands for collection, sometimes

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appearing in court as the attorneys of
sometimes using the names of regularly

In all courts in the vicinity of Bost
mitted to do so, they enter their own
ways retain the exclusive control and m
in and out of court, whenever an attor
record. They use the name of a regu
for the mere purpose of complying with
addition to appearing in court in their
poor debtors arrested by them, and do
regular attorneys, in making writs and
collecting executions, &c.

Upon the claim placed in their han
brought an action against the plaintiff
of Boston, using the name of a regularl
recovered judgment on September 1, 1
amount of $15.12 debt and $8.19 costs,
tion in favor of the plaintiff on said ju
was duly returned in no part satisfied.

Cupples & Co. then brought another
ment in the Police Court of Charlesto
judgment, including the full amount of
costs. They then took out an execu
ment, with the usual directions for the
in said action; and one Perkins, who
ploy of Cupples & Co., and who had
of their cases in and out of court, made
by law for the arrest of poor debtors,
attached to said execution. Perkins th
an officer with instructions to arrest the
officer arrested him; he recognized wit
for the relief of poor debtors, gave the
himself to be examined, was examined
the judgment creditors, and was finall
upon taking said oath.

The judgment upon which executi
which the plaintiff was thus arrested,
dollars, excluding the costs in that a
this fact was unknown to the plaintiff

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the oath had been administered to him. Both judgments having been upon default and without his actual knowledge.

The defendant gave Cupples & Co. no special instruction as to the manner in which they were to proceed, or the proceedings they were to adopt in collecting said bill. He called upon them in answer to their advertising card sent to him, a copy of which is printed in the margin.* He had no knowledge of the manner in which they collected bills and conducted their business, except such as he derived from this advertisement, and he had no actual knowledge of any of the proceedings of Cupples & Co. and Perkins, in trying to collect his claims against the plaintiff, or in making said affidavit, or in causing the plaintiff to be arrested, until after the bringing of this suit. He left with them several other claims against other parties for collection, at the same time, Cupples & Co. agreeing with him to make no charge against him on any of his claims unless they were successful in making the collections.

Upon the foregoing facts, if the plaintiff was entitled to recover, a default was to be entered against the defendant, and the case stand for the assessment of damages only; otherwise, judgment for the defendant.

P. H. Cooney, for the plaintiff.

C. W. Turner, for the defendant.

LORD, J. It is not necessary in this case to consider whether the relation of attorney and client existed between Cupples & Co. and the defendant, nor whether the defendant understood

* "Office of 'The New England Collecting Agency' for the Special Collection of Physicians' Accounts. 3 School Street, Room 15. Boston, Mass., Dec. 1873. Sir: As the close of the year is now at hand when it is customary for books to be made up and accounts sent out, we would again direct your attention to our agency for the collection of physicians' accounts. We have made complete arrangements for systematically and promptly collecting all such, throughout the city and neighborhood. Every effort is made to trace parties who have moved, and most energetic steps are taken to compel reluctant and dilatory debtors to settle. Should you intrust us with your collections we shall take your instructions as to the manner in which you wish your debtors treated, whether with delicacy, so as not to offend them, or with such severity as to show that no trifling is intended. Our terms are ten per cent. commission on the amount we collect. Settlements made as often as wished. Yours obediently J. E. Cupples & Co."

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Cupples & Co. to hold themselves out as
card sent by them to the defendant, wh
which he responded, contains ample no
the firm and of the business pursued by
selves out as professional duns; a char
known. Their card contains full notic
they did business. They announced th
instructions; that they had modes of doi
delicacy which could not offend, or with
cated that there was to be no trifling. W
employs such agents with such knowledg
special instructions, authorizes the agen
responsible for injuries caused by the us
see fit to adopt in the prosecution of his
whether those means be honorable and
is had to insolence and insult or to m
process. They are his servants to do
manner, though that manner may be
This view of the case renders it unneces
the mere fact that the present defendant
proceedings against Caswell, and that th
Caswell was arrested was in his name
benefit would be of itself sufficient to ho
sible for the illegal arrest and imprisc
Upon the agreed statement, therefore,
defaulted, and the case is to stand for

A

HENRY F. WALLING *vs.* FREDERICK

Suffolk. March 24. — Sept. 16, 1876. DE

A bill in equity, filed in this state against a person r
relief only against him personally, was served on
pœna at his last and usual place of abode in tha
"for the purpose of excepting to the jurisdiction
an injunction against him should be vacated. T
then filed an answer to the bill, not waiving the ob
court. There was no other or formal motion to di

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wards ordered the injunction to be dissolved on the defendant filing a stipulation to abide the decree of the court in the case. The defendant filed the stipulation, and a decree was entered against him. *Held*, that the court had not acquired jurisdiction over the defendant; and that his acts did not amount to a waiver of the objection of the want of jurisdiction.

BILL IN EQUITY, filed December 29, 1874, praying for an injunction to restrain the defendants from selling certain maps. Hearing before *Ames*, J., who reported the case for the consideration of the full court, in substance as follows:

The defendant Beers resided in the State of New York, and the only service made upon him was by leaving, on December 30, 1874, a notice at his last and usual place of abode in that state, to appear and show cause why a preliminary injunction should not issue against him, as prayed for in the bill. On January 2, 1875, an injunction was issued as prayed for. On January 5, 1875, Beers filed a special appearance "for the purpose of excepting to the jurisdiction of the court," and moved "that the injunction be discharged and vacated for want of jurisdiction." This motion was overruled, and he filed an answer to the bill, not waiving the objection founded on the want of jurisdiction of the court. There was no other or formal motion to dismiss the bill as to him on that ground. It was afterwards ordered that the injunction should be dissolved, provided the defendant Beers should, within one week from the date of the order, file a written stipulation, with sufficient surety, to indemnify the plaintiff against all damages and costs, according to the final decree of the court, if any such there should be, in favor of the plaintiff, and generally to comply with such final decree. This order having been complied with, the injunction was, on January 28, 1875, dissolved.

The plaintiff was afterwards allowed to amend his bill by adding thereto a prayer that the defendants be required to render an account and to pay over to him all the profits of said publication, or an equitable portion thereof, or such as would have accrued if the work had been performed with proper skill, care and diligence.

Upon the facts of the case, it was afterwards decreed that, as to all the defendants except Beers, the bill should be dismissed, with costs; but that the bill should be maintained

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against him, and that the case be submi
tain and report the account between hi
particularly what profits Beers had de
charged with, and what damage the pla

G. Griggs & W. A. Field, for the pla

W. S. Macfarlane, for the defendant

AMES, J. The decree sought for was
fendant personally, and it was therefore
be personally brought within the jurisdi
service which was attempted to be ma
left at his last and usual place of abode
have that effect. *Spurr* v. *Scoville*, 3 C
15 Gray, 457.

It is true that he was served with a
a preliminary injunction should not is
bill, and that, upon his failure to appea
granted. And, at a later stage of the
dissolved upon his filing a written
promptly comply with any decree of t
plaintiff, if there should be any such de
case was tried upon issue joined upon
upon the ground of want of jurisdicti
There was no formal motion that the
but it is sufficient that, by the form of
tion was brought to the attention of th
by proceeding to trial afterwards, does
that he did not thereby withdraw his
diction of the court. *B*

FRANK A. HATCH, administrator, *vs*
ANCE COMPAN

Suffolk. March 28. — Sept. 21, 1876. D

No recovery can be had upon a policy of life insur
icy, if death results from the insured having v
illegal operation, known to her to be dangerou
abortion, without any justifiable medical reason.

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CONTRACT on a policy of insurance, for $1000, on the life of Flora A. Hatch, the wife of the plaintiff. The policy contained the following clause:

"This policy is issued, and accepted by the assured, upon the following express conditions and agreements: 1st. If the said person whose life is hereby insured shall die by her own act, or hand, whether sane or insane, or in, or in consequence of, a duel, or of the violation of the laws of any nation, state or province, then, and in every such case, this policy shall be null and void."

At the trial in the Superior Court, before *Colburn*, J., without a jury, the issuing of the policy, the death and due proof thereof, were admitted. The judge found the following facts:

That the insured died on April 27, 1874, by reason of a miscarriage, produced by an illegal operation, performed upon her on April 16, 1874, and voluntarily submitted to by her, with intent to cause an abortion, without any justifiable medical reason.

That such an operation is dangerous to a woman's life, and was known to be so by the deceased and her husband, but that the evidence offered in this case shows that not more than about one per cent. of such operations result in causing the death of the woman.

The defendant requested the judge to rule, as a matter of law, upon the facts found: 1. That a death so caused violates the condition of the policy, and thereby avoids it. 2. That, the death being so caused, there can be no recovery upon the policy, whether the facts do or do not amount to a breach of said condition. 3. That the plaintiff was so far connected with the cause of the death that he is not entitled to recover in this suit."

The judge declined so to rule, and ordered judgment for the plaintiff for the amount of the policy; and the defendant alleged exceptions.

D. Foster & A. D. Foster, for the defendant.

H. W. Bragg, for the plaintiff.

ENDICOTT, J. It appears by the bill of exceptions, that the deceased voluntarily submitted herself to an illegal operation, with intent to cause an abortion, without any justifiable medical reason; that the operation performed upon her was dangerous to life, and known by her to be so; and that a miscarriage was effected by the operation, from the consequences of which she died.

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It is therefore established that this v
condemned alike by the laws of nature
civilized states, and known by her to h
actually result in death. And the que
for a death so caused, the defendant is l

We are of opinion that no recovery
because the act on the part of the assu
such a character that public policy woul
from insuring her against its consequen
question that a contract to insure a wo
her dying under or in consequence of
abortion would be contrary to public
enforced in the courts of this Commo
Society v. *Bolland*, 4 Bligh N. R. 194
lian Assurance Co. 30 L. J. (N. S.) Ch.
4 E. & B. 243.

It is therefore unnecessary to consi
upon the special clause of this policy, a
bar.

JOHN CUMMINGS, administrator, *vs.* W
& others.

Suffolk. March 30. — Sept. 21, 1876. D

A testator, by his will, after giving a sum in trust
queathed one eighth part of the remainder of his
T. absolutely, and six eighths to a trustee, to pay
W. and of one eighth to T., and the income of tw
E. and M. during their lives; he directed that the
on his death, from W. and T., by note or book
their respective shares, one half from the portio
from that in trust; upon the death of W., T., E.
of his estate, the income of which was given to hi
dren, and, if without children or more remote d
the others of said four children" in equal parts
revoked that portion of his will creating a trust
stead thereof gave in trust for R. during his li
property as I may die possessed of, as my other
the will above named." T. died before the test
transferred certain bank shares to himself as tr
but retained control of them, appropriated the

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daughter ever knew that the transfers had been made until after his death. *Before the date of* his will, and up to his death, the testator had charged certain sums *on his books* to R., and, subsequently to the date of his will, certain sums to his *daughter* E. *Held*, that the portion of the remainder, given to T. absolutely, *lapsed and* became intestate property, R. taking one fourth absolutely; that the *portion given* in trust to T. passed to his brothers and sisters, R. taking one fourth *in remainder* absolutely. *Held, also*, that the charges against W. on the testator's *books*, including interest, and his notes held by the testator, were debts to be deducted from his share, one half from that given absolutely, the other from that *given in trust*, although the notes were barred by the statute of limitations. *Held, also*, that the charges against T. and his notes must be deducted from his share before its distribution, and that interest should be charged, if he had not paid it. *Held, also*, that the charges against R. and E. must also be deducted from their shares, as debts. *Held, also*, that there was no completed gift of the bank shares or transfer of title, and that they must be considered as assets of the estate, and so administered. *Held, also*, that the deductions to be made from the fund held in trust must be from the principal and not from the income.

BILL IN EQUITY originally brought by Andrew T. Hall, executor of the will and codicil of William Bramhall, and, after the death of Hall, revived by the administrator with the will annexed of the estate of Bramhall, to obtain the instructions of the court.

The will of the testator, dated April 18, 1865, contained the following clauses:

"Fourth. I give and bequeath the sum of twelve thousand dollars to said Andrew T. Hall, in trust, for the benefit of my son Robert Bramhall during his life, to be used and applied as follows: The said Hall is to keep the same safely invested, and pay to said Robert Bramhall all the net income thereof, as often as received, taking his receipt therefor."

"Sixth. I give, devise and bequeath one eighth part of all the remainder of my estate, real and personal, to each of my two sons, William T. Bramhall and Thomas M. Bramhall, their heirs and assigns forever.

"Seventh. I give, devise and bequeath the other six eighth parts of all said remainder of my estate to the said Andrew T. Hall, in trust, to manage and take care of the same, keeping it properly invested, and pay over the income as follows: the income of one of said eighth parts thereof to each of my two sons William T. Bramhall and Thomas M. Bramhall, during their lives; and the income of two of said eighth parts to each of my two daughters, Elizabeth S. Bramhall and Maria S. Bram-

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hall, during their lives; the inco
ters is to be paid upon their indi
if they or either of them so elect,
and invested for their or her ben
which at the time of my decease
sons William T. Bramhall and T
by note or book account, is to be
shares, one half from the proport
and one half from the portion give

"Eighth. Upon the decease of
T., Thomas M., Elizabeth S., and
bequeath that portion of my estate,
given to him or her for life, to hi
and assigns forever. And if either
child, or more remote descendant, t
bequeath such share to the others of
shares, their heirs and assigns foreve

The codicil, dated July 20, 1866,

"First codicil to my will, dated th
1865: To wit, fourth of said will, w
to Andrew T. Hall, in trust, ten thou
of my son Robert Bramhall during h
will I now revoke and declare void; a
and bequeath to the said Andrew T.
Robert Bramhall, during his life, an
property as I may die possessed of, as
entitled to under said will above n
T. Hall is to keep the same safely in
Robert Bramhall such portion of net
as received, taking his receipt for the s
as may be necessary support and ma
Should the income of the property comi
his reasonable necessities and requireme
direct and request the said Hall to invest
say state of Massachusetts or city of B

The facts of the case and the instructi
the opinion. Hearing before *Endicott*, J
for the consideration of the full court.

J. Willard, for the plaintiff.

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W. G. Russell, for William T. Bramhall.

C. H. Hurd, for Robert Bramhall.

G. Putnam, Jr., for the daughter Maria.

H. E. Ware, for the daughter Elizabeth.

C. H. Hill, for the grandchildren.

ENDICOTT, J. Before considering the several requests for instructions propounded by the bill, it is necessary to determine how far the sixth, seventh and eighth clauses of the will are affected by the provisions of the codicil.

When the testator made the will, April 18, 1865, he had five children living, who were his only heirs at law, William, Thomas, Robert, Elizabeth and Maria. Thomas died before the testator, and after the codicil was made; the others survived him. By the fourth clause of the will, the testator gave twelve thousand dollars to a trustee to hold in trust for the benefit of Robert, and the income to be paid to him during his life, upon his receipt. By the sixth clause, he gave one eighth part of the remainder of his estate to each of his sons William and Thomas absolutely. By the seventh clause, he gave the other six eighths to a trustee to hold in trust, and to pay over the income of one eighth to William and Thomas respectively, and of two eighths to Elizabeth and Maria respectively, during their lives. The seventh clause also contains a provision that the amount of all debts due him, on his death, from William and Thomas, by note or book account, should be deducted from their respective shares, one half from the portion given outright, and the other half from the portion given in trust. At this time, William, Thomas and Robert were largely indebted to him for money lent to them to assist them in business and for other purposes, as appears by his books, which was charged to them as a debt, and on which an interest account was kept. He also, at that time, held notes of William and Thomas then overdue. He thus endeavored to make the shares of the remainder of his property equal, by charging to William and Thomas the debts they owed him, so that his four children, who were to share the remainder, should on the final distribution and settlement of the estate, have each received the same amount. Robert not being entitled to a share in the remainder, but being provided for by a separate trust fund, under which he takes less than a share in the remainder

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would be, the testator did not r
he then had no charges against h
clause, he gave, upon the death
or Maria that portion of his es
given to him or her for life, to hi
event that either should die with
scendants living, he gave "such
children" in equal parts absolute

Under these clauses, an equal d
of his property was evidently int
dren; the daughters taking only t
each son taking one half his sha
only of the other half. And the
and must be taken as part of the s
sition of the share of each so held
cease.

The codicil, dated July 20, 1866
this division. It is inartificially dr
tention of the testator are apparent.
creating a trust for the sole bene
thereof" gives to the same trustee n
in trust for Robert during his life, "
property as I may die possessed of, a
entitled to under said will above na
ceived, or so much as is necessary fo
to pay over to Robert, on his receipt.
not necessary for his support and ma
invest. He thus intended to give Ro
children. No provision is made in
tion of the principal after Robert's de
"all such property as I may die pos
tion, he undoubtedly refers to the rem
posed of in the sixth and seventh cla
are entitled to no other property unde
Robert is to take under the codicil is i
that he did not intend that Robert sh
that share absolutely, as provided for
the sixth clause; and as each of the
receive an equal share in amount of th

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two sons take a part of their shares absolutely, Robert is entitled to an equal share of the remainder with the others, which must be held in trust. And the effect of the codicil is to insert Robert's name in the seventh clause, and to give him the income of a share in the remainder equal to that of his sisters. This cuts down the shares of the other brothers and sisters, and, taking the will and codicil together, William and Thomas each take one tenth of the remainder absolutely, and the income of the remaining eight tenths is to be paid over by the trustee, one tenth to William and Thomas, and two tenths each to Elizabeth, Maria and Robert.

Robert being thus introduced into the seventh clause, and entitled to an equal share in the remainder, the same as the other children, it follows that he must take his share subject to the provisions therein contained as to the other children, in those respects wherein he stands on the same footing with them or either of them. As he was indebted to the testator in the same manner as William and Thomas, he must take his share subject to the same deductions. It was clearly the intention of the testator, at the time he made the will, that the debts of those who were indebted to him should be deducted from their shares, in order that the division should be equal; and though he says nothing in terms as to Robert's debts in the codicil, except that *he is* to have an equal portion as the others, it is evident that the equality he intended can only be obtained by deducting Robert's debts from his share. *Smith* v. *Chandler*, 1 Gray, 524. *Upton* v. *Prince*, Cas. temp. Talbot, 71.

Nor is the effect of the codicil limited to the seventh clause; it applies also to the eighth, and introduces the share, of which Robert is to receive the income during life, into the system of remainders provided in the event of the death of either of the children. His share thus became subject to the same limitations to which the other shares were subject, and he became entitled to an equal portion of the share of any brother or sister dying without children; for it is clear the testator intended that all that portion of the remainder of his property which was in trust should be subject to the provisions of the eighth clause; and as in the codicil he gave no remainder over in Robert's share, he clearly intended it should come within that clause. This con-

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struction gives Robert "an equ
may be entitled to under said w
and intent of the codicil. An
amount with the others because
two brothers, or because the trus
the payment of his income and
of income, which may remain af
support of Robert.

The general scheme, therefore,
codicil, is an equal division of the
dren; and the debts due to the tes
time of his decease, he intended to
part of the remainder to be divide
be deducted from and to be a charg
division of the whole remainder is
and Thomas take a part of their sha
fact that the amount of income rece
ively may vary by reason of deduct
Treadwell v. *Cordis*, 5 Gray, 341, t
equal proportions of the income of
of each child in excess of $20,000 w
proportional share in the fund. And
in speaking of the words "equal pro
does not mean in equal aliquot parts
tions equalized or made equal by cha
made to those who had received the
their shares, and replacing the amou
of the estate to be divided."

This general statement of the inte
the will and the effect of the codicil ha
several of the requests for instructio
which will be considered in their order.

1. By the sixth clause, as changed
and Thomas each take one tenth of t
Thomas having died before the testator,
being no gift over of this portion of his
came intestate property. It is therefo
among the heirs at law, and Robert take
same absolutely. *Sohier* v. *Inches*, 12 G

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Workman, 2 Allen, 472. *Smith* v. *Haynes*, 111 Mass. 346. In *Jackson* v. *Roberts*, 14 Gray, 546, the court found reasons for taking that case out of the general rule, which we do not find in this case.

As to the one tenth of the remainder in trust for Thomas under the seventh clause, as modified by the codicil, upon the death of Thomas before the testator, it passed under the eighth clause to his brothers and sisters, and Robert is entitled to one fourth in remainder absolutely. *Prescott* v. *Prescott*, 7 Met. 141. *Goddard* v. *May*, 109 Mass. 468. The result would be the same, if it were to be considered as lapsed, for Robert would then take one fourth absolutely as heir at law. This share of Thomas goes to his brothers and sisters, subject to the deductions directed in the seventh clause, and which will be considered more at length hereafter.

2. It appears that at the testator's death, William was indebted to him in a large sum of money as charged upon his books, and on several notes dated more than six years before his death. In the books William is charged with various sums paid to him for his business and other purposes from the year 1860 to the testator's death in 1871. Against these charges are credited payments made from time to time by William. An interest account was made up yearly on the charges and payments, and carried to the next year's account, leaving a balance charged to William in 1871 of about $40,000. In addition to this sum, the notes amounted to about $8000.

It is admitted that the principal thus charged in the book account, and the notes, if not barred, should be deducted from William's share; but it is contended that interest should not, because by reason of the provision of the will, that the share of William should be diminished by his debts, they became advancements to a child, upon which interest cannot be allowed. *Hall* v. *Davis*, 3 Pick. 450. *Osgood* v. *Breed*, 17 Mass. 356, 359. It is also contended that the notes cannot be treated as debts or advancements, because barred by the statute of limitations.

The first question that arises is, whether the debt of William on the notes, and as charged in the books, is an advancement. It is not, in the books, expressed to have been made or charged as an advancement, and has not been acknowledged in writing

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by William to be so. It does
Gen. Sts. c. 91, § 8. The chars
cates that it was treated as a
been made from time to time, a
in the usual manner, as in a pu
interest and principal are treated
also the notes are merely evide
22 Pick. 508. They are not adv
ute, or by virtue of their origin
come such by reason of the pro
tion of the testator in this respec
and that is to be ascertained f
Bacon v. *Gassett*, 13 Allen, 334.
debt is not necessarily to be trea
the will orders it to be deducted f
well v. *Cordis*, *ubi supra*, the testat
to his children should not draw in
ceed $20,000, and the court ordere
on the excess, because the testator
thus in his will order debts to be
child's portion, and, when he fails
tention in that respect is to be gat
uses, as applied to the original ch
a fair construction of his words in
William's debts, we are of opinio
that the whole sum due him and ch
interest and also the notes, should
not as an advancement. *Poole* v.
other words, the testator intended t
his estate, and as such to form a
William.

In *Hall* v. *Davis*, 3 Pick. 450, the
dren should be charged with the
against them, and the bequests given
by deducting such demands, and tha
"as a part of the legacies and devise
court said: "No doubt the testator
notes and the book charges as deb
bution of his estate he chose to con

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ments." In *Bacon* v. *Gassett*, 13 Allen, 334, the will, after directing that money advanced and notes taken from his children should be deducted from their portions respectively, designated the deductions to be so made as advancements; the language was technical and explicit as indicating his intention. Those cases are relied upon as controlling this, but the language here is very different. The testator says: "The amount of all debts which at the time of my decease shall be due to me from my sons William and Thomas, whether by note or book account, is to be deducted from their respective shares." There is nothing to show any intention to change the character of the debt by note or book account, which at that time in terms included interest, except so far as to make it a charge on the share, which it would not otherwise necessarily have been; *Hancock* v. *Hubbard*, 19 Pick. 167; and the fact that he charged interest afterwards is significant as showing the meaning of the language that he used.

Nor is the objection well taken that the notes cannot be deducted because barred by the statute at the time the will was made. Debts due from a legatee, who is a child of the testator, cannot be barred in his favor by the statute, so that the testator has no right to treat them as advancements or as debts. In distributing his own property among his children, and deciding what shall be a just and equal portion for a child, he may treat any sum which he has paid to a child as a debt or advancement to be deducted from his share. It is in the nature of a charge to be satisfied out of the portion, and must be met before the legatee is entitled to the legacy. A testator may not only make his own debts due from the legatee a charge, but debts due from another. It is not unusual to charge a daughter's share with her husband's debts to the testator. In *Poole* v. *Poole*, L. R. 7 Ch. 17, a testator directed that certain advances should be deducted from a daughter's share, and also, if at the period for distribution she should be indebted to either of her brothers and sisters, his trustees should be empowered to deduct such debts from her portion. She had borrowed money from them both before and after the date of the will, and most of the debts had been barred by the statute before the distribution. And it was held that they should be deducted; but as the testator had put his own debt on the footing of an advancement, the infer

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ence was that he intended to put the claim
sisters on the same footing, as advanceme
and interest was not allowed. See *Rose* v.
Courtenay v. *Williams*, 3 Hare, 539.

The case of *Rogers* v. *Daniell*, 8 Allen,
phrase "legal debts." The direction of t
debts should be deducted from each child
signed by a daughter with her husband, v
him, were held not to be her legal debts, a
make the contract, and under no circumst
enforced against her.

Although these notes could not have be
an action at law, yet they were legal contra
and evidence of a payment of money by the
the father could properly regard them as as
the remainder of his property, so far as t
share of the son to whom the money had be

The account and the notes are, therefo
of a charge upon William's share, and n
half from the portion given absolutely, a
portion given in trust. The deductions fr
in trust must be from the principal and
Treadwell v. *Cordis*, *ubi supra*.

3. The charges and credits against Tho
similar to those against William, and c
same period, and the testator also held
dated more than six years before his deatl
in the accounts is, that while Thomas is
he is not charged with interest, and no
was struck by the testator. We are of
rule, laid down in regard to William's d
of Thomas, including account and notes,
left open, interest should be charged to
ination, it appears that he has not paid
general scheme of the will and codicil, t
treated alike. Nor is this debt any
Thomas died before the testator. It is
directed in terms to be deducted from
debtedness is not changed, and the debt i

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guished by his death. It is a burden which is attached to that particular share, and whether upon his death the share, or any portion of it, goes to his issue, his heirs at law, or his brothers and sisters as provided in the will and codicil, those, who take, take subject to the deductions. To hold otherwise would be to reduce the amount which the testator intended should go to the trust, and materially change the purport and intent of the will. And it does not affect the question that the persons who take the share of Thomas absolutely on his death, and who take the income of the trust fund, are the same.

4. A similar account was opened with Robert in 1860, containing charges and credits, which was closed April 1, 1865, before the date of the will, at which time the balance appears to have been about $7000. As we have previously expressed the opinion that Robert, upon being admitted by the codicil to a share of the remainder under the seventh clause of the will, must take his share subject to the same provisions as to deduction of debts applicable to the other children, this sum must be deducted as a debt from the principal of the share in trust, on which he is to receive income. The subsequent and separate charges against Robert for board at a lunatic hospital, beginning July 5, 1865, before the date of the codicil, and continued by the testator until his death, must stand upon the same ground. The fact that Robert was unable to pay his own board, and that there was a moral obligation or legal duty on the part of the father to support him, would not preclude the father from treating the money so advanced as a debt to be deducted from Robert's share; and in settling the estate the sum of $5000 so charged must also be deducted.

The fact that Robert became insane is not material in construing the will or determining the rights of the several children. Robert had been insane and at the hospital more than a year before the codicil in his favor was made; and though he continued to remain there until the testator's death, no change was made in the will.

5. In regard to the bank shares transferred by the testator to himself as trustee for his daughters Elizabeth and Maria respectively, we are of opinion, on the facts before us, that they must be considered assets of the estate to be held and administered as such.

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The case comes within the rules stated in *Brabrook* v. *Boston Five Cents Savings* where the authorities are considered at le he intended a gift, never completed it, an trustee for his daughters except by the m cate. He retained the control of the st dividends to himself, and neither daught transfers had been made until after his act on his part delivering the property ou dicating an intent and purpose to pass the and he did not so deal with it as to depriv ership or to change his right in that res *Delbridge*, L. R. 18 Eq. 11; *Warriner* v. 340; *Shurtleff* v. *Francis*, 118 Mass. 154.

6. In the year 1866, the testator charg his daughter Elizabeth certain sums, amou representing the expenditure upon a house had been conveyed to her by her husband' do not constitute an advancement under t no evidence that they were intended by tion of her legacy *pro tanto*. The only q sum so charged constituted a debt, which of the will, the testator intended should portion. We are of opinion that it doe viously stated.

In the case of *Smith* v. *Chandler*, 1 C ordered the residue of his property to be parts: one part he bequeathed to a son; daughters; and one to the children of a d the time of the will, none of the legatees Afterwards the husbands of the two daug and by a codicil he directed that their del from the legacies of the respective wives. indebted, and, having died, by another was given to his children, but the test debt to be deducted from the share. T ceased daughter also incurred debts for The testator made no codicil in regard to held that the notes were to be deducted

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spectively, although there was no provision in the will and codicil to that effect. The court found that it was the intention of the testator, as gathered from the will and codicils, that the debts of all the legatees, or those who were to derive immediate benefit from the legacies, should be deducted, and that no express provision was necessary to effect that result as to the debts of the children of the deceased daughter. That case bears directly upon the point here presented. Any inference to be drawn from the omission to mention the debts of Elizabeth in the will with William and Thomas is rebutted by the fact that no debts were then due from her, and, as she received the benefit of the expenditure on the house, it is immaterial that she did not request it, and did not know that it was charged to her. There is no evidence that he ever intended it as a gift.

The sum thus advanced to Elizabeth must therefore be deducted as a debt from the principal of her share, held in trust for her benefit under the will. *Decree accordingly.*

HUGH MORRISON *vs.* LORENZO G. HOWE.
SAME *vs.* WILLIAM H. CLEMENCE.

Middlesex. Jan. 12. — Sept. 6, 1876. COLT & ENDICOTT, JJ., absent.

Under the Gen. Sts. c. 44, § 8, surveyors of highways are authorized to remove a building which temporarily obstructs a highway.

The decision of highway surveyors, that a thing in the highway constitutes an obstruction, is conclusive.

In an action, against a person acting under the authority of highway surveyors, for the conversion of a building, which the plaintiff was moving through the streets of a city, and which the highway surveyors had adjudged to be an obstruction, it appeared that the building had been taken to pieces by the defendant. The jury found that this was a reasonable mode of removal under the circumstances. *Held*, that this was conclusive of the right so to remove it, whether the decision of the surveyors as to the mode of removal was conclusive or not. *Held, also*, that the plaintiff had no ground of exception to an instruction that, in determining whether the mode of removal was reasonable, the jury were to consider that the plaintiff had no right to have the building in the highway.

Evidence, that an act done by a surveyor of highways, within the scope of his lawful authority, was induced by an improper motive, is immaterial.

In an action against a person, acting under the authority of the surveyors of highways, for taking to pieces a building while in the street of a city, which the surveyors had adjudged to be an obstruction to public travel, the plaintiff put in evi

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dence a license from the mayor and aldermen of t
to move the building through the streets. It appea
tiff had not complied with the terms of the license,
of no avail to the plaintiff.

TWO ACTIONS OF TORT for the conver
in this court, before *Wells*, J., who report
sideration of the full court, in substance

On April 3, 1874, the plaintiff was the
ings on the land of another on Green St
public highways in Lowell, with the righ
from. On April 17, the plaintiff filed
and aldermen of Lowell, for licenses to
term of four days a sufficient width of
for moving the buildings from Green St
highways in Lowell, to a lot on Elm S
the plaintiff owned. Each petition
clause: "In case said license is granted
the same, I hereby agree with the city
keep said portion of said streets, so oc
the acceptance of the surveyors of high
ell, and the said building shall be moved
petitions were granted "on the terms a
the petition, provided said building b
drawn by oxen." On April 27, the
voked this license, and notified the plai
On April 29, the surveyors of highwa
notified the plaintiff to remove his b
highways of the city forthwith, and p
them for the occupancy or removal of
sons assigned that they obstructed ar
ways, and hindered, incommoded and
and further, that, "if, after thirty-six
this notice, said buildings remain on
shall remove them therefrom at your e
delivered to the plaintiff on April 30,
in the forenoon.

One of the buildings, called the
ninety feet long, and for its removal t
each for a building forty-five feet long

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ing, the plaintiff cut the same into four pieces of about equal lengths, moved one part through the streets to the Elm Street lot, prepared the next part for removal and removed it into Green Street, and did the same with the third piece. Another building was separated from its ell, prepared for moving, and moved into George Street, and cut so as to be moved in two pieces, and the ell was prepared for moving and moved into and through George Street and into Green Street. Two licenses were taken for this building, one for removal of the main part and another for the ell. Both parts were moved into the streets more than four days before April 29. There was evidence that all these parts of buildings when moved into the streets, and until taken down by the defendants, stood so that horses and wagons could and did pass by them in the streets.

On April 30, the plaintiff, on receiving the notice from the highway surveyors, commenced moving upon rollers, and not on wheels, the second section of the long block which stood in Green Street, and, working all night, got it on to the Elm Street lot on the morning of May 1, at about eight o'clock. He came back and attached his horses to the said third section, and was proceeding to move that on rollers by means of a windlass fixed in the highway and operated by a horse attached to the lever and travelling in a circle in the highway, intending to move that in the same manner in the route designated in the license, to the Elm Street lot, when the defendant Clemence, acting as city marshal of Lowell, and also under verbal direction of the surveyors of highways, stopped the plaintiff's horses and forbade and prevented him from moving it further through the streets. The same was done with the ell and the two parts of the George Street building, and all this was done between eight o'clock in the morning and noon of May 1, and they so remained in the highway until May 2, when the surveyors of highways made the following order: "In board of surveyors of highways. Lowell, May 2, 1874. Ordered: That the city marshal take down the three buildings or portions of buildings in George and Green Streets, supposed to be owned by Hugh Morrison, and incumbering the said streets, thereby incumbering and endangering public travel, and remove the material thereon to the city yard and keep the same there at the disposal of the owners." Under

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this order, the defendant Clemence, wi
who was superintendent of buildings, an
ons, on that day took to pieces the m
Street house, as it stood in the street, a
the city wagons and conveyed them to a
the city, about three fourths of a mile
on May 4, did the same with the ell o
the third section of the long block st
When Clemence so prevented the remov
that he should leave the buildings in th
the defendants, and should have nothing
and did not go near the buildings again.

There was evidence that the removal
Street could have been completed at
pense if it had not been interrupted, a
upon Elm Street they would have bee
than by any other disposition of them.

The plaintiff asked the judge to instr
"1. That no license from the mayor
the buildings through the city was nece
2. That the plaintiff was not prohibite
highways of the city of Lowell for the
ings, and is entitled to damages for an
erty even though in the highway, unless
ized by law, and that there was evid
conversion by the defendants or one of
be left to the jury to determine whethe
of buildings described, considered in re
place when and where, and the manner
moved, were suitable and proper to b
ways of Lowell, established according t
common convenience of the whole com
jury should find they were suitable and
removed in a reasonable manner with d
ants would be liable for taking them
them to the city grounds, even though
surveyor of highways, and that under
taking them to pieces would be a cor
plaintiff, acting under the license in g

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expedition, moved his buildings into the streets and, with due diligence, in a reasonable manner, and without unreasonable delay, was moving them towards the place designated in the license, the license was not so revoked as to deprive him of the right to move the buildings over the highway towards the place designated, although the time named for the removal had expired. 6. That it was a misuse or destruction of the buildings to take them down and destroy their character and value; or that the jury should pass on that question, and if they should find it a misuse or unreasonable and unnecessary disposition of the property, or not required by the circumstances, the defendants would be liable in trover, even though they preserved the pieces and offered to return them to the plaintiff. 7. That if the buildings were nuisances or incumbered the travel, &c., as they stood in the streets, the surveyors could only authorize their removal or remove them, and could not legally destroy them, and to take them to pieces would be a conversion, although they offered to return the pieces. 8. That the highway surveyors had no authority to take down and destroy the buildings in the streets, and could not authorize the defendants to do so, and that at most it was a question for the jury whether that was a reasonable disposition of the buildings as they stood. 9. That if the buildings were put in the streets, prepared to be moved under the license, and the time named for the removal expired while they were there, or if the license was revoked by the mayor and aldermen while they were so there, that would not deprive the plaintiff of the right to finish the removal, with due diligence, to the place designated in the license, or to remove them through the streets as best he could to preserve them as buildings, if the jury should find such removals would be reasonable and proper under all the circumstances. 10. That the defendants would have no right to destroy the buildings or take them to pieces there, even under the order of the surveyors of highways, if the jury should find that it would be reasonable and proper that they should be moved through the streets, and that they could be moved through the streets without damage to the public, and without unreasonable hindrance and delay of others in the use of the streets."

The judge declined to give any of the instructions requested, but submitted the following questions to be answered by the

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jury: "1. Was the third quarter se
moved into the street on the afternoon
or previously? 2. Were the buildings
to remain in the street longer than wou
he had exercised reasonable diligence in
the removal of the buildings by taking
mode of removal under the circumstanc
jury returned the following answers: "
day, April 27th. 2. They were. 3. It

The jury were instructed that, in ar
tion, they were to consider that the p
buildings were taken down, had no righ
entire through the streets of the city to
the defendants were not bound to move
be moved entire either to Elm Street
any other streets of the city.

The following question was also pro
"Did the defendants take possession o
manner or for any purpose other than
purpose of enforcing the city ordinances
surveyors of highways, for the purpose
structions from the streets?" It was ag
this question should be in the negative,
of the plaintiff on account of the exclu
by him to show that one motive, which i
and the surveyors of highways to indu
removal of the buildings through the stre
vent buildings of that class from being
Elm Street.

The judge thereupon ordered verdicts
the plaintiff could not maintain the act
judgment was to be entered on the verdic
to be ordered, and such disposition to
cases as the court should determine.

D. S. Richardson, for the plaintiff. 1
sent the question of construction or repai
the question of the manner and purpose
was using the highway. Whether suc
were authorized by law was a question o

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by the jury upon the evidence. *Gregory* v. *Adams*, 14 Gray, 242. *Graves* v. *Shattuck*, 35 N. H. 257. *Hopkins* v. *Crombie*, 4 N. H. 520, 525.

2. The surveyors of highways had no authority to pass conclusively on the question whether the buildings, in the manner they were being moved through the highways, were common nuisances, and had no authority to interfere with this use of the highway, unless the jury should find that the buildings unnecessarily obstructed the free passage of the public or endangered those rightfully using the way.

3. If the removal was authorized, the destruction was not authorized, unless the jury should find that the destruction was reasonably necessary and indispensable to the removal under all the circumstances. *Loker* v. *Brookline*, 18 Pick. 848, 849. *Mellen* v. *Western Railroad*, 4 Gray, 301. *Perry* v. *Worcester*, 6 Gray, 544.

4. Evidence was improperly excluded that one of the motives of the defendants and the surveyors was to prevent the building from being erected or placed on Elm Street. If the jury were to pass on the question of the reasonableness of "taking down the buildings" and destroying their character as buildings, and reducing them to "material," the motives inducing such action would have an important bearing, and might properly require clearer and stronger evidence in the minds of the jury to determine the reasonableness of acts done under such guidance. It is only when the act done and manner of doing are clearly authorized by law that the motive is unimportant.

5. In the third question, the jury were instructed to pass upon the reasonableness of the removal "by taking down the buildings," under the circumstances, but they were erroneously instructed also, as matter of law, that in answering the question they were to consider that the plaintiff had no right to have the buildings moved through the highways. This left nothing for the jury to pass upon on this question; for if the buildings could not legally be moved, nothing could be done but take them down. There was evidence that the buildings could have been moved to Elm Street at small expense, and would have been of much greater value than by any other disposition. This the jury were not allowed to consider.

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A. P. Bonney, for the defendants.

DEVE 8, J. The defendants acted
surveyo s of highways of the city of
as to cer ain buildings standing in the
have no converted them to their own
taking t em down and removing the
and they have always been ready to deli

It is c ntended that no question of t
of highw ays is here involved, and tha
whether the use made by the plaintiff
his buildings through them was unre
amount to an obstruction of the ordinar
If this were a controversy between the
ing without public authority in removi
obstruction to their own lawful use of
undoubtedly be the case; because priva
the risk of being deemed and treated a
show that they are justified in what th
their own rights. The cases cited by th
than this. *Hopkins* v. *Crombie*, 4 N. H
Shattuck, 35 N. H. 257.

There may be a use of a highway, so
acter as to amount legally to an obstr
public travel can still be continued over
duty of the surveyors to remove whate
bers a highway, or hinders, incommodes
elling thereon. Gen. Sts. *c.* 44, § 8.
remove not only a structure which per
temporarily, obstructs the way, as it doe
rubbish or of goods, with which it may
Green, 4 Cush. 433, 437. Whether tha
highway constitutes an obstruction is to
and their decision is not liable to be
jury. *Benjamin* v. *Wheeler*, 15 Gray, 4
98 Mass. 581. *Bay State Brick Co.* v.
If it were otherwise, although acting as
only so act at the risk of being afterwar
and the highway would necessarily in
obstructed, while the character of that

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determined to be a nuisance was being discussed and considered by the judicial tribunals.

It is said, however, that, even if the removal of the buildings by the surveyors was authorized, they had no authority to destroy them. Without considering whether the decision of the surveyors as to the mode of removal is or is not conclusive, it is sufficient that it has been found as a fact by the jury that the taking down of the buildings was a reasonable mode of removal under the circumstances, and therefore that what they had a right to do has been properly done and with due regard to the rights of the plaintiff. Nor was it erroneous in the presiding judge to rule that, in determining whether the mode of removing the buildings adopted was reasonable, the jury were to consider that the plaintiff had no right to have them in the highway. This assumed only that the adjudication by the surveyors, that thus situated they were an obstruction to the public travel, was conclusive, and that the plaintiff could not of right demand that they should be moved entire upon his Elm Street lot or any other distance through the streets of the city.

The evidence that the motive of the surveyors, or of one of them, in making their order, was that buildings of this class should not be placed upon Elm Street, was not relevant. An act, done within the scope of a public officer's lawful authority, does not become illegal by reason of the motive which may have influenced his mind in doing it. *Benjamin* v. *Wheeler*, *ubi supra*.

It is unnecessary to consider whether the mayor and aldermen could properly issue a license for the removal of buildings through the streets of the city, which would control the surveyors in the performance of the duty imposed upon them by the general law. If such license could properly have been issued, it is clear that, to be of any avail, its conditions must be complied with. The license issued required the buildings to be "moved without delay," and it is found by the jury that they were permitted to "remain in the street longer than would have been necessary, if the plaintiff had exercised reasonable diligence in their removal." It further appears that he was engaged in moving them, and proposed to move them, in a different way from that provided by the license. The license of the plaintiff

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was revoked on April 27, of which he
On April 29 he was notified by the sur
incumbered the street and that he m
thirty-six hours, and no act was done b
fere with his occupation of the street u
Jud

CITY OF SOMERVILLE *vs.* CI

Middlesex. March 1. — Sept. 7, 1876. ENDI

The St. of 1874, *c.* 274, § 2, providing that "any w
years, who resides in any place within this state fo
ceiving relief as a pauper, shall thereby gain a se
only to unmarried women.

CONTRACT for supplies furnished
March 5, 1875, to April 10, 1875. The
the Superior Court, and, after judgment
court on appeal, on an agreed statement
follows:

Mary McCloskey, being the wife of
more than twenty-one years of age, and
settlement in this Commonwealth, resi
arrived at said age, in Boston, for more
without either of them receiving relief
McCloskey never derived or acquired a
ton or in any other place in this Commo

If, upon these facts, Mary McCloskey
Boston, judgment was to be entered for
for the defendant.

C. Robinson, Jr., for the plaintiff.

J. L. Stackpole, for the defendant.

COLT, J. The plaintiff seeks to rec
under the pauper laws to a married wo
action it is contended that a married
marriage, had no settlement in this C
one under the St. of 1874, *c.* 274, § 2,
and five years' continuous residence in

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band, who had himself no settlement there or elsewhere in this state, and who acquired none by such residence.

The statute relied on declares that any woman of the age of twenty-one years, who resides in any place within this state for five years together without receiving relief as a pauper, shall thereby gain a settlement in such place; and it expressly repeals the first section of the St. of 1870, *c.* 392, by which any unmarried woman of the age of twenty-one years was permitted to gain a settlement by ten years' residence.

The question here is, whether the later statute, by the omission of the word "unmarried," also repeals the provisions of the Gen. Sts. *c.* 69, § 1, by which the settlement of a married woman is made to follow the settlement of her husband if he has any; otherwise, her own at the time of marriage, if she then had any, is not lost or suspended by the marriage.

These statutes relate to the same subject matter; they constitute parts of a system devised for the regulation of a complicated part of the internal police of the Commonwealth; each must be construed so as to preserve, if possible, the harmony of the whole. In the language of Shaw, C. J., in *Goddard* v. *Boston*, 20 Pick. 407, the two statutes "are to be construed together. A later statute on a given subject, not repealing an earlier one in terms, is not to be taken as a repeal by implication, unless it is plainly repugnant to the former, or unless it fully embraces the whole subject matter." In ascertaining the intention of a new statute with reference to its effect upon existing laws, it is a fair subject of judicial consideration that those laws have long been established in accordance with sound morality and the settled policy of the state, and therefore are not likely to be repealed by doubtful words or by mere implication.

The rule that the settlement of a married woman follows that of her husband has long been the statute rule of this Commonwealth. Sts. 1789, *c.* 14; 1793, *c.* 34, § 2. It rests upon the principles of the common law, and in England is as old as the law of settlement. *St. Michael* v. *Nunny*, 1 Stra. 544. *Rex* v. *Alton*, 1 Burr. 307. It is founded on the highest consideration of public policy and morality; it concerns the unity of the marriage relation, and is declared by Blackstone to prevail because the law will not permit the separation of husband and wife. 1

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Bl. Com. 363. It cannot be inferred, provision, that the Legislature intende pauper settlements should under any compulsory separation of man and wi joint parental relations to their child contended for by the plaintiff, the wife in five years, irrespectively of the fac time the husband's settlement was el lose the settlement which up to the en hold by virtue of her marriage, and ac of the statute. If both should fall in as furnished by law would compel the

Upon the whole we are of opinion th ond section of the St. of 1874 was to years the time of residence required t unmarried woman, and not to extend whom the law as it then stood was app ute relating to married women is not acquire a settlement in five years must and subject to the contingency of marr

Judg

GEORGE HERRICK *vs.* WILI

Middlesex. Jan. 11.—Sept. 8, 1876. Co

The fact that the driver of a horse drives him or st road crossing, and that the horse, frightened by and injures a person, does not, of itself, show, as on the part of the driver.

TORT for personal injuries. Trial fore *Rockwell*, J., who allowed a bill o as follows:

The facts in the case which were un defendant had a contract with the c scholars from Newton Upper Falls to t Newtonville in the morning, and to g

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the session in the afternoon; that he employed a person for this purpose to drive a horse and covered omnibus wagon to and from the school-house; that the driver the day of the accident drove to the school-house, and, without getting the scholars, finding that he was two or three minutes early, drove past the school-house about one fourth of a mile down across the railroad track into the village, stopped his horse in front of a watchmaker's shop about fifty feet from the track, and went into the shop to have some repairs made to his own watch; that he left the door ajar standing near the door some three feet from the horse where he could look at him; that after he had been in the shop about five or ten minutes, learning of the approach of a train, he ran out and took hold of the reins by the horse's head to hold him until the train passed by; the horse at first sprung forward some three feet, but the driver succeeded in checking him and got him quiet, when the train, which was a long freight train, made an unusual loud jarring noise, as of the sudden breaking up or stoppage of the train, causing the horse to start again; that the driver who had hold of the horse tried to stop him, and in the effort to check him was forced along the road some two hundred feet when the horse freed himself of the driver, ran down the road and came in contact with the plaintiff, a drover, who was on foot in the road driving cattle, and injured him.

It was further in evidence undisputed that the driver had no authority or permission from the defendant to go beyond the school-house or to use the horse and wagon for any purpose of his own; that he went to the watchmaker's on his own account and for his own business, and not for the purpose of executing the defendant's orders or doing his work; that the road to the watchmaker's was no part of his route between Newton Upper Falls and the school-house, but one fourth of a mile beyond it, which distance would have to be retravelled to return to the school-house; that the way from Newton Upper Falls to the school-house did not take him near the track of the railroad, and that, because of the accident, he did not on that day get the scholars and carry them to Newton Upper Falls.

The defendant contended that, as the act of the driver in going to the watchmaker's was not to execute his orders or to perform

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the work for which he was employed
that object and was for the driver's o
the plaintiff could not recover of the
the judge so to rule. The judge refus
matter of law, that the defendant was
tiff could recover. The defendant alle

F. S. Hesseltine, for the defendant.

G. W. Gordon, for the plaintiff.

LORD, J. In construing this bill of
sider ourselves at liberty to regard an
as findings either of judge or jury; b
disputed facts upon which the judge r
this view, we think the ruling of the
upon the question of due care on th
servant. We see no evidence of a w
matter of law. If there had been a
character of the horse, or any circums
justified a tribunal in finding that the
proximity of a locomotive engine or tr
of reasonable care, such facts should a
ceptions finds that the facts were all u
such undisputed facts the judge ruled
defendant was liable. This ruling goe
person drives a horse near to where car
matter of law, for all damage which m
taking fright, though he uses every po
diligence to prevent the injury. We
the law. And, as the bill of exception
as a fact of want of reasonable care,
undisputed do not show such want of
as matter of law that the defendant wa

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JOHN P. SQUIRE *vs.* CITY OF SOMERVILLE.

Middlesex. Jan. 14. — Sept. 8, 1876. COLT & ENDICOTT, JJ., absent.

Land, taken by a city to widen a highway, had been previously filled in by the owner, in pursuance of an order of the mayor and aldermen, to abate a public nuisance. Held, that the measure of damages was the value of the land as it stood at the time of the taking; and that an instruction that the jury were to allow the fair market value of the land taken, appraising it as land filled at the expense of the petitioner, was erroneous.

PETITION to the county commissioners for a jury to assess damages for the taking of land on September 16, 1873, for the widening of Milk Street in the city of Somerville.

At the trial before a sheriff's jury, it appeared that the land was formerly a part of the Miller's River Basin, and that, before the taking by the respondent, it had been filled by the petitioner at his own expense, in pursuance of an order of the mayor and aldermen of Somerville, dated June 16, 1873, passed in accordance with the St. of 1873, *c.* 304, to abate a nuisance. The petitioner, under objection, was allowed to put in evidence as to what was a fair price for filling the land taken; and the sheriff instructed the jury that, in computing the petitioner's damages, the jury were to allow him the fair market value of the land taken, appraising it as land filled at the expense of the petitioner, under the St. of 1873, *c.* 304, and the order of the mayor and aldermen.

The jury returned a verdict for the petitioner. In the Superior Court, the verdict was accepted; and the respondent appealed to this court.

C. Robinson, Jr., for the respondent.

H. W. Muzzey, for the petitioner.

LORD, J. We think the instruction to the jury by the sheriff authorized the jury to regard the cost of filling the petitioner's land, under the St. of 1873, *c.* 304, as a part of the value of the land, to be added to what its value would have been without the filling. This instruction was erroneous. The St. of 1873 was passed, requiring the land to be filled for the purpose of abating a nuisance. It was required, not for its special local benefit to that estate, but for the public good. The land filled may or may

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not have been improved by
of the filling. That was
that the owner was require
cost of doing it to the valu
passed by which his whole
clared a nuisance, requiring a
remote position in reference
moval of his buildings, a way
site, the value of the land woul
into the situation in which the
it was taken for a public use.
made in adapting land and bui
are applied. The instruction
appraise the value of the land as
taking. Whether the expenditu
it were wise or unwise, wheth
made, or whether made for one
such expenditure is not necessa
value to the land, as it would ha
ture.

ANNA Y. SNOW *vs.* INHABITA

Barnstable. Jan. 25.—Sept. 7, 1876. E

In an action against a town for injuries sustain
to protect travellers from falling down an e
of a highway, which the defendant town was
tiff, a girl nearly nineteen years old, testified
on the side where the embankment was; that
across the way; that she thought how she wa
room enough to pass safely between the cart a
to her she must be careful or she would fall;
menced backing towards her and she steppe
and sustaining the injuries in question. The
plaintiff must have been in the exercise of ordi
nary prudence, of the plaintiff's sex and age,
ably be expected to exercise under like circum
would attempt to pass while the street was obs
in selecting the place where to pass, and while

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cident. The jury found for the plaintiff. *Held*, that the instructions given were apt and sufficient, on the issue of due care on the part of the plaintiff, and that the evidence was sufficient to justify the verdict of the jury.

TORT for an injury occasioned by a defect in a highway in defendant town.

At the trial in the Superior Court, before *Pitman*, J., the evidence tended to show that the injury was received on High Street, a short street running at right angles with Commercial Street, and therefrom in a northwesterly direction; that the town was bound to keep the way in repair; that the alleged defect was the absence of a railing on the northerly side of the street, at a point about fifty-five feet from Commercial Street, at which point there was a bulkhead or embankment just outside of the limits of the street, extending from the side of the street to the depth of about four feet, and almost straight up and down, and without protection by a railing or fence; that at the bottom of the embankment was a yard, constituting a part of the premises of one Winslow; that the embankment was composed of sod turned bottom up, and that the body of the street was laid out in sods of the same kind; that the street at the point of the embankment was fourteen feet and seven inches wide; that the side opposite to the side where the accident occurred was made of earth banked up to the height of three feet above the street; and that on this embankment rested a wooden fence, two to three feet high.

The evidence tended to show that the plaintiff, who was nearly nineteen years old at the time of the accident, lived upon High Street, about three minutes' walk from the place of the accident, and had lived there all her life; that she had at different times visited the Winslow house, and had passed by the embankment two or three times daily for many years; that she had frequently noticed the embankment and the Winslow yard, and the absence of a fence or railing, and that there had been no fence or railing there for years.

The plaintiff testified that about ten in the forenoon of June 27, 1874, she turned from Commercial Street into High Street, intending to pass up the street to her home, and by the place where the accident occurred; that she then had in her right hand a pail with milk, and in her left hand two small bundles of

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cloth; that, as she turned
almost directly across the st
ment, a horse harnessed to a
was heading a little up High
cart nearest and very near to
she continued walking up the
embankment; that when she
thought there was about the
the cart and the edge of the
started the horse to give her
that she then thought there w
safely; that it appeared to her
pass, and that she kept right on,
cart, it started and commenced
it would strike her, she stepped
embankment and fell into the ya

Upon cross-examination, she st
untarily to avoid the cart, and
where she was about to step, nor
the fact that she was at the edge
between the cart and where she f
foot, leaving the weeds out which
embankment; that she had noticed
fore; that at the time she steppe
cart; that the cart did not strike h
not was because there was no bruise
before reaching the cart and up to
no obstacle to prevent her seeing th
Commercial Street; that she did
although she knew the embankme
thinking of how she was going to ge
by; that she did not think there
there was room enough. "I thin
must be careful or I should fall;" t
the cart, she thought she could not
behind the cart she thought it start
driver was unloading coal at the em
that, when he took his horse by the
loading. In answer to the question,

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of the cart and prevent her fall, she answered that she could not, having both her hands full. "I could n't try; if I had had my hands free, I don't think I could have grasped the tail of the cart and saved myself from falling;" also that she did not speak to the driver, nor he to her; that the driver, as she was about attempting to pass, was at the head of the horse with his hand on the bit.

The plaintiff called one Gifford, who then resided upon the same side of High Street as the embankment, who testified that he left his house to come down High Street, and passed down until he came to the tail of the cart; that he found the upper wheel plumb with the edge of the embankment, and that it was impossible for him to get by there; that he then crossed the street, crept under the horse's neck upon the other side, and was proceeding down to, and had got to Commercial Street, when he met the plaintiff turning the corner; that he stopped at the foot of High Street, and turned around from curiosity to see how the plaintiff would get by the horse and cart; that he thought the teamster was trying to make room for her; that, as she approached, the driver took the horse's head and drew him a little; that the cart must have moved, though he could not say it did; that she stopped or hesitated within two or three feet of the tail of the cart; that then the cart commenced to back and was backing towards the edge of the embankment, and that while it was backing she began to walk ahead, and was behind the cart while it was backing, and that she then disappeared behind the embankment; that he was anxious about her when she was about to pass between the cart and the embankment, and before she had actually reached it, for the reason that the cart was then backing; that the horse could not stand still where he was; that it occurred to him that she had lost the favorable time for passing. He also added upon cross-examination, "I think the driver had started up the horse a little, so that his nose was over a low fence. I know it must have been, but I don't recollect the position of the horse's head; then the horse and team commenced to back slowly before she had actually started. It is my impression, she had hesitated a while before starting."

The teamster was called by the defendant, and testified that he had been unloading his cart of coal by shovelling from one

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side around the tail of the
to stand behind the cart; tl
Commercial Street; that he
by shovelling down the emb
to his horse's head, took hold
turn the head of the horse d
Commercial Street, and was d
at which time the plaintiff w
and on the side nearest Comm
a cry and saw the plaintiff up
"the horse had moved his fo
Just as soon as he moved I hea
go off." There was evidence t
horse were in length fifteen feet

The defendant contended tha
gerous; that the plaintiff must
embankment, that it would be da
the cart and the embankment, ar
or crossed over to the other side
evidence that the plaintiff was t
bankment by the driver's backin
or that she, through fear that tl
stepped aside and fell; and that,
railing at the place of the fall, sh
the backing of the cart near to or

The defendant submitted vario
which, so far as they appear materi

8. If the road and embankment
or fall were dangerous, and the pla
believe that the road and embank
before she had reached such danger
ing such dangerous place, fell down
would constitute evidence of want o

4. If the street was obstructed by
plaintiff saw the obstruction and the
of railing at and opposite the end of
gerous character of the place, if it wa
tiff in attempting to pass them fell,
these facts, as some evidence of negli

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5. If the plaintiff came to the place where she fell, and saw or had reason to believe that it was dangerous to pass between the cart and the embankment, and there was on the other side of the street an opportunity to pass without danger, she would be bound to cross.

16. If the cart was being backed upon the plaintiff, and there had been a reasonable railing at the place where she fell, one question for the jury is, would she have been injured by being jammed, or bruised, between the cart and railing or otherwise, and if so, the plaintiff cannot recover for absence of a railing.

18. That if all the evidence of the plaintiff, relating to the time of the accident and fall, is equally consistent with care or negligence on her part, she cannot recover.

The judge refused to give the instructions requested, and instructed the jury as follows: "In order to recover, the plaintiff must satisfy the jury: 1. That the way was unsafe. 2. That the injury arose solely and proximately from the alleged defect. 3. That the plaintiff was in the exercise of ordinary care." Upon these points, the judge further instructed the jury as follows: "Towns are bound to erect a suitable barrier, railing or other adequate protection, where there is such risk of a traveller, using ordinary care in passing along the street, being thrown or falling into the dangerous place, that such protection is requisite to make the way itself safe and convenient. If the negligence of a third party contributed to the injury, then the plaintiff cannot recover. Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances. Ordinary care has relation to the situation of parties and the business in which they are engaged, and varies according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which it is to be exerted. The degree of care must vary with the apparent peril. As applied to the present case, the plaintiff must have been in the exercise of ordinary care in travelling at the time; must have exercised ordinary prudence in determining whether she would attempt to pass while the street was obstructed by the horse and cart, and in selecting

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the place where to pass, and
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on apparent peril, the jury s
as to the obstruction of the s
bankment, and the plaintiff's
whether or not she exercised
tion required, under the rule
cannot be careless and recover;
tiff must have exercised ordina
to judge, she having the burde
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ous knowledge of the defect or
attention directed, at the momen
the plaintiff knew of the existe
jury to weigh, in determining wl
cise due care; but it is not conclus
sidering the question of due care,
as they think proper to the fact
plaintiff's hands were employed in
of a third party contributed to the
recover. If, for instance, she was
cart backing upon her, by the neg
put in fear by his negligence in bac
that she stepped off and over the b
she cannot recover. Negligence of
tion is an act or omission which con
foreseen and guarded against."

As to the 16th request for instruc
suitable railing would not have prev
plaintiff received, or would have c
then the plaintiff cannot recover; it
that she had suffered from the want c

The jury found for the plaintiff;
exceptions.

J. L. Eldridge, for the defendant.

J. M. Day, for the plaintiff.

COLT, J. Under the instructions g
must have found that there was a defe
was the sole and immediate cause of t

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this defect was occasioned by the want of a suitable railing at the place where the accident happened; that the plaintiff, although she knew of the defect, and although she attempted to pass while the street at that point was obstructed in part by a horse and cart standing across it, was nevertheless in the exercise of due care; and finally, that neither the negligence nor the wilful act of the driver of the cart, or the fear caused thereby, contributed to the injury.

This establishes the liability of the defendant, and gives the plaintiff a right to recover, unless the evidence fails to justify these findings, or unless the judge improperly refused to give the specific instructions requested upon this part of the case.

We think there was evidence to support each of these several propositions. It is not a question of its weight, or whether the verdict ought to be set aside on a motion for a new trial. The only question here is whether there is any evidence in the plaintiff's favor proper to submit to the jury. *Forsyth* v. *Hooper*, 11 Allen, 419. The only point made at the argument was as to its sufficiency to prove that the plaintiff was in the exercise of due care. But the plaintiff herself testified that she was watching the cart and thinking how she was going to get by; that there was room enough to pass safely between the cart and the embankment at the side of the road where the railing ought to have been placed; and that it occurred to her she must be careful or she would fall. All this was some evidence that she was mindful of the danger to which she was exposed, and careful to avoid it. The jury may have believed the plaintiff, and disregarded evidence in the case at variance with her testimony. They have declared by their verdict that the care which was actually exercised was such care as a person of the plaintiff's age and sex should be reasonably required to exercise under all the circumstances of the case. And we cannot say, as matter of law on exceptions, that the evidence does not justify the verdict on this point.

Most of the specific instructions asked for on this point were sufficiently covered by the instructions given. The third, fourth and fifth had special reference to the effect of the plaintiff's knowledge of the defect, and of the danger in attempting to pass, upon the question of her due care. As applied to the facts dis-

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closed, they were properly r
previous knowledge is a pra
cases, and depends upon th
obstruction or defect is such
pass over the road in safety;
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to pass; and while passing; and
The judge could not properly be c
cific acts required of the plaintiff.
of law, that the plaintiff was bou
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v. *Taunton Branch Railroad*, 116 1
117 Mass. 297. *Gerald* v. *Boston*,
Metropolitan Railroad, 104 Mass. 7
Mass. 339. *Barton* v. *Springfield*,
Fitchburg, 110 Mass. 384.

The measure of prudence required
with sufficient accuracy. *Elkins* v.
115 Mass. 190. *Dowd* v. *Chicopee*, 1

The jury were told that if a suital
prevented the injury, or would have
plaintiff could not recover; and this c
teenth request. The eighteenth requ
the state of the evidence.

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Without going over each of the numerous requests, it is sufficient to say that we see no error in the refusal to give them, or in the instructions which were given.

Exceptions overruled.

INHABITANTS OF HYDE PARK *vs.* PHINEAS E. GAY.

Norfolk. Jan. 26. — Sept. 7, 1876. ENDICOTT & DEVENS, JJ., absent.

On the morning of the Lord's day, before daylight, the fire department of a town, for the purpose of extinguishing a fire, ran hose from a river across a railroad track, which hose were cut in two by a gravel train owned by the defendant. *Held*, in an action of tort by the town for the injury to the hose, that the persons in charge of the hose had a right, in the absence of positive information, to expect that no train would be run on that day; and that those in charge of the train were for that reason required to exercise greater caution. *Held, also*, that the plaintiff was not a trespasser. *Held, also*, that a request to rule that danger signals should have been made in each direction, by the plaintiff, was rightly refused. *Held, also*, that if the running the train on the Lord's day, in violation of law, was the direct cause of the injury, the action could be maintained, without showing further negligence on the part of the defendant.

TORT for running over and destroying fire hose laid across a railroad track. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

About half past two o'clock on Sunday morning, September 27, 1874, a fire broke out in a building at Hyde Park, about seventy feet westerly of the line of the Boston, Hartford and Erie Railroad. Neponset River ran one hundred feet easterly of the railroad, and the fire department of the town stationed two steam fire-engines on the bank of the river, and carried four lines of hose across the track of the railroad to the burning building. The place where the lines of hose were laid across the track was a few feet northerly of the railroad station, and there were platforms on each side of the track, about eighteen inches high, so that the lines of hose were supported by the platforms, and were not on the track.

The defendant was the owner of a locomotive engine and of gravel cars, and had an agreement with trustees, who were in the possession and management of the railroad, by which he was authorized, at certain rates, to transport gravel in his own cars

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over the railroad, at such t
interfering with the regular t
the men to run his trains, and
against any damage to third
trains. From about seven o'cl
26, to about six o'clock the nex
use of the track, free from all o

During the progress of the t
three o'clock on Sunday morni
of loaded gravel cars belonging
management of his men, passing
to the city of Boston, struck the
and broke them, and did some oth

The station agent of the trustee
to do with the defendant or his tr
the station agent, soon after the fir
the chief of police, and others, th
over the road before six o'clock i
conflicting evidence as to whom, an
warn any train that might be app
obstruction on the track. But th
offered evidence tending to show t
could be seen on board the train w
making the signal in use on the rail
thing was all right and to go ahead
and confined to the inside of the bu
be seen outside. There was no m
conflicting as to the degree of darkne
the air.

The defendant requested the judge
lows: "1. That the defendant, at t
plained of, had the same right to the
railroad, at the place where the lines o
that landowners have to their lands,
this case is concerned.

"2. That the fact that it was about
morning, that the accident happened,
of the parties any different from what
it had happened at the same hour on an

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"8. That it was the duty of the persons having charge of the hose across the track to post danger signals in each direction, at a sufficient distance, to give any train that might approach notice of danger, and if there was time to post such signals, and the duty was neglected, and the accident happened in consequence, the plaintiff cannot recover.

"4. That the plaintiff must show that the managers of the train had sufficient notice given them that the lines of hose were across the track, or that there was danger, in season to stop the train. That if the signal given was the usual signal used upon this railroad, that everything was all right and to go ahead, it cannot be held that it was a signal to stop, or of danger, unless the managers of the train understood it to be such.

"5. That the station agent at Hyde Park was not the agent of the defendant, and that the defendant is not responsible for any information he may have given.

"6. That under the circumstances of this case the defendant is not liable, unless the managers of the train were guilty of reckless and wanton misconduct in the management of the train.

"7. That the plaintiff can only recover in this case by showing that the same precautions were taken against an unexpected train as would be required in case of a regular train."

The judge gave the first instruction prayed for, in relation to the defendant's right to the use of the road, substantially as requested, and also gave the instruction requested, in relation to the station agent, but added that the inquiries made of the station agent and his replies might be considered by the jury as bearing upon the question of the care exercised by the plaintiff; refused to give the other instructions requested, and instructed the jury, among other things, as follows:

"1. This action rests on the principle that the law gives a remedy to any one who, without fault or negligence on his part, suffers an injury by the unlawful act or negligence of another.

"2. The running of this train on the Lord's day was an unlawful act on the part of the defendant, and if such unlawful act or the negligence of the defendant was the cause of the injuries, the plaintiff may recover therefor, provided it was free from fault or negligence.

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"8. It must, however, ap
to extinguish a dangerous c
the tracks, and that in so pla
omit any act which a perso
capacity would do under prec

"4. It is not negligence o
foresee and provide against t
unless the plaintiff had some
in order to recover, the plainti
the approach of the train was k
of ordinary sense, prudence ar
same circumstances, to avoid an

"5. In this case, if you find t
given a signal of danger to the
not to do so, it is not necessary t
stood by those in charge of the
should be such that it would hav
son in the use of ordinary care in

The jury returned a verdict for
ant alleged exceptions.

J. R. Bullard, for the defendant

N. B. Bryant, (*W. H. H. Andrew*

COLT, J. The fact that the de
agents, was running a train of ca
regulating the observance of the I
and material bearing on the relati
parties at the time of the accident
the care required of both. The pe
in the absence of positive informa
that no train would be run on that
those in charge of the train were for
ercise greater caution towards them
been properly told, as requested b
rights of the parties were no differ
have been on any other day. *Wright*
road, 4 Allen, 283, 290. *Lane* v. *Atla*

Nor could the judge properly instr
were in charge of the hose were bo
signals or other specified precautions

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agers of the train had notice sufficient to stop, in order to entitle the plaintiff to recover. The question what acts of care were required, under all the circumstances, was for the jury, and it was left to them with proper instructions. Nor could it be ruled, on the facts disclosed, that the defendant was only liable for reckless and wanton misconduct in running the train, as in cases of injury to mere trespassers. The town was not a trespasser, but was in the exercise of a common law right to enter upon private property in order to prevent the spread of fire, and the case shows a just occasion for the exercise of the right. *Metallic Compression Co.* v. *Fitchburg Railroad*, 109 Mass. 277.

All the specific instructions requested were either given or rightly refused. The men who had charge of the fire engines and apparatus were required only to provide against such injury to those who were in the possession and use of the railroad as might be reasonably apprehended in the exercise of ordinary care. They were not required to anticipate, without previous notice, the unlawful act of the defendant, and if, when they became aware of the approaching train, they did all that a person of ordinary prudence would do under the same circumstances to avoid injury, they were not chargeable with negligence.

To the defendant's objection that the jury was permitted to find for the plaintiff, although the managers of the train were free from any fault except that of running a train on Sunday, it is sufficient to say that the instructions given plainly required the jury to find that the act of running the train on the Lord's day was the distinctive and direct cause of the injury complained of; and this is enough to support the action.

Exceptions overruled.

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Edward J. Coleman

Norfolk. Jan. 25. — Sept. 8, 1

The St. of 1866, c. 193, allowing a certificate required to be made or not make the payment of the fee § 48 of that chapter, of a poor deb by or upon behalf of the creditor.
If a poor debtor is entitled to his disc to give him a certificate of such dis tered into by him under the Gen. St

Contract on a recognizan c. 124, § 10, by George Franc as sureties, and conditioned th upon mesne process, should, v the arrest, deliver himself up istrate authorized to act, giv thereof in the manner provide and place fixed for his examin the same was concluded, and magistrate, making no default tion, and abide the final order

At the trial in the Superior tiff called as a witness the mag of the desire of Francis to tak debtors, and who read from h made by him, testifying that h and that these minutes were hi "Citation at my office, Hyde P P. M. Defendant and attorne creditor or attorney. No certifi of prepayment of fee for the s out consent of magistrate." T ination, was allowed, against th that he was present during the that Francis and his counsel plaintiff, nor any one on his bel ration of the hour fixed for the made out a certificate of the di

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and demanded the payment of one dollar as his fee for the same, which was refused, and that thereupon he destroyed the certificate, without having delivered it to Francis or his attorney; that Francis departed without his, the magistrate's consent, which was withheld solely upon the ground of the refusal of Francis to pay the fee for the certificate.

The judge ruled that the facts disclosed did not constitute a breach of the recognizance, and directed the jury to return a verdict for the defendants; and, by the consent of the parties, reported the case for the consideration of this court; judgment to be entered on the verdict, if the rulings were correct; otherwise, a new trial to be ordered.

L. L. Scaife, for the plaintiff.

J. E. Cotter, for the defendants.

LORD, J. The legal effect of the magistrate's record, unaided by the parol testimony objected to, is the same without as with the evidence; its competency is therefore immaterial. By that record, without examination and without the payment of any fees, the debtor was entitled to be discharged from arrest and imprisonment. Gen. Sts. *c.* 124, § 48. The St. of 1866, *c.* 193, changes the amount of fees of the magistrate, but does not in terms make any change in respect to the person by whom they are to be paid. If by implication the fee of one dollar is to be paid by the debtor, which we do not mean to intimate, the payment of such fee is not a condition precedent to his right to discharge. It is not necessary to consider what would be the effect, if any, of the absence of the magistrate's certificate in any subsequent proceedings upon the execution. So far as the debtor entered into any contract with the creditor, he has fully performed it; and the magistrate could not, by refusal to make a certificate, deprive him of rights which by law had already become fixed. *Judgment for the defendants.*

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ELIZA KOHLHEPP *vs.* I

Norfolk. Jan. 26. — Sept. 8, 1

Under the St. of 1868, *c.* 223, autho
sewerage, and requiring that a de
the act, "as certain as is required
in the registry of deeds for the cou
of the land taken may be proved
sufficiency of the description that it
as recorded in the registry of deeds,
at the same time with the written d
plan is in sections, if the entire plan
Where land is taken by a town for pu
a description of the lands taken, "a
ance of land," to be filed in the regis
are situated, the question whether t
reference to a plan, is sufficient to ide
is a question of fact.

TORT for breaking and ente
ditch through it, and turning t
the same.

At the trial in the Superior
mitted that the acts which con
done by certain commissioners
Roxbury to improve Stony Bro
poses of sewerage, under the
c. 223, and 1870, *c.* 220, after t
the registry of deeds for the c
plan or plans hereinafter menti
was the property of the plaint
erick Kohlhepp, owned a trac
plan mentioned, being marked
fendant, in justification of the
the close had been taken by the
under the acts above mentioned
ing paper, which was recorded
istry of deeds for Norfolk Coun

"Know all men by these pr
West Roxbury, at a meeting d
of June, 1870, in pursuance of

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the acts of 1870, appointed the undersigned, Theodore B. Moses, William J. R. Evans, and Robert M. Morse, Jr., commissioners to improve Stony Brook and its tributaries, and authorized said commissioners to exercise all of the powers granted to said town by chapter 223 of the acts of the year 1868, and to perform all the duties therein imposed on the selectmen of said town.

"Now, therefore, the undersigned hereby declare that in the capacity of commissioners as aforesaid, and under the authority and for the purposes stated in said chapter 223 of the acts of the year 1868, and in the name and behalf of said town of West Roxbury, they did, on the ninth day of January, A. D. 1871, take a certain piece of land believed to belong to Frederick Kohlhepp, and bounded and described as follows, to wit: beginning at the southerly corner of the premises herein described, and thence running northerly eighty-three and five tenths feet; then turning and running northeasterly sixty-three feet; then turning and running northwesterly thirty-one and two tenths feet; then turning and running southwesterly sixty-three and five tenths feet; then turning and running southerly seventy-nine feet; and then turning and running southeasterly thirty-three feet to the point of beginning. Containing four thousand three hundred and thirty-five square feet, the same being shown on a plan made by Theodore B. Moses, and recorded with Norfolk Deeds, lib. ——, fol. ——, and they further declare that said land was taken, pursuant to the provisions of chapter 223 of the acts of the year 1868.

"In witness whereof, they have hereto set their hands, this ninth day of January, 1871.

"T. B. Moses,
"Wm. J. R. Evans,
"R. M. Morse, Jr.,
} Commissioners."

The defendant also produced a roll of ten plans, numbered 1 to 10 respectively. On the face of the plan No. 1 were the words, "Plan of lands taken by the town of West Roxbury to widen and straighten Stony Brook. October 1st, 1870, scale 20 ft: T. B. Moses, Surveyor." On the face of each plan were the words, "'October 1st, 1870, scale 20 ft. T. B. Moses, Surveyor.' Received and filed January 12, 1871. J. Foord, Register." On the back of plan No. 2 was the following indorse

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ment, in the handwriting o
"190, town of West Roxbu
10 plans."

It was agreed that, if it
prove that these plans we
by the commissioners in tl
a continuous line of the cha
bury, from the Boston bou
plaintiff's close.

It was admitted that at t
no plan on file or recorded i
plan called for in said state
such plan has been recorded i
the plans hereinbefore referre
the same time with said state
in the registry, and the defen
tent, that the reason that the
in any book was that, in the
too bulky.

The plaintiff contended tha
ers was not sufficient to show
taken under the acts for the
was not competent for the de
actually recorded or filed in s
date of the statement, was the
therein; that parol evidence w
what plan was intended to be
fact intended to be taken; and
said plans considered as one pl
the statement, still the stateme
was insufficient to show that tl
under said acts.

The plaintiff offered to pro
acquainted with land surveying
of the plans, the land claimed
located and defined upon the
to the admission of this eviden

The judge thereupon, with
drew the case from the jury a

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arising upon the evidence for the determination of this court. If the evidence offered by the defendant was competent and sufficient to prove that the land was lawfully taken under said acts, judgment was to be entered for the defendant, unless the judge erred in excluding the evidence offered by the plaintiff. If the evidence was not sufficient to prove that the land was so lawfully taken, or if the judge erred in excluding the evidence offered by the plaintiff, the case was to stand for trial.

C. G. Keyes, for the plaintiff.

R. M. Morse, Jr., for the defendant.

LORD, J. The St. of 1868, *c.* 223, requires that the town, upon taking land for the purposes of the act, shall, within sixty days of the taking, file in the office of the registry of deeds for the county in which the lands are situate, a description of the land so taken, "as certain as is required in a common conveyance of land." It does not follow that the description is not sufficiently certain, because it is in part words and in part a drawing or plan. Nor is it an objection to such plan that it is in sections, if the entire plan is intelligible and may be identified. Nor is it an objection that the written description refers to "a plan recorded with Norfolk deeds, lib. , fol. ," though writing and plan are simultaneously filed as part of the same description. The question is of identity, which it is competent to prove by evidence. That is a question of fact.

The only other question raised is, whether the description of the land by words and plans is a sufficient description. And this, too, is a question of fact. The court cannot say, as matter of law, whether the description does or does not define the land which was taken. The question to be decided is, can one familiar with the land and the monuments upon and about it, by the courses, distances, monuments and other means of identification therein given, apply the description, as filed in the registry, to the land of the plaintiff entered upon by the defendant, with such reasonable certainty as to show the limits of the taking. If so, this is all which the statute demands, and this is a question of evidence and not of law, and the case must

Stand for trial.

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Opinion of the Justices

**In a capital case, a memorandum of
man of the jury, or a recommendati
part of the judicial proceedings in
consideration should be given to su
at the trial, by the Governor and C
commutation of the sentence, does n
any precedents from which any rule
a question of fact, the determination
of the Governor and Council.**

On May 16, 1876, the foll
Governor and Council, and or
ernor, together with the record
the Justices of the Supreme J

Ordered, that the record in t
roy, together with two papers
of the Supreme Judicial Cour
Governor, dated February 26,
of the Supreme Judicial Court
answer to the following questio

First. Are the papers, so tr
part of the judicial proceedin
thereof, and what is their legal

Second. What consideration
given those papers by the G
upon an application for the com
Pomeroy?

By the record it appeared th
court held in Suffolk by the Ch
ton; Pomeroy was convicted by
gree; and that exceptions, alle
argued before the full court a
and the defendant sentenced to

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The note of the Chief Justice to the Governor accompanied the certified copy of the record of the conviction and sentence, delivered by the clerk of the court to the sheriff and transmitted by the sheriff to the Governor, as directed by the Gen. Sts. *c.* 174, § 24; and was as follows:

"Court House, Boston, February 26, 1875.

"May it please Your Excellency:

"In the case of Jesse Harding Pomeroy, convict of murder in the first degree, the jury, when they returned their verdict, delivered to the judges presiding two papers: the one a memorandum, signed by their foreman, of the ground of the verdict; the other a recommendation that the sentence be commuted, signed by all the jurors. As these papers form no part of the files or records of the court, the originals are herewith transmitted to Your Excellency, together with the copy of the conviction and sentence.

"I have the honor to be, with great respect,

"Your Excellency's most obedient servant,

"Horace Gray, Chief Justice.

"To His Excellency the Governor."

The papers inclosed were respectively signed as above stated, and were in the following words:

"Guilty of murder in the first degree by reason of the accompanying acts of atrocity apart from premeditated malice aforethought."

"The jury recommend that the sentence be commuted to imprisonment for life on account of his youth."

On May 23, 1876, the Justices of the Supreme Judicial Court returned the following answer to the questions referred to them by the Governor and Council:

The Justices of the Supreme Judicial Court, having considered the questions upon which their opinion has been requested by His Excellency the Governor and the Honorable Council, respectfully submit the following answer:

By the laws of the Commonwealth, murder committed, either with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, is murder in the first degree; the degree of murder is to be found by the jury; their verdict is

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returned orally by their fore
and affirmed by the whole ju
by such verdict find the ac
degree, the only sentence tha
A memorandum of the groun
tion to mercy, presented by t
the manner of returning, rec
the form of the sentence; an
cial proceedings in the case, o
legal relation to the judicial p

The transmission of such m
to the Governor by the justi
other effect than to identify,
papers received from the jury
judicial record, are not includ
whole record of the conviction
require to be transmitted to t
court.

What consideration should be
ernor and Council, in passing u
mutation of the sentence, appea
upon any question of law, or u
any rule or principle of law ca
question of fact, upon which the
an opinion, and the determinati
the discretion of the Governor,
the Council, in the exercise of t
vested in them by the Constituti

Boston, May 23, 1876.

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INDEX.

ABORTION.

See INSURANCE, 2.

ACCEPTANCE.

See BILL OF EXCHANGE, 3, 4; FRAUDS, STATUTE OF, 2–4.

ACCOUNT.

See EQUITY, 8.

ACTION.

1. The owner of land is not liable for not preventing surface water from accumulating thereon and flowing thence upon the adjoining land of another, to his injury. *Morrill* v. *Hurley*, 99.
2. An action of tort for inducing the promisee of a note to indorse it in blank upon its transfer, by fraudulent representations as to the legal effect of such indorsement, cannot be sustained before actual payment by the indorser. *Freeman* v. *Venner*, 424.
3. A laborer, employed in loading ice on board a vessel from the wharf, after finishing his work, went on board the vessel for the gratification of his curiosity, and there fell down an open hatchway and broke his leg. *Held*, that he was a mere intruder, and that the owners of the vessel were not liable for the injury. *Severy* v. *Nickerson*, 306.
4. The amount found due to a *cestui que trust* for income from the trust fund, by the final account of the trustee duly filed and allowed, is recoverable in an action at law by the *cestui que trust* against the trustee. *Johnson* v. *Johnson*, 465.
5. On the morning of the Lord's day, before daylight, the fire department of a town, for the purpose of extinguishing a fire, ran hose from a river across a railroad track, which hose were cut in two by a gravel train owned by the defendant. *Held*, in an action of tort by the town for the injury to the hose, that the persons in charge of the hose had a right, in the absence of positive information, to expect that no train would be run on that day; and that those in charge of the train were for that reason required to exercise greater caution. *Held*, *also*, that the plaintiff was not a trespasser. *Held*, *also*, that a request to rule that danger signals should have been made in each direc-

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tion by the plaintiff, was right
the train on the Lord's day, in
injury, the action could be mai
on the part of the defendant.

See CARRIER, 2, 5; CHARITY, 3;
ING; GUARDIAN AND WARD, 1
TROVER; WORK AND LABOR.

ADMI

See EXECUTOR

ADI

See EVI

ADC

See DEVISE

AFF

See T

AG

See PRINCIPA

AGRE

See Co

ALIM

On a petition to make absolute a decr
cruelty, and to award a gross sum in
nual sum, ordered at a preceding te
vised for the reason of altered circu
ties, and the former relations and co
of the separation, and the facts upon
as well as any new facts bearing upo
sideration. *Sparhawk* v. *Sparhawk*,

See AP

APP

1. In a case of divorce or alimony, no ap
the full court in matter of fact. *Spa*
2. If this court has power, on a probate
judge presiding at the trial of issue
grant a delay in the trial on account
of the testimony expected nor any st

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tation having been made, it will only do so where the circumstances connected with the absence of the witness, and his alleged relation to the case, are so peculiar as to require that the ordinary rule should be dispensed with. *Newell* v. *Homer*, 277.

5. In an action to recover damages for breach of a contract to deliver a lot of plate-glass, the case was submitted to the Superior Court on an agreed statement of facts, from which it appeared that the contract was completed by correspondence between the parties in August, 1871, in which the defendants offered to furnish the glass within sixty days from the date of the order, and the plaintiff ordered the same, stating that it would not be needed before the following December; that on October 17, 1871, the defendants notified the plaintiff of the arrival of the glass, and requested shipping directions, and the plaintiff replied on November 9, 1871, that he did not then need the glass, owing to building delays, and offering to make a deposit to retain the glass until required; that on December 9, 1871, the defendants informed the plaintiff that they would retain the glass subject to his order upon the receipt of $1500 on account, and on December 26 the plaintiff sent $400, and promised after the first of the year to do better; that from this time the parties continued to deal with each other, the plaintiff making purchases amounting to more than $400, and nothing further was said about the plate-glass until August 15, 1872, when the plaintiff directed the defendants to forward the glass; that the defendants on August 20 refused, because of the long delay and the plaintiff's neglect to make the full deposit of $1500, and claimed the right to apply the $400 to the subsequent purchases of the plaintiff. The Superior Court found that the plaintiff was not entitled to damages on the plate-glass contract. *Held*, on appeal to this court, that the judgment disclosed no error of law, from which an appeal would lie under the Gen. Sts. *c.* 112, § 11; that the facts would warrant a finding that the judgment below proceeded upon the inference of fact that a reasonable time had elapsed, and that the plaintiff had waived his rights under the contract. *West* v. *Platt*, 421.

See Costs; Recognizance, 1.

ARBITRAMENT AND AWARD.

1. A submission to arbitration by rule of court is a waiver of all defects in the pleadings. *Ames* v. *Stevens*, 218.
2. An award under an agreement of parties and rule of court cannot be impeached for error in the application of the rules of law, unless the terms of the submission or award expressly or impliedly subject the latter to the revision of the court. The statement of the grounds of the award, or of the conclusions of law adopted by the referees as applicable to the facts found by them, is insufficient. *Gardner* v. *Boston*, 266.
3. A submission was made to arbitration to determine the "demand which H. has against A. in the settlement of the affairs of the late firm of P. & A." The award thereunder determined "the claim of H. upon A in the matter

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of settling the copartnership betw
the receipt of a sum of money nas
full from P. of any claim which th
copartnership existing previous to
against A. on the award, the declar
ner in the firm of P. & A., of whic
ners, and that he was ready to perfo
of him. The answer was a genera
within the submission. *Held*, on exc
tried the case without a jury, to rule
mission, that it must be assumed to ha
the firm of P. & A. consisted of H. an
perform on his part what the award re

4. An action of tort for injuries alleged t
of the defendant's servant in driving
ment of parties and under rule of court,
report was to be final. His report stated
by which it appeared that the defendant
ing the wagon and its driver in his busin
with a load of stock, and occasionally, u
bring back a load for some other person;
defendant had so agreed to carry a load
thereof were to load and unload; that the
ingly, the driver helping in lifting, but taki
heavy table at the top of the load was no
owners rode on the wagon to steady the tab
driver, before starting, said to the owners t
on, and they answered that it was not necess
if the load was all on, and, on their answe
way; and that, in going down a descent in
caused the injury sued for. The arbitrator
and driver were suitable for the business in w
the owners of the machinery were guilty of n
ing their load upon the wagon, and in directin
load in the condition in which they had place
careless in attempting to carry the load throu
so loaded; and that the main question was, wh
starting and driving the wagon as it was loaded
the case to the Superior Court "for its determ
for which party judgment should be entered as
The Superior Court gave judgment for the plain
appeal to this court, that the question whether
the defendant in starting and driving the wagon
it was a fact which the arbitrator was bound to
ment must be set aside. *Preston* v. *Knight*, 5.

See ESTATES OF DECEASED P

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ARREST.

An officer, who has a warrant for the arrest of a person charged with a misdemeanor, and who has reasonable cause to believe that such person is in the dwelling-house of another, after notifying him that he has a warrant against a person in the house, and, upon demanding entrance, is refused, has a right to enter the outer door of the house by force, for the purpose of serving the warrant; and he cannot be treated as a trespasser, although he has failed to notify the owner of the house who the person sought to be arrested is, no inquiry having been made in relation thereto, and in fact the person sought for is not there. *Commonwealth* v. *Reynolds*, 191.

ASSAULT.

On the trial of an indictment, charging the defendant with an assault with intent to kill, the judge instructed the jury that, if they should find that the assault was committed by wanton or reckless acts, the ordinary and natural consequence of which would be the killing of the person assaulted, they would be justified in finding the defendant guilty of an assault with intent to kill. *Held*, that the instruction did not assume that such acts constituted the intent, but that they furnished evidence from which it might be inferred by the jury. *Commonwealth* v. *Reynolds*, 191.

ASSESSMENT.

See Eminent Domain, 1; Evidence, 1; Exceptions, 1; Lease, 1; Sewer.

ASSIGNMENT.

See Lease, 2.

ATTACHMENT.

1. In an action by A. against an officer for attaching the plaintiff's furniture, on a writ against B., there was evidence that the officer went to A.'s house, where B. was temporarily residing, and told A. that he was an officer and had come to attach B.'s furniture; that A. said she owned all the goods there, and told the officer not to take them; that he asked her to point out her goods and she refused, saying she would not give him any information as to what were her goods and what were not; that the officer thereupon attached all the furniture as the property of B., some of which in fact belonged to A., and some to B. *Held*, that this evidence warranted a finding that A. had not unlawfully or fraudulently intermingled her goods with those of B., and that she might recover for the taking of her goods. *Davis* v. *Stone*, 228.

2. An officer, after attaching furniture in a dwelling-house in the city of Boston, and placing a keeper over it, neglected to remove it or to take any steps towards such removal for seven hours in the middle of the day. *Held*, as matter of law, that the officer delayed for an unreasonable time to remove the chattels, and that he became a trespasser. *Ib.*

See Bond; Forgery, 2–4; Mechanic's Lien, 1; Trust and Trustee, 2

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ATTO

On the issue whether a signature, on a
the plaintiff may call the counsel of
required to disclose any matter of con
opinion upon any statement of the d
Jewett, 215.

AWA

See ARBITRAMEN

BAN

Under the U. S. St. of 1864, *c.* 106, § 5
established under the statute to purch
"as it shall purchase at sales under j
by such association, or shall purchase
tion," such corporation has authority
necessary in order to secure a debt du
the security of the debt is the real ob
tional Bank of South Reading, 153.

BANKRU

1. An action, begun in a state court by a
ration against which, pending the acti
the attachment was made, proceedings
will not be dismissed on motion of the
poration, for want of jurisdiction.
Railroad, 81.
2. Upon the filing by the defendant in a
and before judgment, of a copy of the
United States District Court, he is en
await the determination of that court
and, upon filing his certificate of discl
his favor. *National Bank of Clinton* v
3. Proceedings to enforce a mechanic's li
ruptcy proceedings against a debtor w
conveyed all his interest in the land.

See CONTRACT, 3, 4; FRAUDU

BEA

See DE

BETTER

See EVIDENCE, 1; EXC

BILL OF E

1. Where a bill of exchange is made
Agent," the word "Agent" is a mer

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against him as indorser, parol evidence is inadmissible to show that he was merely an agent, and that the plaintiff knew this fact. *Barthett* v. *Hawley*, 92.

2. In an action by a holder of a bill of exchange against an indorser, there was evidence that notice of the dishonor and protest was forwarded from London to the plaintiff in Boston, by the next mail which left London for America after the protest, and was by him delivered to the defendant in person on the same day that it was received by him from the mail carrier in Boston. *Held*, that this evidence warranted the inference that the bill and protest were received by the defendant as soon as if they had been forwarded directly to him. *Ib.*

3. The words "I take notice of the above," written and signed upon an unnegotiable bill of exchange by the drawee, do not of themselves necessarily import an acceptance of it, and parol evidence of a refusal to accept by the drawee, at the time of its presentation, is admissible. *Cook* v. *Baldwin*, 317.

4. A part payment by the drawee of a bill of exchange is not such a recognition of his obligation as will, as matter of law, bind him to pay the remainder. *Ib.*

BILL OF LADING.

See CARRIER, 1, 2.

BOARD OF HEALTH.

See SHIP.

BOND.

1. The written application to a master in chancery, under the St. of 1870, *c.* 291, by a defendant, who wishes to give a bond to dissolve an attachment, need not be signed by him. *Commonwealth* v. *Costello*, 356.

2. Real property was attached as the property of A., standing in the name of B. The condition of a bond given, under the St. of 1870, *c.* 291, § 3, to dissolve the attachment, was that if A. and B. should pay to the plaintiff a sum stated, (being the amount at which the property was appraised,) if he should recover so much therein, or any amount not exceeding that sum, within thirty days after final judgment, the bond should be void, otherwise to remain in full force. *Held*, that the bond was valid. *Ib.*

See EVIDENCE, 8; FORGERY, 2–4; MECHANIC'S LIEN, 1.

BOSTON, CITY OF.

See WAY, 3, 4.

BOUNDARY.

See DEED.

BROKER.

1. A. agreed with B. that if B. would find anybody that would trade with A. for certain land owned by him, he would pay B. $500. B. accordingly intro-

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duced to A. a person with whom A.
of the property. *Held*, that, upon tl
came entitled to his commission, t
Pearson v. *Mason*, 53.

See INSURAI

BURDEN O

See EVIDENCE, 1; PROMIS

BY-L

See SER

CAPITAL AN

See DEVISE ANI

CARR

1. It is no excuse, for the conversion b
signee, that the consignor fraudulentl
and that the consignee knew that th
less than it was, and did not notify tl
Albany Railroad, 201.
2. If a carrier by railroad refuses to del
than the non-payment of freight, an ac
or payment of freight. *Ib.*
3. A consignor sent, by an association
defendant was one, a car load of oats
to a station beyond the line of the d
transit company a bill of lading, whic
the oats were stated to weigh 20,000 l
for the full contents of the car. In a
defendant for the conversion of that po
agent of the defendant testified that h
the excess of oats above 20,000 lbs.
Held, that the testimony was competen
also, that a request to the court to ru
transit company that the oats weig
weighed more, so that they might be c
consignee knew that the oats were "
come on without notifying the defend
paying freight on the excess, unless de
excess of oats and the plaintiff could
consignee bought the grain deliverable
4. It is competent for a common carrier,
goods, in their delivery, by the breaki
a local usage that such apparatus is to

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goods; and, if such usage is shown, the carrier is not liable for injury to the goods, occasioned by a latent defect in the apparatus furnished by the consignee. *Loveland* v. *Burke*, 139.

5. A common carrier, having a hogshead of molasses to deliver, was furnished by the owner with skids wherewith to unload it from his wagon. The skids, owing to a latent defect, broke under the weight of the hogshead, and the contents thereof were lost. *Held*, that the owner could not maintain an action against the carrier for the loss. *Ib.*

CASE STATED.

A case stated in an action at law cannot be heard or reserved by a single justice of this court, but is within the exclusive jurisdiction of the full court. *Massachusetts National Bank* v. *Bullock*, 86.

See APPEAL, 3; TRUSTEE PROCESS, 2.

CERTIORARI.

See SEWER, 4.

CHALLENGE.

See JUROR.

CHARITY.

1. A corporation, the object of which is to provide a general hospital for sick and insane persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable institution. *McDonald* v. *Massachusetts General Hospital*, 432.

2. The facts that a corporation, established for the maintenance of a public hospital, by its rules requires of its patients payment for their board, according to their circumstances and the accommodation they receive; that no person has individually a right to demand admission; and that the trustees of the hospital determine who are to be received; do not render it the less a public charity. *Ib.*

3. A corporation, established for the maintenance of a public charitable hospital, which has exercised due care in the selection of its agents, is not liable for injury to a patient caused by their negligence, nor for the unauthorized assumption of one of the hospital attendants to act as a surgeon. *Ib.*

See TAX.

CITY.

See EMINENT DOMAIN, 1-3; PRINCIPAL AND AGENT, 1; WAY, 14.

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CITY C(
See Cor

CIVIL
See Equity,

CODI
See Devise and

COMMIS
See Bro

COMPL
See Intoxicatin

COMPRO
See Contr

CONFES
See Evidi

CONFLICT O
See Marr

CONFUSION O
See Attachi

CONSIGNOR AND

1. A letter issued by a firm of commissi of goods and stating that they "will t received in store," does not import tha surers of such goods, and is fulfilled proper insurance against fire. *Johnson*
2. A consignee, who effects insurance up suance of an agreement that "all con ance as soon as received in store," is n the name of the consignor, or place th *Ib.*
3. A consignee, who has made advances effected insurance for the benefit of the of the goods by fire without his fault money that he had upon the goods then

See Insura

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CONSTITUTIONAL LAW.

1. The St. of 1874, *c.* 205, so far as it provides that when a wife is living apart from her husband, for justifiable cause, and he fails to support her, this court may make such order as it deems expedient for the support of the wife and the maintenance of the minor children, is constitutional, although it makes no provision for a trial by jury. *Bigelow* v. *Bigelow*, 320.
2. The St. of 1874, *c.* 221, prohibiting the employment of all persons under the age of eighteen, and of all women, in laboring in any manufacturing establishment, more than sixty hours per week, violates no contract of the Commonwealth implied in the granting of a charter to a manufacturing company. *Commonwealth* v. *Hamilton Manuf. Co.* 383.
3. The St. of 1874, *c.* 221, prohibiting the employment of all persons under the age of eighteen, and of all women, in laboring in any manufacturing establishment, more than sixty hours per week, violates no right reserved under the Constitution to any individual citizen, and may be maintained as a health or police regulation. *Ib.*
4. A law, which merely prohibits a woman's being employed in any manufacturing establishment more than a certain number of hours per day or week, does not violate her right to labor as many hours per day or week as she may see fit, and is within the power of the Legislature to enact. *Ib.*

See CONTEMPT.

CONTEMPT.

The common council of a city has no power to commit and punish for contempt; and so much of the St. of 1863, *c.* 158, § 2, as undertakes to confer such authority is unconstitutional and void. *Whitcomb's case*, 118.

CONTINGENT INTEREST.

See DEVISE AND LEGACY, 5.

CONTRACT.

I. *Making.*

1. A. offered by letter to "help out" B. at a certain price with a kind of article of which A. had a full supply. B. promptly accepted the offer by letter, and named the quantity he would like, together with the manner of delivery. A. replied to B. by letter, on the same day, that by his offer he merely meant to substitute B. in his place in an offer made to him. *Held*, in an action by B. against A. on an alleged agreement of sale, that these letters did not show such an agreement, nor constitute a sufficient memorandum to take the case out of the statute of frauds. *Oakman* v. *Rogers*, 214.

See INSURANCE, 17; TOWN, 2; WORK AND LABOR.

II. *Consideration.*

See BROKER.

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III. V

2. An action will not lie on an agreem pounding any misdemeanor, unless it knowledged in and approved by the pending, according to the Gen. Sts. c. v. *Hood*, 403.

3. A secret agreement in fraud of credi the debt of his assignee in full, if he v common law, and contrary to the pro act. *Blasdel* v. *Fowle*, 447.

4. A note and mortgage on her separate of a bankrupt, at his request, in pur the bankrupt was to pay the debt of would assent to his discharge in bank void; and it is immaterial that the n the discharge, and that the wife did n

5. A contract, by which a shareholder i purchase of a part of his stock at a purchaser the office of treasurer of the in case of his removal to repurchase t lic policy, and as a fraud on the othe absence of evidence that the transacti the shareholder, or that it was consen corporation. *Guernsey* v. *Cook*, 501.

See BANK; EQUITY, 1–4;

IV. *Const*

6. The expression "payable as conveni providing for the payment of a certain ble at all, but only as an extension of

7. An assignment, executed on August 3 to me until October 1" from the tena rents on the first day of each month, October 1. *Kendall* v. *Kingsley*, 94.

See EVIDENCE, 11; GUARANTY, 3, 4; I

CONVERS

See CARRIER, 1,

CORPORA

1. A banking corporation organized und brought an action, describing itself as Bangor, "a corporate body organized u of America, and having an established State of Maine;" and, to prove its corp

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cate of the comptroller of the currency that it had been duly organized, and the testimony of the bookkeeper of a bank in Boston that the Merchants' National Bank of Bangor did a banking business under that name, that he had been in their banking house in Bangor, was well acquainted with the cashier, and that his own bank was in the habit of receiving remittances from the Merchants' National Bank of Bangor. *Held*, that the evidence was competent to show that the plaintiff was *de facto* a banking corporation and transacting business as such. *Merchants' National Bank* v. *Glendon Co.* 97.

2. By the St. of 1874, *c.* 55, the Old Colony Railroad Company was authorized to purchase the rights, franchise and property of the Middleborough and Taunton Railroad Corporation, and the latter was authorized to convey to the former its franchises and property, rights, easements, privileges and powers, and thereupon the former corporation was to "be subject to all the duties, liabilities, obligations and restrictions to which said last named corporation may be subject." *Held*, that the Old Colony Railroad Company, upon the completion of the purchase and conveyance, became directly liable in an action of tort for damage occasioned by the prior neglect of the Middleborough and Taunton Railroad Corporation. *New Bedford Railroad* v. *Old Colony Railroad*, 397.

3. In an action to recover for materials alleged to have been sold to a railroad corporation, it appeared that, immediately before the alleged sale, the president of the corporation made a large purchase of railroad iron of the plaintiff, and that the corporation sanctioned the proceeding, received and used the iron and paid for it in the manner agreed to by the president; that, upon the application to the plaintiff by the contractor for the building of the defendant's road, for railroad material to be used, and afterwards actually used in the building of the road, the plaintiff told the president that he would sell to the railroad company the material in question upon its order, but would not sell to the contractor, and that thereupon the president told him to send the materials to the company; that the plaintiff's bill was sent to the president, who replied that he would present it to the directors of the company. Evidence was also introduced that the president always acted for the railroad company on its part, and that the directors when spoken to upon this subject, always referred to the president, and took no part themselves. *Held*, that upon this evidence it was a question of fact for the jury whether the president was the authorized agent of the company in making the purchase. *Reed* v. *Ashburnham Railroad*, 43.

See BANK; BANKRUPTCY, 1; CHARITY; CONSTITUTIONAL LAW, 3-4; CONTRACT, 5; EVIDENCE, 2.

COSTS.

Double costs are not allowable under the Gen. Sts. *c.* 112, § 13, in cases coming up by appeal. *Ames* v. *Stevens*, 218.

See ESTATES OF DECEASED PERSONS; GOODS SOLD AND DELIVERED.

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COUNTY COM

See MANDAM

COVEN

See LEASE;

DAMA

1. Upon a contract by the defendant to
the plaintiff, at his request, for an
before an action is brought, and a re
plaintiff is entitled to recover as his
fendant agreed to pay. *Pearson* v. *M*
2. In an action brought by a mortgagee
gaged property by a removal of fixtur
the alleged injury and before the act
his mortgage sold the mortgaged prer
debt and all prior incumbrances, is
King v. *Bangs*, 514.

See PATENT, 6; REPLE

DEEI

1. The town of Charlestown in 1640 esta
both landing places being upon the t
afterwards maintained ferry ways upo
flats from high to low water mark for
the ferry. Certain lands on each sid
beach leading from the upland to the f
each side of the river," were conveyed
and reconveyed by him in 1784 to the
Malden Bridge across the river, just w
veyed "the old ferry ways on the fl
Bridge on both sides of channel." Th
mark were permanent structures of sto
veyance included the land under and u
and low water mark, and that the east
land, parallel with the general course
Gerrish v. *Gary*, 132.
2. The owner of a tract of land divide
through it, and had a plan thereof mad
between two of the streets, two lots, th
"90," and that of the other "103.70
marked "3." In fact the distance bet
and, according to the scale marked on
side line of each lot carried that line t

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a deed, which referred to the plan, the side line and the lines on the passageway, of the first lot, were described as running "ninety feet to a passageway eight feet wide, then turning at a right angle and running on said passageway," a given distance. *Held*, that the plan and the deed must be construed together, and that the side line did not run ninety feet, exclusive of the passageway. *Walker* v. *Boynton*, 349.

See EMINENT DOMAIN, 4, 5.

DELIVERY.

See DEVISE AND LEGACY, 8.

DEMAND.

See CARRIER, 2.

DEVISE AND LEGACY.

1. A testator left the residue of his property "to the children of my brother A. by his present wife, and the survivors of them, and to the children of my nephew B. and the survivor of them, their heirs and assigns forever." At the death of the testator, A. had eight children and B. had two. *Held*, that the children of A. and of B. took *per capita* and not *per stirpes*. *Hill* v. *Bowers*, 135.

2. A testatrix, by her will, bequeathed property in trust, the income to be paid to her adopted daughter for life, remainder to her children, if any, in fee, and, in case of her death without issue, to the residuary legatee under the will, and, by another clause in the will, gave and bequeathed to her brother all the rest, residue and remainder of her property and estate, "to be taken, held and enjoyed by him and his heirs forever, in fee simple." The brother died five years before the testatrix, leaving no issue, but leaving brothers and sisters. *Held*, that the residuary bequest went to the adopted daughter. *Burrage* v. *Briggs*, 103.

3. Where legacies are given to the same person by different instruments, the general rule is that the second is to be treated as additional to the first, in the absence of anything signifying a different intention; but the apparent intention of the testator must govern. *Wainwright* v. *Tuckerman*, 232.

4. A will contained a bequest of $5000 to A. in trust, to pay the income to C. for life, and after his death to convey the principal in equal shares to his wife and daughter; a devise of a house in G. to C.'s wife for life, with remainder to her issue; a pecuniary legacy to a servant; and a residuary devise and bequest to other persons. By a codicil the testator bequeathed $7000 to A. and B. in trust to pay the income to C., with no provision as to the remainder after his death, and devised the house in G. to him, and gave to the servant named in the will "$200 additional, making in all $1000." *Held*, that the bequest of $5000 in the will was wholly revoked by the codicil; that C. was entitled to the income of $7000 only; and that the residue of that sum, after his death, would go to the residuary legatees. *Ib.*

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DISORDER

1. Upon an indictment for keeping a d
ged that, during some substantial po
ment, the defendant had, in whole o
of the premises complained of; and
the defendant, they were a commo
and disorderly house. *Commonwealt*
2. It is sufficient, to support an indic
that the defendant suffered and allo
of drunkards, thieves and prostitute
the night. *Ib.*
3. The common nuisance charged in a
house may consist in drawing togethe
ful practices. *Ib.*

DIVO

See ALIMONY;

DOW

See EQU

DRA

See EMINENT DOM

EASEM

If an easement is created by grant, it d
it ceases. *Atlantic Mills* v. *Mason*, 24

See MILL, 4,

EMINENT I

1. Under the St. of 1869, *c.* 391, § 5,
whose land has been filled up for the
plated by the statute, if "dissatisfied w
raising the grade of his said land, may
aldermen, within sixty days after he sh
and the city of Cambridge shall thereup
as tenant in common an undivided part
der to and require the city of Cambridg
Cambridge, 157
2. To constitute a legal taking by the city
River, under the St. of 1872, *c.* 177, the
description of the stream taken, within
taking, as provided by the St. of 1846,
default therein the city is liable for dam
Power Co. v. *Allen*, 352.
3. The Cochituate Water Board of the city
the passage of the St. of 1872, *c.* 177,

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agency of the board "to take, hold and convey to, into and through said city all the water of Sudbury River," caused a dam to be built across the river, and a canal to be cut from it, by which a portion of its water was for several months diverted into Lake Cochituate. The city failed to file in the registry of deeds within sixty days from the time of the taking the description of the stream taken, as required by the St. of 1846, c. 267, § 1. *Held*, in an action of tort against the members of the board, that, even if their acts were authorized by the city, they became liable as trespassers, by reason of the default by the city in not filing the description required by the above named statute. *Wamesit Power Co.* v. *Allen*, 352.

4. Under the St. of 1868, c. 223, authorising a town to take land for the purposes of sewerage, and requiring that a description of the land taken for the purposes of the act, "as certain as is required in a common conveyance of land," shall be filed in the registry of deeds for the county in which the lands are situated, the identity of the land taken may be proved by parol evidence; and it is no objection to the sufficiency of the description that it refers to a plan; or that the plan is referred to as recorded in the registry of deeds, when in fact the plan was filed in the registry at the same time with the written description, and was not recorded; or that such plan is in sections, if the entire plan is intelligible and can be identified. *Kohlhepp* v. *West Roxbury*, 596.

5. Where land is taken by a town for purposes of sewerage, under a statute requiring a description of the lands taken, "as certain as is required in a common conveyance of land," to be filed in the registry of deeds for the county in which the lands are situated, the question whether the description of the land, by words and by reference to a plan, is sufficient to identify the land taken with reasonable certainty, is a question of fact. *Ib.*

EQUITY.

I. *Jurisdiction and General Principles.*

1. All instruments made for the purpose of giving effect to an illegal agreement are tainted with the illegality, and cannot be enforced in a court of equity. *Blasdel* v. *Fowle*, 447.

2. A bill in equity cannot be sustained by one of the parties to a contract for illegal trading with inhabitants of states declared in insurrection against the United States government, against another party to such contract, for an account of resulting profits. *Snell* v. *Dwight*, 9.

3. A bill in equity cannot be sustained by one member of a partnership against his copartners, for an account of profits resulting from an illegal trading with inhabitants of states declared in insurrection against the United States. *Dunham* v. *Presby*, 285.

4. The court will not entertain jurisdiction of a bill in equity for an account of profits resulting from an illegal trading with inhabitants of states declared in insurrection against the United States, if the illegal character of the transaction appears in evidence, although it does not appear on the face of the bill, and is not set up in the answer. *Ib.*

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5. A mortgagor procured the mortgaged
mortgage to a third person, who adva
a secret trust for the mortgagor, to ev
he had been separated, and to deprive
having procured a conveyance of the p
appointed administratrix of his estate.
in equity against the trustee for the re
trix and in her own right. *Held, also,*
were properly joined in the bill as plai
6. This court, under its general equity ju
execution of trusts, may appoint truste
though no express provision for such ap
the instrument creating the trust. *In r*
7. This court has jurisdiction in equity, u
to abate a private nuisance, which thre
injury to a right of way. *Cadigan* v. *B*
8. A bill in equity alleged an agreement l
that the plaintiff's shares of stock, allot
tain mining companies, should be issuec
held by him until the assessments, to be
should be paid; that the plaintiff had pa
as shown by an account annexed to the l
shares and appropriated the proceeds;
balance due on the over-payment of the
highest value of the stock since the pla
on demurrer, that the plaintiff had a pl
at law. *Frue* v. *Loring*, 507.
9. Upon a bill in equity to restrain the o
injured by fire, a part of which was leas
relief, it appeared that the building was
four of whom only joined in a lease for
lessor. It did not appear that the plaint
when he brought the bill. *Held*, that th
it would not be retained for the purpose
against A. *Tainter* v. *Cole*, 162.
10. A purchaser at a sale on execution c
position of an assignee in law of such
rights as if it had been voluntarily assi
assignment and sub-leases made subsequ
not constitute a cloud upon the title af
McNeil v. *Ames*, 481.
11. This court will not take jurisdiction i
term for years has been sold under an e
chaser the counterparts of his lease and
12. This court has no jurisdiction under th
bill in equity, by an assignee in law of a

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who claims the rent of a tenant, if it appears that a judgment at law in favor of the plaintiff will be conclusive and afford him the same relief as a suit in equity. *McNeil* v. *Ames*, 481.

See EQUITY, 13; TRUST AND TRUSTEE, 1; WAY, 2.

II. *Pleading and Practice.*

13. A bill in equity, filed in this state against a person residing in another state, seeking relief only against him personally, was served on the defendant by leaving a subpœna at his last and usual place of abode in that state. He appeared specially "for the purpose of excepting to the jurisdiction of the court," and moved that an injunction against him should be vacated. This motion was overruled. He then filed an answer to the bill, not waiving the objection to the jurisdiction of the court. There was no other or formal motion to dismiss the bill. The court afterwards ordered the injunction to be dissolved on the defendant filing a stipulation to abide the decree of the court in the case. The defendant filed the stipulation, and a decree was entered against him. *Held*, that the court had not acquired jurisdiction over the defendant; and that his acts did not amount to a waiver of the objection of the want of jurisdiction. *Walling* v. *Beers*, 548.

14. The owners of several lots of land may join in a bill in equity to restrain a private nuisance which threatens a continuous and permanent injury to a passageway, in which they have a right of way in common, as appurtenant to their several estates. *Cadigan* v. *Brown*, 493.

15. On a bill in equity against a trustee under a will to establish a resulting trust in the bulk of the estate, the court will order persons, who may claim the same as *cestuis que trust* under the will, to be made parties defendant. *Sears* v. *Hardy*, 524.

16. A motion for a trial by jury on issues of fact in equity should ordinarily be made before the case is referred to a master; and will not be granted after the coming in of his report, if the issue was made by the pleadings, and the case referred to the master without objection, and heard before him at great length, and the evidence before him is not reported, and there is nothing to show that the master's conclusion is unsatisfactory or that the case can be better tried by a jury. *Atlanta Mills* v. *Mason*, 244.

17. On a bill in equity to reform a policy of insurance by inserting a clause which it is alleged the parties agreed to insert, the plaintiff cannot have issues framed for a jury as a matter of right; and the court will not in its discretion frame such issues, without evidence that the plaintiff's suggestion of mistake in the contract has any foundation, or circumstances indicating that the matter can be more satisfactorily tried by a jury than by the court. *Ross* v. *New England Ins. Co.* 118.

18. A report of a single justice in equity submits to the decision of the full court all inferences of fact, as well as conclusions of law, involved in the decision of the question reserved, upon the facts stated in the report. *Parks* v. *Bishop*, 340.

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19. The decree of a single justice of t
brought before him on a master's re
appears, and the evidence is unrep
upon the findings of the master on a
20. Upon a bill in equity for the recon
to the defendant's allegations in his
before whom the case was heard,
fendant under a power of sale in
mortgagor and the defendant, that th
subsequently built upon the land had
no funds for either purpose had bee
he held the property in trust for the
that he had arrived at these conclusi
the defendant moved to amend his an
loans advanced to the mortgagor wh
purchase of the property and in the
ments upon the land, and for a refer
thereof. The presiding judge thereu
accounts, and, upon examination the
other matters than those that had b
them to a master. *Held*, that the pr
these accounts without reversing the f
the defendant and trying the question
Gilson v. *Hutchinson*, 27.

See EQUITY, 5;

ESTATE

See DEVISE AN

ESTATES OF DECE

An action against an administrator was r
eree returned his award in favor of th
by proceedings in the Probate Court, r
commissioners were appointed by that
claims of creditors. *Held*, that the pla
award, and to an execution for his costs
but that execution for the damages awa
termination of the proceedings in the
the motion for judgment on the award,
tion of the validity of other claims agai
whether the estate was or was not in
516.

See EXECUTOR AND A

ESTOPP

See MILL, 2; P

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EVICTION.

Repeated entries by the lessor upon leased premises, and carrying away of crops, cutting down a fruit tree, and removing a cooking stove from the house, though acts of trespass, do not amount in law to an eviction of the tenant. *Bartlett* v. *Farrington*, 284.

EVIDENCE.

1 Upon a petition to the Superior Court for a jury to revise an assessment of a betterment, the burden is upon the petitioner to show that the assessment was excessive. *Bigelow* v. *Boston*, 326.

2. In an action against a corporation upon a promissory note made in its name by "G. F., treasurer," the issue was whether it was the note of the corporation; and the defendant, having called G. F. as a witness, was allowed to ask him, against the plaintiff's objection, whether or not he had authority to make this note as treasurer of the defendant company. *Held*, that the question was inadmissible. *Providence Tool Co.* v. *U. S. Manuf. Co.* 35.

3. On the trial of an indictment for forging and uttering an appeal bond, the government offered evidence tending to show that the name of one of the sureties affixed to the bond was fictitious, by proving who the person really was, who represented himself by the fictitious name to the clerk of the court, in which the bond was given, and that his statements as to his business, residence, occupation and ownership of property were false. *Held*, that the evidence was competent, although the defendant admitted that the name was fictitious. *Commonwealth* v. *Costello*, 358.

4. To prove that the representations of the vendor of a machine as to its efficiency in certain particulars were false, it is competent to show that other similar machines, made and sold by the same vendor, had upon trial been found defective in those particulars. *Waters' Patent Heater Co.* v. *Smith*, 444.

5. A machine was ordered by a person on an agreement to try the same within a specified time according to certain directions, and to pay for it, unless it should fail to work as represented by the vendor. *Held*, that if it had been ascertained by actual trial that machines exactly similar were necessarily incapable from their construction of doing what was promised for them, the person proposing to buy was not bound to put the particular one to the test of actual experiment. *Ib.*

6. In an action for injuries sustained by the plaintiff in falling through a scuttle in the defendant's store, the evidence was conflicting on the point whether the plaintiff had any cause of action against the defendant. The defendant, against the objection of the plaintiff, was permitted to introduce evidence that the plaintiff was in poor credit with the defendant; that at the time of the injury he was indebted to him about $2000; that after the injury, and before the action was brought, the plaintiff made various purchases of the defendant, one of which was on credit; that he had dunned

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the plaintiff, threatened suit for th
collect it; and that during these tr
claim such as he sought to enforce
was competent, as bearing on the qu
the plaintiff had been consistent wi
206.

7. On the trial of an indictment for
testified that the defendant, soon a
parently in what was going on; tha
questions or answer questions." *H*
and appearance of the defendant, as
as to his own opinion or judgment,
Commonwealth v. *Piper*, 185.

8. On the trial of an indictment for mur
at the autopsy and examined the head
in their opinion the injuries to the
the same time and by one blow. *I*
range of their experience as experts,
Ib.

9. On the trial of an indictment for m
made certain experiments upon a d
measuring of the force of blows and th
it with a bat of substantially the same
as the government contended, the mu
court might properly in its discretion
mislead the jury, unless the experim
under conditions the same as those exi

10. On the trial of an indictment for mu
the prisoner jump out of a window of a
was committed, and that soon after he
Held, that it was competent for the C
what window the witness pointed out t
more clearly the window referred to by

11. The terms of a written contract cont
varied by parol evidence of the meanin
ties without objection. *Black* v. *Bache*

12. A written order for the performanc
comes, on its fulfilment, an acknowled
that amount. *Ib.*

13. A letter containing an admission o
against him, although the letter was in
not called on to produce. *Wiggin* v. *B*

14. On the issue whether a signature, on
ant, admissions contained in a bill i
against the present plaintiff are compe
ant signed and made oath to the bill, o

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ised by him to bring the bill for a purpose which implied the admission of the signature to the note. *Brown* v. *Jewett*, 215.

15. On the trial of an indictment for murder, a witness for the government testified to certain acts and declarations of the defendant, which were objected to as in the nature of a confession obtained by inducements held out to him by the officer who had him in charge. The officer denied any intention to extort a confession from the defendant. The jury were instructed that, if they were satisfied the defendant made any declaration under the influence of a promise of favor, to reject all such testimony. *Held*, that the rights of the defendant were carefully guarded, and that he had no ground of exception. *Commonwealth* v. *Piper*, 185.

See APPEAL, 2; BILL OF EXCHANGE, 1–3; CORPORATION, 1, 3; DAMAGES, 2; EMINENT DOMAIN, 4; EXCEPTIONS, 2–5; FORGERY, 3, 4; FRAUDULENT REPRESENTATION, 2–4; GOODS SOLD AND DELIVERED; INSURANCE, 12, 13, 17; INTOXICATING LIQUORS, 2; MARRIAGE; MILL, 2; MORTGAGE, 1; NEGLIGENCE, 2–4; PATENT, 1; PROMISSORY NOTE; SURVEYOR OF HIGHWAYS, 5; USAGE; WAREHOUSEMAN; WAY, 1, 13; WILL, 1, 4.

EXCEPTIONS.

1. Upon exceptions by the petitioner to the ruling in the Superior Court upon a petition for the revision of an assessment of a betterment, a question, not raised by the bill of exceptions, as to the jurisdiction of the board making the assessment, cannot be considered. *Bigelow* v. *Boston*, 326.

2. No exception lies to the exclusion of evidence, unless the bill of exceptions shows that the evidence was material to the issue. *Safford* v. *Grout*, 20.

3. On the trial of an indictment for murder, it is within the discretion of the court to determine the order in which testimony shall be introduced, and no exception lies to the exercise of that discretion. *Commonwealth* v. *Piper*, 185.

4. In an action for false representations as to the pecuniary ability of the maker of a promissory note, whereby the plaintiff was induced to take it, the defendant's bill of exceptions stated that the plaintiff testified as to the representations made by the defendant in regard to the pecuniary standing of the maker of the note, and its value, and that he took the note upon the defendant's representations. The bill of exceptions did not state what those representations were, but no objection was made that they were mere expressions of opinion, or were intended to be so understood. *Held*, that it was to be presumed that the defendant's statements were of facts susceptible of knowledge, as distinguished from matters of mere opinion and belief, and were calculated to have material influence upon the plaintiff. *Safford* v. *Grout*, 20.

5. A bill of exceptions stated that the plaintiff offered in evidence letters between himself and his agent in the transaction with the defendant which was the subject matter of the action, the agent's representation to the plaintiff concerning it, and the agent's conversation with a third person, and

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that this evidence was admitted by the
tion, but without any statement of
could not infer that the evidence so ad
the defendant, or tended to prejudice
of exception. *Pennock* v. *McCormick*,
6. It is no ground of exception that instr
form requested, if they are given in
Commonwealth v. *Cobb*, 356.

See ARBITRAMENT AND AWARD, 3; A
4; GOODS SOLD AND DELIVERED; INS
LIEN, 6; REPLEVIN, 2.

EXECUT

1. The service of a writ of execution, duly
completed by him after the expiration o
sis, 143.
2. A demand upon trustees of an executio
tion, and a search for goods and effects
ment of service of the execution as wil
the service, after the expiration of his
debtor. *Ib.*

See EQUITY, 10–12; ESTATES

EXECUTOR AND AD

1. The provision of the Gen. Sts. *c.* 97, § 1
son indebted upon a joint contract, his
the contract had been joint and several
against himself alone, relates only to th
such contract against the executor of a d
must still prove that the original liability
vivor and the executor of the deceased a
2. In an action on the Gen. Sts. *c.* 97, § 28
alleged to be jointly liable with F. upon
tained two counts, one upon each contrac
actions upon the same contracts in which
adjudged not liable. As to the first count
that the original liability, if any, was jo
peared that the plaintiff in the former ac
and no facts appeared tending to show th
executor was not liable on the contracts.

See ESTATES OF DECEA

EXECUTORY D

See DEVISE AND L

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EXPERT.

See EVIDENCE, 8, 9; PATENT, 1.

FERRY.

See DEED, 1.

FIRE.

See ACTION, 5.

FLATS.

See DEED, 1.

FOREIGN LAW.

See MARRIAGE.

FORGERY.

1. An instrument falsely made, with intent to defraud, is a forgery, although, if it had been genuine, other steps must have been taken before the instrument would have been perfected, and these steps are not taken. *Commonwealth* v. *Costello*, 358.
2. An indictment for the forgery of a bond to dissolve an attachment need not set forth how the bond could have been used to defraud. *Ib.*
3. On the trial of an indictment for forging and uttering a bond to dissolve an attachment of real estate, a bond was produced with an approval annexed, while that alleged in the indictment was without an approval. *Held*, that the approval did not constitute a part of the bond, and that there was no variance. *Held*, *also*, that the approval might properly be put in evidence as bearing upon the question of the intent with which the bond was made. *Ib.*
4. On the trial of an indictment for forging and uttering a bond to dissolve an attachment of real estate, it appeared that the signature of one of the sureties was fictitious. The defendant contended that the person signing the fictitious name had assumed it before this transaction; and asked the presiding judge to instruct the jury that they must find that the person assumed and used the fictitious name for the purposes of fraud in this particular case, and that it was not enough to constitute forgery, if he had previously assumed and used the same name for the purposes of crime or fraud generally. The judge declined so to instruct the jury, but did instruct them that, although a party might sign or use a fictitious name which he had adopted, for innocent purposes, he could not acquire a right to use it for fraudulent purposes by so using it any number of times. *Held*, that the defendant had no ground of exception. *Ib.*

See EVIDENCE, 8.

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FRAUDS, ST

1. An oral guaranty of the payment of payment of a debt of the guarantor, v. *Swett*, 322.
2. If a seller of merchandise, in order t to permit the purchaser to take posse vents an acceptance and receipt of it frauds. *Safford* v. *McDonough*, 290.
3. By the terms of a contract of sale of the goods and take them away. The seller, took the bill of parcels of the was told that they were, and the good doorway of the store. He said he wo for goods sold and delivered, that thes acceptance and receipt of the goods wi *Mann*, 219.
4. In an action for goods sold and deliv ceptance by the buyer to take the case show some unequivocal act of accepta sample, it is not enough for him to sh the possession of the buyer, and that *Remick* v. *Sandford*, 309.

See CONTRACT, 1

FRAUDULENT REI

1. In an action for false representations, materially influenced the conduct of th sole or predominant inducement. *Saff*
2. At the trial of an action for false repr of the maker of a promissory note, whe the note in payment for goods sold the his counsel, "Whether you sold the le his representations? In consequence upon those representations, did you sel note?" *Held*, that the questions wer any objection to their form. *Ib.*
3. At the trial of an action for false repr of the maker of a promissory note, an maker, seven months after the date of purpose of rendering competent eviden ant against the estate of the bankrupt fendant at the time the representations was properly admitted. *Held, also*, th *Ib.*

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4. At the trial of an action for false representations, made in July, 1870, as to the pecuniary ability of the maker of a promissory note, whereby the plaintiff was induced to take the note in payment of goods sold the defendant, a witness was asked by the plaintiff, "Did you have a claim against A. (the maker of the note) in the latter part of July, 1869, or the first of 1870?" He answered, "I did." He was then permitted to testify that the claim was due in January, 1870, and was settled in March, 1870, by a note given for the amount of the claim and of a bill of goods sold A. at that time, and that the note was signed or indorsed by the defendant. *Held*, that the first question was preliminary, and that the evidence was properly admitted as tending to show a knowledge on the part of the defendant that A. could not at that time pay his debts in the ordinary course of business. *Held, also*, that a mortgage of personal property by the maker of the note to the defendant, subsisting at the time of the latter's representations, was properly admitted for the same purpose. *Safford* v. *Grout*, 20.

See ACTION, 2; EVIDENCE, 4; EXCEPTIONS, 4; INSURANCE, 4; RECOGNIZANCE, 6; TROVER.

GAMING.

1. A guarantor and indorser of a check given with his knowledge in payment of a gambling debt, who pays the check to the holder, upon non-payment by the drawee and protest, cannot recover therefor from the drawer, or a prior indorser. *Scollans* v. *Flynn*, 271.

2. The payment by A. of B.'s gambling debt, A. knowing it to be such, gives him no ground of action for the money against B. *Ib.*

GIFT.

See DEVISE AND LEGACY, 8.

GOODS SOLD AND DELIVERED.

In an action on an account annexed for goods sold and delivered, there was evidence of the sale and delivery, and that the plaintiff's bookkeeper showed a copy of the bill annexed to the writ to the defendant, who said he would settle it in a few days. *Held*, that this evidence was sufficient to warrant a verdict for the plaintiff; and that the defendant's exceptions were frivolous, and must be overruled, with double costs. *Cassidy* v. *Hyland*, 221.

See SALE.

GOVERNOR AND COUNCIL.

See VERDICT, 2.

GUARANTY.

1. The defendant and C. and D. bought a quarry and afterwards sold a portion to R., taking his notes in payment. In a subsequent settlement C. and D. paid to the defendant a balance due him on the sale, and also gave him a

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written agreement to pay and save hi
note for the purchase money, while th
rate written agreement to assume at
notes of R. given for his purchase of a
should fail to pay them at maturity."
by the assignees in bankruptcy of C.
unpaid note of R., that the agreemen
promise of the defendant. *Davis* v. *C*

2. The following instrument is a contr
guaranty the payment to A. for any g
by B., not however binding myself to
than five hundred dollars, except by a
guaranty to remain in force until it
Capen, 222.

3. Land upon which a block of houses wa
in mortgage, and a third person agre
cause the houses to be fully completed
ing that they and all things appurtena
to the acceptance of the mortgagee.
houses, which were built upon marsh la
that territory, were all finished except
They had then settled somewhat, to th
objection to the foundations was known
had been finished they settled further, a
gagee, to protect himself, to raise them
Held, that the third person was not li
ciency of the foundations. *Hyannis Sa*

4. Land on which a house was in proces
gage to a savings bank, and a third pe
gagee that the house should be witho
lot graded, and the whole premises co
clear and free from all liens and atts
to hold the bank harmless from all loss
neglect on his part to keep and perfo
ment. *Held*, on the non-performance
finish the house and recover the expen
the mortgagor was solvent. *Barnstabl*

See FRAUDS, ST

GUARDIAN A

1. A guardian cannot, as such, maintai
ward. *Blanchard* v. *Ilsley*, 487.

2. The guardian of an insane person m
the Gen Sts. *c.* 109, § 22, to invest all
chase of an annuity upon his life. *Ho*

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HOMICIDE.

See EVIDENCE, 7–10, 15; EXCEPTIONS, 3; JUROR; VERDICT, 2.

HOUSE.

See ARREST.

HUSBAND AND WIFE

See CONSTITUTIONAL LAW, 1; PAUPER; PLEADING, 1.

INCOME.

See DEVISE AND LEGACY, 6, 8.

INDICTMENT.

1. An indictment may contain two or more counts alleging distinct offences, if they are of the same general description, and the mode of trial and the nature of the punishment are the same. *Commonwealth* v. *Costello*, 358.

2. An indictment against B. for receiving stolen goods contained three counts. Each count alleged the larceny by A. of certain goods of a value stated, and of the property of a person named, and contained the further charge that the defendant, at a time and place named, "the property, goods and chattels aforesaid, so as aforesaid stolen, taken and carried away," feloniously did receive, knowing them "to have been feloniously stolen as aforesaid." The goods described in the several counts were different goods, and the times on which they were alleged to have been stolen and received were different. The record, treating the counts as three counts for larceny and three for receiving stolen goods, stated that a *nolle prosequi* was entered as to the second and fourth counts. *Held*, that the form of the indictment was usual and sufficient, and that the validity of the last count was not affected by the *nolle prosequi* entered as to the others. *Commonwealth* v. *Cohen*, 198.

See FORGERY, 2; NEGLIGENCE, 2; RAILROAD.

INFANT.

See INTOXICATING LIQUORS, 4; NEGLIGENCE, 4; PARTNERSHIP.

INSANE PERSON.

See GUARDIAN AND WARD, 2.

INSURANCE.

I. *Life.*

1. The St. of 1861, *c.* 186, relating to the forfeiture of policies of life insurance, applies, by force of the St. of 1872, *c.* 325, § 7, to foreign as well as to domestic insurance companies. *Morris* v. *Penn Ins. Co.* 502.

2. No recovery can be had upon a policy of life insurance, on the ground of public policy, if death results from the insured having voluntarily submitted herself to an illegal operation, known to her to be dangerous to life, with

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intent to cause an abortion, without s
v. *Mutual Life Ins. Co.* 550.

II. F

3. Insurance effected by a consignee "o
in trust, or on commission," is not lim
but enures to the benefit of the consig
4. A person insured made an oral agreen
pany to renew his policies when they e
policies were made, signed and entered
date, and remained in its office until a
10, 1872. The insured on Novembe
office, paid the premiums, gave the dep
accepted the policies of the same date
answer to his inquiries, said that in his
plus, was sound and good, and would
company was enjoined from going on w
company voted to collect all premium
policies outstanding on November 9 a
equity to compel the receivers to return
from collecting the deposit notes and t
that, by his agreement and acceptance
the policy holder stood in the same posi
if he had taken his policies on that d
of the secretary were merely the expre
representation of fact. *Commonwealth*
5. A policy of insurance described the pro
story granite building." *Held*, that th
with a granite front only, and three stori
only one story high in the middle; an
property of the kind described in the p
covered by the insurance. *Medina* v.
6. A policy of insurance upon "stock of
as retail hair store," does not extend
rials, although such as are usually kept
7. A mortgagee of chattels agreed to as
the purchaser of $62,000. He had pr
gagee to the amount of $57,000. After
proposed purchaser, there was a loss
property. *Held*, that the insured inter
tial payment. *Haley* v. *Manufacturers*
8. A mortgagee of chattels agreed to as
that, until the assignment was comple
keep the property insured for the ben
not do, and the mortgagee insured h
name. *Held*, that a liability of the pr

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insurance under his contract with the mortgagee, did not affect the contract between the mortgagee and the insurers. *Haley* v. *Manufacturers' Ins. Co.* 292.

9. A policy of fire insurance contained, after the statement of the property insured and the amount of the insurance, the following clause: "Reference is had to application on file at this office, which is hereby made a part of this policy, and a warranty on the part of the assured." *Held*, that, by force of this clause, the statements in the application, from representations antecedent to the contract, became stipulations forming part of it, and as such, to have any binding force, should, under the provisions of the St. of 1864, *c.* 196, have been set forth in the body of the policy. *Held*, *also*, that a subsequent clause in the policy, that the insurers were not to be liable "if the insured, in the written or verbal application for insurance makes any erroneous representation materially affecting the risk," did not vary the construction to be given to the contract as to the statements in the written application. *Taylor* v. *Ætna Ins. Co.* 254.

10. A clause in a policy of fire insurance, that the insured shall, in case of loss, make affidavit stating "the whole value and ownership of the property insured," does not require the insured, to make any statements with regard to incumbrances on the property. *Ib.*

11. A building was insured against fire by a policy which provided that if the property should be sold, or if the policy should be assigned, without the consent of the company, "in every such case the risk shall cease and determine, and this policy be null and void." The building was conveyed, a mortgage given back for part of the purchase money, and the policy was assigned, with the consent of the company, to the grantee, who afterwards made an indorsement upon the policy by which it was to be payable, in case of loss, to the original insured "as his interest may appear." This was also assented to by the company. The grantee afterwards conveyed the building to another person without the consent of the company, and, on its destruction by fire, made proof to the company, stating that this person was sole owner. *Held*, that the policy was avoided by the last mentioned conveyance, so that neither the plaintiff nor any other person could maintain an action thereon. *Smith* v. *Union Ins. Co.* 90.

12. In an action on a policy of insurance against fire, the issues were whether an addition to the building, in which was the property insured, materially increased the risk, and whether the insurer assented to the addition being made. A witness for the defendant, who had the general management of its business, was asked on cross-examination whether the plaintiff did not, in an interview with him, show him a letter containing the statement: "All my companies have paid, and I see no reason why the others should not pay." The witness answered in the negative. *Held*, that the evidence was collateral and irrelevant to the issues on trial, that the witness could not be contradicted, and that the admission of a letter written by an agent of other insurance companies, containing such a clause, with evidence that it was shown to the witness, gave the defendant good ground of exception. *Kales* v. *Builders' Ins. Co.* 333.

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the other blanks, left for the value o
were not filled. The amount of insu
to, under his subscription to the stock
1872, and enough remained to insur
Held, that on this evidence the jury w
valid contract of insurance existed be
at the time of the loss. *Dodd* v. *Glo*

See EQUI

INTER

See DEVISE AN

INTERNATIO

See EQUITY,

INTOXICATIN

1. The provision of the St. of 1869, c. 41
medicinal purposes only, pure alcohol
physicians, known to be such," does no
mission merchant, dealing principally
Mills v. *Perkins*, 41.
2. It is not sufficient evidence of a sale
only," within the St. of 1869, *c.* 415,
druggists. *Ib.*
3. If a complaint, under the St. of 1875,
son complained of was unlicensed to se
sumed that he had a license to sell gen
385.
4. A sale and delivery of intoxicating li
is not a sale to a minor within the St. o

JOINDI

See EQUITY, 5, 15;

JOINT DE

See EXECUTOR AND

JUDGME

See EXECUTOR AND A

JURISDICT

See BANKRUPTCY, 1; CASE STATED;

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JUROR.

On the trial of an indictment for murder, it is within the discretion of the court, in the absence of statutory regulations, or a general rule of court, to determine the order in which the right to challenge a juror shall be exercised by the Commonwealth, or by the defendant, and no exception lies to the exercise of that discretion. *Commonwealth* v. *Piper*, 185.

JURY.

See Constitutional Law, 1; Equity, 16, 17; Sewer, 3

JUSTICE OF THE PEACE.

See Poor Debtor.

LAND DAMAGES.

See Way, 8–12.

LANDLORD AND TENANT.

See Contract, 7; Eviction; Recoupment.

LARCENY.

See Indictment, 2.

LAW AND FACT.

See Arbitrament and Award, 4; Eminent Domain, 5; Libel, 2; Negligence, 1, 3; Patent, 4; Verdict, 2.

LAW OF NATIONS.

See Equity, 2–4; War.

LEASE.

1. An assessment upon an estate under a betterment act, which has been paid by a lessor, may be recovered by him of a lessee, who, by a lease made before the passage of any betterment act, has covenanted to pay "all taxes and duties levied or to be levied thereon during the term," if the lease was made and the assessment laid before the passage of the St. of 1871, *c.* 382. *Simonds* v. *Turner*, 328.

2. On the assignment of a lease of land by the original lessee, a contract of even date was executed by the assignee, by which he agreed to make improvements on the premises, to be paid for by the lessee, and to reassign the lease to him on such payment being made in full. *Held*, that this contract did not amount to a present reassignment, and that the assignee was liable upon the covenants of the lease. *Ib.*

See Equity, 10–12; Eviction; Tenant in Common, 1; Trustee Process, 1.

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LEGA

See Devise A

LIBI

1. A written communication is libellou reproach and disgrace. *Atwill* v. *Mac*
2. In an action for libel it appeared tha father of the plaintiff's wife to acc parents, and that the defendant was d the general standing of the plaintiff. reported the result of his inquiries to t to contain the libel, and to the same wife. *Held*, that the trust which the tion in which he stood to the parents casion which made the communicatio *also*, that it was for the jury to decid whether the defendant had made an h in which he was placed, or whether it to defame the plaintiff. *Ib.*

LICEN

See Patent, 5, 6; Surve

LIE

See Consignor and Consignee, 3; F IC'S L

LORD'S

One who travels on the Lord's day to has hired, and into which he inten cleaned, is not travelling from necessit action for injuries sustained at a railr of the servants of the railroad corpora *road*, 490.

See Acti

MANDA

Upon the neglect of a town to make a hi missioners, the Gen. Sts. c. 43, § 49, exercise of which no discretion is lef mandamus lies to compel them to con v. *County Commissioners*, 401.

MANUFACTURING

See Constitutio

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MARRIAGE.

On the trial of an indictment for polygamy, it appeared that the defendant, being a Protestant, had been married in Ireland to a Roman Catholic, by a Roman Catholic priest, that he had cohabited with the woman there as his wife, and that he had afterwards, while his wife was living, been married to another woman in this Commonwealth. *Held*, that the law of Ireland must be proved as a matter of fact; and that, in the absence of evidence what that law was, the marriage there must be considered as legal. *Commonwealth* v. *Kenney*, 387.

MARRIED WOMAN.

See CONSTITUTIONAL LAW, 1; CONTRACT, 4; PAUPER; PLEADING, 1.

MASTER AND SERVANT.

1. At the trial of an action for seduction, it appeared that the injured girl, who was the sister of the plaintiff's wife, was, at the time of the seduction, taking care of the plaintiff's household, without paying board, during the sickness of the plaintiff's wife, upon an understanding with the plaintiff, but with no agreement with her father or herself as to the payment of wages or for any definite period of service. *Held*, that this did not establish the relation of master and servant so as to give a right of action to the plaintiff. *Blanchard* v. *Ilsley*, 487.

2. A laborer cannot recover against a firm of contractors for personal injuries resulting from the negligence of their foreman, who is his fellow-servant. *O'Connor* v. *Roberts*, 227.

3. In an action of tort for injuries sustained while in the defendants' employ, there was evidence that the plaintiff was twenty years old, and unacquainted with machinery; that, after being employed in shovelling sugar in the warehouse of a sugar refinery, in which there was no machinery except an elevator, he was sent by his foreman into an adjoining room to work upon machines for the drying of sugar, he never having been in a similar employment before; that there were several machines in the room upon a platform raised above the floor; that each machine consisted of a stationary iron cylinder, within which revolved a copper vessel at such velocity as to appear perfectly still, the motion being controlled by a lever within reach of a man standing on the platform; that he was directed by the foreman of the room to go upon the platform and work upon the machines indiscriminately with the other men; that the foreman showed him how to start the machines, and told him to take the sugar out when it turned white, but gave him no other instructions; that he worked during the day upon the machines, but the next morning, having returned to his usual work, refused to go to work upon the machines at the request of the foreman of the machine room; that he was ordered to work upon the machines by the foreman of the warehouse, and did so, but received no new directions; that at the end of the day, having cleaned the machines, he was told by the fore-

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man to go back and clean them again,
to clean the machines as another ma
and, while so at work, his arm was ca
off; that he was as careful as he could
danger; that it was obvious that the i
pidity, and that he could see and know
by moving the lever in one way, and
that when he returned to clean the
over, and he was not required, unless
while the copper vessel was revolving;
been performed without putting his ha
the evidence tended to show that the pl
danger, of which he had no knowledg
him of the risks, or instructing him h
been submitted to the jury. *O'Connor*

See ARBITRAMENT AND AWARD, 4

MASTER IN C

See BOND, 1; EQUITY,

MECHANIC'

1. A former owner of land, subject to a
veyed with a warranty against incumb
the estate as entitles him to dissolve th
of 1874, *c.* 321. *Glendon Co.* v. *Town*
2. If the St. of 1872, *c.* 318, § 2, applies
an entire contract, the work called for b
formed, owing to the failure of the ot
his part, it is no objection to the enfo
that the petitioner, in his statement of
labor to be greater than it actually was,
had wilfully and knowingly claimed
ris, 58.
3. The St. of 1872, *c.* 318, § 2, providing
Gen. Sts. *c.* 150, § 5, to be filed with th
a mechanic's lien, shall set forth in add
number of days of labor performed or f
arising from a contract for labor only.
4. At the trial of a petition to enforce a
petitioners' statement filed in the office
performed labor on a block of seven ho
mont and Kendall streets, in the city o
T. H. Smith, — the land on which said
about one hundred and fifty feet on
northwesterly on Tremont Street, and n

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such labor was performed by consent of the said Smith, and by virtue of an agreement with a person having authority from said Smith to procure the same to be done. *Held*, that the statement sufficiently identified the ownership of the land, and described the work done by the petitioners jointly as partners; that the name of the owner was sufficiently given, if that was all the petitioners knew; and that the authority under which they acted was sufficiently stated. *Patrick* v. *Smith*, 510.

5. A., the owner of a lot of land, made a contract with B., whereby A. was to advance money to B. to build houses on the land, and to convey the land to B. for a certain sum and the amount of advances; and B. was to build the houses and buy the land. B. made a contract with C. to do certain work on the houses for an entire sum. Before C. completed the work, B. went into bankruptcy, and C. afterwards in good faith went on and did some work on one of the houses under the contract, but did not complete his work owing to the failure of B. to comply with the terms of the contract. *Held*, that C. was entitled to a lien under the Gen. Sts. *c.* 150, for the value of his labor. *Smith* v. *Norris*, 58.

6. A. made an oral contract to sell land to B., and gave him immediate possession thereof. B. soon after made a contract with C. to repair and enlarge the buildings on the premises. After this, A. gave B. a deed of the land, and at the same time B. gave A. a mortgage upon it, both being dated as of the day when the parol contract of sale was made. C. began work under his contract before the deed and mortgage were given, and continued the work afterwards. *Held*, that, on these facts, a judge, who tried the case without a jury, might properly find that the seisin of B. was instantaneous, and rule that A.'s right under the mortgage took precedence of C.'s lien. *Perkins* v. *Davis*, 408.

See BANKRUPTCY, 3.

MILL.

1. On a bill in equity by the owner of a mill privilege against the owner of another mill privilege, lower down the same stream, to restrain him from maintaining his dam at too great a height whereby the water was set back, the report of a master, to whom issues of fact were referred, found that the setting back of the water was directly attributable to the maintaining of the defendant's dam at a greater height than he was entitled to maintain it, and did not directly negative certain acts of the plaintiff which the defendant contended caused the water to set back. *Held*, that the report sufficiently passed upon the question at issue. *Atlanta Mills* v. *Mason*, 244.

2. The owner of an estate on a stream, entitled to a share in the water power belonging to an upper privilege on the stream, cannot affect the rights of the other owners in that privilege by a grant to an owner of the lower privilege; nor by declarations *in pais*, made at the sale, as to what the rights of the upper privilege are. *Ib.*

3. On a bill in equity by the owner of a mill privilege against the owner of another mill privilege, lower down the same stream, to restrain him from

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maintaining his dam at a greater heigh
the defendant may have alleged infring
in the use of the stream, determined by
224.

4. The owner of an upper and a lower mi
ilege, reserving, for the benefit of the
could be drawn through the waste gate,
dam. *Held*, that the reservation was
might afterwards be used. *Ib.*

5. That unity of titles in the dominant an
extinguish an easement, the ownership
tensive; and if a person holds one estat
part of the other, the easement is not e

6. The owner of an upper and lower mill
estate the water which would be condu
upper estate, and conveyed the upper es
tail race and the river, and the only w
portion of the upper estate could return
estate. The purchasers of the upper
through the intervening land, against
lower estate, to whom the land belonged
was discharged directly into the river.
of the lower estate had the right to obje
to have the trench closed. *Ib.*

MISDEMEA

See CONTRA

MONEY HAD ANI

See PLEADI

MORTGA

I. *Real Es*

1. Upon a bill in equity by an assignee in
upon the land of the bankrupt from th
admissible in behalf of the defendant th
a loan of a certain sum to enable him, t
up the mortgage, that the defendant le
verbal promise to assign the mortgage
certain notes then due to the defendant
Bank of South Reading, 153.

2. A., the equitable owner of certain real
be conveyed, if the trust should not be re
named in his will for the benefit of his w
to himself, and to a third person for h
which the property was subject, and wi

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equitable owner of the property. The trust was not revoked in his lifetime, and by his will he devised all the property held in trust for him to B. in trust for the benefit of his wife and children. *Held*, that the mortgages had been extinguished by the assignments to A., and that his administrator with the will annexed properly refused to charge himself with the mortgages in the Probate Court. *Putnam* v. *Collamore*, 454.

8. On the trial of a writ of entry, it appeared in evidence that the demandant attached the land in question as the property of A. on June 28, 1871, and afterwards duly levied thereon; that A. derived title from B., the deed containing a recital that the land was subject to a mortgage from B. to C., which A., as part consideration for the deed, was to assume and pay "as his own debt" and save B. harmless and indemnified therefrom; that A., on June 27, 1871, was appointed executor of the will of D., to whom C. had assigned the mortgage; that after the demandant's attachment, A., as executor, entered upon the mortgaged premises for breach of condition, assigned the mortgage for full value to the tenant, and used the proceeds to pay legacies; that A. included the mortgage among the assets of the estate, and, in his final account, charged himself with the full amount of the inventory. *Held*, that a ruling that, as matter of law, the mortgage was paid and satisfied, was incorrect. *Pettes* v. *Peppard*, 522.

See DAMAGES, 2; EQUITY, 5, 20; MECHANIC'S LIEN, 6; PARTITION; TENANT IN COMMON, 2; TROVER.

II. *Personal Property.*

4. A bill of sale of merchandise, absolute in its terms, given to protect the vendee against his liability as surety for the vendor, and to secure a debt of the vendor to the vendee, with a verbal agreement that when the vendee should be relieved from his liability and the debt paid, his interest in the property should cease, but with no condition of defeasance in writing, is not a mortgage. *Pennock* v. *McCormick*, 275.

5. A mortgagee of chattels agreed to assign his mortgage, of which there had been a breach of condition, to a person proposing to purchase the chattels, (who was not then and who never became the owner of the equity of redemption,) upon the payment of certain notes given by him for the purchase. The agreement contained the following clause: "In case of failure to pay said notes, or either of them, or the interest, the said party of the first part [the mortgagee] resumes the right to foreclose said mortgage, or take or sell said property, the same to all intents or purposes as if said notes below mentioned were the notes mentioned and specified in said mortgage, and it being the intent hereof to allow said mortgage to remain as security for the payment of the notes below mentioned." *Held*, that this agreement was collateral to the mortgage, and that the payment of one of the notes was not a payment *pro tanto* of the mortgage debt. *Haley* v. *Manufacturers' Ins. Co.* 292.

See FRAUDULENT REPRESENTATION, 4; INSURANCE, 7, 8.

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MURD

See EVIDENCE, 7-10, 15; EXCEPT

NATIONAL

See BA

NEGLIGE

1. The fact that the driver of a horse driv
of a railroad crossing, and that the h
train, runs away and injures a person, d
law, want of due care on the part of th
2. The degree of negligence on the part o
tion, required to be proved on an indi
§ 98, is not changed by the St. of 1871,
the latter statute, if negligence of the s
on, gross negligence must be averred an
burg Railroad, 372.
3. In an action against a railroad corporat
son so injured by being struck by a car,
died almost immediately, there was evide
and south, crossed a highway at grade
short distance north of the highway, a si
the highway a little easterly of the main
the station; that the station was south o
used by persons going to the station fr
crossed the side track obliquely, the dist
dred and fifty-seven feet; that at the poi
one could see up the track to the north f
and from the track itself for half a mile;
to the station to see his daughter off by
the ground was frozen and slippery; th
from the east, a freight train was coming
the main track, except a single car, whic
that, as he was crossing the side track b
the detached car, which was moving
warning. *Held*, that, on this evidence,
finding that the plaintiff's intestate was
C. J., and MORTON, J., dissenting. *H*
4. In an action against a town for injuries
a railing to protect travellers from fallin
of the limits of a highway, which the de
repair, the plaintiff, a girl nearly ninete
passing along the way on the side where
a horse and cart stretched across the w
going to get by, and that there was roo
cart and the embankment; that it occur

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she would fall; that she kept on, when the cart commenced backing towards her and she stepped aside, falling off the embankment and sustaining the injuries in question. The judge instructed the jury that the plaintiff must have been in the exercise of ordinary care, such as a person of ordinary prudence, of the plaintiff's sex and age, would commonly and might reasonably be expected to exercise under like circumstances, in determining whether she would attempt to pass while the street was obstructed by the horse and cart, and in selecting the place where to pass, and while passing, and at the time of the accident. The jury found for the plaintiff. *Held*, that the instructions given were apt and sufficient, on the issue of due care on the part of the plaintiff, and that the evidence was sufficient to justify the verdict of the jury. *Snow* v. *Provincetown*, 580.

See Action, 5; Railroad; Warehouseman; Way, 14.

NOLLE PROSEQUI.

See Indictment, 2; Verdict, 1.

NOTICE.

See Bill of Exchange, 2; Insurance, 14; Promissory Note, 1; Sentence.

NUISANCE.

See Disorderly House; Eminent Domain, 1; Equity, 7, 14; Surveyor of Highways, 3, 4, 6; Way, 12.

OFFICER.

See Arrest; Attachment; Execution; Surveyor of Highways.

ORDER.

See Evidence, 12.

PARDON.

See Verdict, 2.

PARTITION.

Where a mortgage by a tenant in common of his undivided interest in land is invalid because his co-tenants do not join therein, the mortgagee cannot object to the decree of a probate court affirming the report of commissioners appointed to make partition, by which they set off, without regard to the mortgage, the land mortgaged to the co-tenants, other than the mortgagor, and award a certain sum of money to the mortgagor to make the partition just and equal, nor can he demand that the sums so awarded be paid or secured to him. *Marks* v. *Sewall*, 174.

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PARTNER

The members of a partnership contribut
proportions, with an agreement that the
between them. Upon the dissolution
insufficient to pay back the contributio
Held, that the assets must be divided in t
and the deficiency borne by the partners
that one of the members of the firm was
v. Drive, 324.

See DEVISE AND LEGACY

PATENT

1. The extent of an invention claimed in le
the specification, which is to be construe
experts that, at the time the letters were
and claimed therein, was not novel, is ir
construction to be given to the specificati
2. The description of an invention claimed i
ing upon a cross shaft or hinge in such m
ting portion thereof can be turned up or
into or out of the seat or past it, and sai
down or adjusted to a sitting level, strikes
may be located in rear of the seat fulcru
and person occupying the same, the seat
of its fulcrum and coming up under said s
"a swinging or lever seat, set and moving
sustained when in use by a stop or stops s
of the seat comes in contact with said sto
down, substantially as herein set forth;
weights or springs whereby the said seat
or raised position automatically, as herein
was for a tilting seat, suspended upon a
tained as a lever under the weight of th
downwards at the back of the seat or in
with supports in front of the fulcrum; tha
lar form and position of the several pa
shown in the specification; but that if in
accomplished in substantially the same m
ment, notwithstanding differences in the
of the parts. *Ib.*
3. An invention embracing as an essential
former patent has been issued, is not less
of its containing something additional, its
Ib.

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4. Whether a patented invention is or is not an infringement of a prior patent is a question of fact for the jury. *Jackson* v. *Allen*, 64.

5. A patentee of a chair granted the exclusive right to make and sell the chair within the United States, and covenanted not to grant a license to any other person to make or sell chairs of the kind. He subsequently made an agreement under seal with a third person, the later patentee of another chair, reciting that a suit which had been brought by a former licensee under the first patent against the later patentee, for an infringement of the former patent, had terminated in favor of the later patentee and had been dismissed because it was held that the chair made by him was not deemed an infringement of the earlier patent, and agreeing for a money consideration to abide the decision in the said cause and to make no claim against the later patentee on account of any chair made or to be made under his patent. The suit referred to had in fact been dismissed by an arrangement of the parties thereto. *Held*, that if the chair of the later patentee was in fact an infringement of the earlier patent, the agreement with him was in substance a license, and constituted a breach of the covenant in the earlier agreement; and that after the execution of the contract with the later patentee neither the earlier patentee nor his first licensee could maintain any proceedings against the later patentee for making the chair patented by him on the ground of infringement of the earlier patent. *Ib.*

6. A patentee, reciting the issue of his letters patent, but not describing himself as the inventor of the improvement, granted an exclusive license to make and sell the same "as patented under and by said letters patent," and covenanted not to grant licenses to any other person to make and sell articles of the same character, and also to institute or cause to be instituted legal proceedings against all parties who might infringe said letters patent, and to exercise due diligence in such proceedings so as to restrain such parties as promptly as possible, in order that the licensee might enjoy the exclusive privilege of making and selling the articles in question without competition. *Held*, that this agreement did not amount to a warranty that the licensee should enjoy the privilege against persons not claiming rights under the licensor; nor estop the licensor to show that his patent was invalid, by way of affecting the damages in an action against him by the licensee for breach of the covenants to sue infringers and not to grant other licenses. *Ib.*

PAUPER.

The St. of 1874, c. 274, § 2, providing that "any woman of the age of twenty-one years, who resides in any place within this state for five years together without receiving relief as a pauper, shall thereby gain a settlement in such place," applies only to unmarried women. *Somerville* v. *Boston*, 574.

PAYMENT.

See Bill of Exchange, 1; Insurance, 13; Mortgage, 3, 5.

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PEDLER.

1. It is no defence to a complaint under the
conspicuous posting of a pedler's name,
license upon his parcels or vehicle, that he
cels which he sells are carried on his perso
2. The omission of a pedler to comply with
the conspicuous posting of a pedler's name
license upon his parcels or vehicle, renders
by § 27 of the same chapter. *Ib.*

PILOT.

Where a vessel signals for a pilot before e
Beverly, and the pilot does not offer his s
the harbor lines and the signal has been ta
his services, and is not liable for compulso
of this Commonwealth. *Perkins* v. *Buckle*

PLAN.

See DEED, 3; EMINENT

PLEADING.

I. *Parties to Act*

1. Since the passage of the St. of 1871, *c.* 31
an action for a tort of his wife. *McCarty*
See CORPORATION, 2; GUARDI

II. *Declaratio*

2. A count for money had and received, with
plaintiff would claim money sent by him th
ered or paid to an insurance company and
defendant, and alleging a demand upon the
is a count in contract and not in tort. *Am*
3. The words "with count in tort" in a w
filed, are mere surplusage. *Ib.*

III. *Demurrer*

4. A demurrer to evidence must be in writing
party. *Golden* v. *Knowles*, 336.
5. A demurrer to the plaintiff's evidence admi
tends to prove, and, if it is overruled, the p
Ib.
6. A report from the Superior Court in an act
tiff's evidence, and that thereupon "the d
dence, and the case is reported for the dete
cial Court, it being agreed that if the defe

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there shall be an entry of verdict for defendant; otherwise a new trial." It appeared by papers transmitted with the report that a verdict was rendered for the plaintiff. *Held*, that the proceedings were irregular and erroneous, and that the report must be dismissed. *Golden* v. *Knowles*, 336.

IV. *Answer.*

7. An allegation that the "defendant made a contract in writing" is not supported by evidence of a contract not signed by the defendant, and the objection of variance is open to the defendant, although he does not set up the statute of frauds in his answer. *Reid* v. *Stevens*, 209.

POLYGAMY.

See MARRIAGE.

POOR DEBTOR.

1. A poor debtor, who has entered into a recognizance under the Gen. Sts. c. 124, § 10, to deliver himself up for examination, commits a breach thereof, if at the time and place appointed he appears, and objects to the commencement of the examination, until the execution upon which he was arrested is produced; and the refusal of the magistrate to order the examination to proceed is immaterial. *Simpson* v. *Trivett*, 147.

2. A poor debtor duly presented himself for examination at the time and place to which a hearing, pursuant to a notice given under a recognizance entered into in accordance with the Gen. Sts. c. 124, § 17, had been adjourned at his request, but against the objection of the creditor. The magistrate who granted the continuance was present, but declined to act, having ceased to be a magistrate by reason of a change of domicil, and another magistrate assumed to order a continuance. *Held*, that he had no authority to do so; and that there was a breach of the recognizance, no magistrate competent to act being present, although this happened through no fault of the debtor. *Godfrey* v. *Munyan*, 240.

3. The St. of 1866, c. 193, allowing a magistrate the fee of one dollar for any notice or certificate required to be made or issued by him under the Gen. Sts. c. 124, does not make the payment of the fee a condition precedent to the discharge, under § 48 of that chapter, of a poor debtor, at whose examination there is no attendance by or upon behalf of the creditor. *Coleman* v. *Hawkes*, 594.

4. If a poor debtor is entitled to his discharge from arrest, the refusal of the magistrate to give him a certificate of such discharge is not a breach of the recognizance entered into by him under the Gen. Sts. c. 124, § 10. *Ib.*

PRINCIPAL AND AGENT.

1. The members of the Cochituate Water Board of the city of Boston can justify their acts by the authority of the city, in an action of tort brought against them, only to the same extent as the city might do. *Wamesit Power Co.* v. *Allen*, 352.

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2. One, who employs a firm of collecting agt
card, in which they announce that they w
cacy, so as not to offend them, or with such
fling is intended," giving no special inst
such means as they see fit to adopt, in th
his benefit, and is responsible therefor. *C*

See BILL OF EXCHANGE, 1; CORPORAT
ANCE, 13, 15

PRINCIPAL AND
See DEVISE AND LEG

PROBATE COU
See APPEAL, 2; PARTITI

PROMISSORY N

1. Notice of the dishonor of a promissory n
addressed to the indorser at Townsend, wh
in the town in which he lived. There was e
received his letters at the West Townsend
knew that he lived and that there was a po
had visited and done business with the indo
sitting without a jury, was warranted in ru
cient. *Roberts* v. *Taft*, 169.

2. Where a negotiable promissory note, obtai
has been transferred to a third party before
is upon him to show that he purchased it
determine this, all the attendant circumstan
considered. *Sullivan* v. *Langley*, 437.

See ACTION, 2; BILL OF EXCHANGE, 1,
REPRESENTATION, 2–4

QUARANTIN
See SHIP.

RAILROAD

If an indictment against a railroad corporat
§ 98, and the St. of 1871, c. 352, does not a
of the corporation to give the signals req
death of the person killed, evidence of suc
Commonwealth v. *Fitchburg Railroad*, 372.

See ACTION, 5; CARRIER, 2, 3; CORPORA
LIGENCE, 2, 3; TRUST AN

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REASONABLE TIME.

See APPEAL, 3; ATTACHMENT, 2.

RECEIVING STOLEN GOODS.

See INDICTMENT, 2.

RECOGNIZANCE.

1. The recognizance required by the provisions of the Gen. Sts. c. 137, upon an appeal from the judgment of a justice of the peace in a civil action, is the assent to the words of the magistrate to the effect that the conusors acknowledge themselves to be indebted to the other party in a specified sum to be paid if the party appealing fails to enter and prosecute his appeal. A certificate thereof by the magistrate, sent with the copies of the case to the court appealed to, operates as a return of the recognizance to that court. *Martin* v. *Campbell*, 126.

2. At the bottom of a memorandum of a recognizance by an appellant from the judgment of a justice of the peace in a civil action, to prosecute his appeal, below the signature of the magistrate, was an attestation by him that the paper was "a true copy." *Held*, that this attestation might be treated as surplusage. *Ib.*

3. Upon an action by a conusee upon a recognizance to prosecute an appeal from the judgment of a justice of the peace in a civil action, the proper papers having been filed and an affirmation of the judgment obtained by the conusee, upon the failure of the conusor to enter his appeal, no further judgment of forfeiture or order that the recognizance be estreated is necessary to enable the conusee to enforce it. *Ib.*

4. The certificate of a recognizance to prosecute an appeal from the judgment of a justice of the peace, recited that the conusee recovered judgment against the conusors "for her title and possession in and to a certain piece of land, with the buildings thereon," describing them, "in a personal action" brought by the conusee against the conusors. *Held*, that this sufficed to show that the case was under the Gen. Sts. c. 137, §§ 5–9, and that the magistrate had authority and jurisdiction to take the recognizance. *Ib.*

5. The condition of a recognizance upon an appeal from the judgment of a justice of the peace in an action of forcible entry and detainer was, by the memorandum returned, that the conusors prosecute their appeal "and pay all rent due and to become due, and all intervening damages and costs." *Held*, that the expression "rent to become due," must be construed to mean intervening rent, and was in substantial conformity with the Gen. Sts. c. 137, § 9. *Ib.*

6. That a person was induced to become a surety on a recognizance by fraudulent representations does not affect the right of action against him of a conusee not a party to the fraud. *Ib.*

See POOR DEBTOR.

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RECOMMENDATION
See VERDIC

RECOR
See TOWN, 1; VI

RECOUPM
Damages suffered by a lessee by the lessor'
ises cannot be set up by way of recoupm
the rent reserved. *Bartlett* v. *Farrington*

REMAIND
See DEVISE AND I

RENT.
See CONTRACT, 7; RECOGNIZANCE, 5; REC

REPLEVI
1. In replevin the plaintiff may, without alle
damages for the detention of the property
may be satisfied that the use of the pro
character, was worth to him during the ti
543.
2. In replevin against an officer, who justifie
process against the plaintiff's vendor, the
fraud of creditors, and the jury were instr
sonably satisfy them that the attaching pa
of action. *Held*, that the defendant had

REPORT
See EQUITY, 18; PR

SALE.
Upon an agreement for the sale of mercha
satisfactory note, the purchaser examined
marked with his initials, and piled up by
be taken away upon payment for it or givi
The purchaser never complied with these
allow him to take the merchandise away, c
After remaining for several months it w
fire. *Held*, that there was no such delive
tute the seller a bailee for the purchaser.
See FRAUDS, STATUTE OF, 2-4; GO

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SCHOOL HOUSE.

See Town, 1.

SEAMAN.

See Ship.

SEDUCTION.

See Guardian and Ward, 1; Master and Servant, 1.

SEISIN.

See Mechanic's Lien, 6.

SENTENCE.

The provision of the Gen. Sts. c. 76, § 26, requiring that, before sentencing a boy to the reform school, "the court shall cause notice of the pendency of the case to be given to the mayor of the city, or one of the selectmen of the town, where the boy resided at the time of his arrest," is merely directory; and the omission of such notice does not affect the validity of the sentence. *Fanning* v. *Commonwealth*, 388.

SEWER.

1. Upon a petition for the abatement of an assessment laid by a city for the construction of a sewer, it appeared that culverts had been previously laid in the street and were used by certain unnamed abuttors on the street for the purpose of drainage. *Held*, that, in the absence of evidence that the culverts were laid out as sewers or that the petitioner drained or had any right to drain from his estate into them, the existence of the culverts could not affect the question whether his estate was benefited by the new sewer. *Keith* v. *Boston*, 108.
2. An overestimate of the number of square feet in the estate of a person benefited by the construction of a sewer does not make an assessment by the city thereon invalid, if the estate was assessed no more than its just proportion of the expense of constructing the sewer. *Ib.*
3. At the trial before a jury of a petition for the abatement of a sewer tax, the petitioner offered evidence tending to prove the relative benefit received by the various estates on the line of the sewer. The judge ruled that if the petitioner's estate was benefited at all, it was to be assessed according to the value of the land, independently of the buildings, and that the relative benefit which each estate on the line of the sewer might receive, was of no consequence in determining the amount of the assessment to be laid on the estate, and rejected the evidence. The jury, under this instruction, found that the petitioner's estate was benefited by the sewer, and that the amount assessed upon it was a just proportion of the whole expense of the construction of the sewer. *Held*, that the jury, upon the appeal of the petitioner

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had no authority to consider the relati
the instruction was sufficiently favorab
108.

4. The question of the invalidity of a sev
sion therefrom of persons benefited by
tion to recover money paid under prote
proceeding is by certiorari. *Kelso* v. *I*

5. A city ordinance provided that the su
sewer was built or repaired, should "n
breadth, mode of construction and gen
book kept for the purpose, and insert
then existing and as they are thereafte
was merely directory of the duties of th
ment by the city was not invalidated b
sions. *Ib.*

6. Land that has not in the mean time be
assessment under the Gen. Sts. *c.* 48, §
the time when the assessment is laid.

See EMINENT D

SHIP

Under the Gen. Sts. *c.* 26, § 39, the owne
lations is not liable for the expenses of
had been transferred by order of the bo
was under their care. *Provincetown* v.

See ACTION, 3;

STATE REFORM

See SENTE

STATUTE OF

See FRAUDS, ST.

STATUTES CITED, EX

ENGLISH STA

1 & 2 Geo. IV. *c.* 78.	Bills
25 & 26 Vict. *c.* 88.	Trad

STATUTES OF THE U

1800, *c.* 19, § 31.	Bank
1847, *c.* 8, § 9.	Land
1861, *c.* 3, § 5.	Comm
1864, *c.* 106.	Natio
—— —— § 28.	"

Digitized by Google

1864, c. 225, §§ 8, 9.	Commercial Intercourse	9
1867, c. 176.	Bankrupt	153
—— —— §§ 1, 14, 20, 25.	"	85
—— —— § 21.	"	85

REVISED STATUTES OF THE UNITED STATES.

§ 646.	Circuit Court	83
§ 885.	National Banks	99
§§ 4071-4073.	Witness	121
§ 4972.	Bankrupt	85
§ 4999.	Register in Bankruptcy	121
§ 5002.	Witness	121
§ 5005.	"	121
§ 5006.	"	121
§ 5044.	Bankrupt	85
§ 5063.	"	85
§ 5066.	"	85
§ 5075.	"	85
§ 5086.	"	152
§ 5106.	"	85
§ 5131.	"	448
§ 5133.	National Banks	99
§ 5134.	" "	99
§ 5135.	" "	99

STATUTES OF THE COMMONWEALTH.

1784, c. 28, § 6.	Witness	121
1785, c. 69.	Divorce	321
1789, c. 14.	Pauper	575
1791, c. 60, § 3.	Estates Tail	106
1793, c. 34, § 2.	Pauper	575
1799, c. 31, § 3.	Streets	305
1804, c. 73.	"	305
1810, c. 94.	Massachusetts General Hospital	434
1816, c. 90.	Streets	305
1820, c. 14, § 10.	Supreme Judicial Court	392
1824, c. 44.	Hamilton Manufacturing Co.	384
—— c. 153.	Betterment	394
1833, c. 145.	Corporation	413
1838, c. 42.	Witness	121
1843, c. 54.	Norfolk & Bristol Turnpike	401
1846, c. 167, § 1.	Boston Water Works	352
—— c. 203.	Betterment	402
1850, c. 262.	Boston Fire Department	339
1852, c. 55.	Corporation	413
—— c. 312, § 23.	Demurrer	87
1854, c. 448, § 24.	Boston	124
1855, c. 56.	Divorce	321, 392
1859, c. 237, § 1.	Equity	87
1861, c. 181.	Indictment	367
—— c. 186.	Insurance	503
1862, c. 81.	Railroad Crossing	379
—— c. 84.	Challenge of Juror	186
—— c. 146.	Interest	267
—— c. 176, § 24.	Pilotage	4
1863, c. 158, § 2.	Witness	118
1864, c. 196.	Fire Insurance	254
1865, c. 43, § 2.	Trustee Process	94

Digitized by Google

1865, c. 159. Betterment 267
—— c. 258. Insolvent Estates 519
1866, c. 148, § 1. Divorce 392
—— c. 174. Betterment 267
—— c. 193. Magistrate's Fees 594
1868, c. 75. Betterment 267
—— c. 114. Chapel of the Good Shepherd 213
—— c. 223. Stony Brook 596
—— c. 287. Incumbered Estates 343, 413
1869, c. 111. Sewer 112
—— c. 249. Trustees 413
—— c. 391. Nuisance 158
—— —— § 5. " 157
—— c. 415, § 28. Intoxicating Liquors 41
—— c. 425. Witness 278
1870, c. 77. Magistrate 242
—— c. 291. Attachment 358
—— —— § 3. " 358
—— c. 337, § 2. Way 419
—— c. 349, § 5. Insurance 504
—— c. 392. Pauper 575
1871, c. 310, § 8. Adoption 107
—— —— § 9. " 107
—— c. 312. Married Woman 89
—— c. 322. Trustees 413
—— c. 352. Railroad Crossing 372
—— c. 382. Betterment 328
—— —— § 7. " 327
1872, c. 177. Boston Water Works 352

REVISED STAT

c. 24, § 31. Way 394
c. 44, § 8. Corporation 413
c. 76, § 7. Divorce 392
c. 81, § 13. Supreme Judicial Court 87

GENERAL STAT

c. 8, § 7. Statute 159
c. 10, §§ 1, 6. County Commissioners 121
c. 11, § 5, cl. 3. Tax 212
c. 12, § 22. " 299
c. 17, § 14. County Commissioners 121

Digitized by Google

c. 43, §§ 17, 18. Way 413
—— § 22. " 416
—— § 49. " 401
—— § 65. " 130
—— § 82. " 401
c. 44, §§ 1, 21, 22, 26. Way 300
—— § 6. " 499
—— § 8. " 565
—— § 14. " 500
—— §§ 19, 20. " 418
—— § 26. " 2
c. 48, § 4. Sewer 299
—— §§ 4–6. " 112
—— § 5. " 297
c. 50, § 24. Pedler 188
—— § 27. " 184
c. 52. Pilotage 4
c. 63, § 98. Railroad 372
c. 68, § 36. Corporation 400
—— § 37. " 413
c. 69, § 1. Pauper 575
c. 76, § 26. State Reform School 388
c. 84, § 2. Lord's Day 492
c. 85, § 4. Gaming 273
c. 89, § 12. Estate for Life 106
c. 90, §§ 39, 41. Trust 413
c. 91, § 8. Advancement 560
c. 92, § 5. Will 106
c. 93, §§ 9, 12. Estates of Deceased Persons 524
c. 97, § 28. Estates of Deceased Persons 137
c. 99. Insolvent Estates 518
—— § 8. " " 519
—— § 10. " " 519
—— § 20. " " 520
c. 100, § 9. Trust 413
—— § 15. " 413
c. 105, § 1. Statute of Frauds 323
c. 107, §§ 13, 15. Divorce 392
—— § 15. " 321
—— §§ 45, 53. " 392
—— § 53. " 391
c. 109, § 19. Guardian & Ward 490
—— § 22. " " " 102
c. 110, §§ 7, 8. Adoption 107
c. 112, § 5. Supreme Judicial Court 87
—— § 11. " " " 421
—— § 13. Exceptions 218
c. 113, § 2. Equity 507
—— —— cl. 2. " 413
—— —— cl. 6. " 481
—— —— cl. 9. " 493
—— § 6. " 87
—— §§ 8, 10, 11, 14, 21. Equity 392
—— §§ 8, 21. " 391
—— §§ 10, 12. " 281
c. 115, § 7. Exceptions 392
c. 116, § 14. Police Court 200
c. 117, § 14. Probate Appeal 392
—— § 18. " " 281
c. 120, § 35. Trial Justice 242
—— § 41. " " 200
—— § 50. Justice of the Peace 121
c. 124, § 10. Poor Debtor 147, 594
—— §§ 15–17, 21. " " 152
—— § 17. " " 240
—— § 26. " " 153
—— § 48. " " 594
c. 128, §§ 6–8. Executor and Administrator 521
c. 129, § 64. Demurrer 87
—— §§ 66, 67. Trial 392
c. 131, §§ 5, 6. Witness 121
c. 136, § 48. Partition 176
—— § 50. " 176
—— § 74. " 176
c. 137. Forcible Entry and Detainer 126
—— §§ 5–9, " " " 126
c. 139. Nuisance 494
c. 150. Lien 63
—— § 2. " 513
—— § 5. " 63, 347, 510
—— § 6. " 64
c. 163, § 8. Bribery 120
c. 170, § 33. Recognizance 403
c. 171, § 28. Stay of Prosecution 403
c. 172, § 4. Challenge of Juror 186

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SUPERIOR (
See TRIAL

SUPREME JUDICI
See APPEAL, 1; C

SURET
See RECOGNIZ

SURPLUS
See PLEADING, 3; RE

SURVEYOR OF H

1. Where no assignment of the limits and made to each highway surveyor under t ors may nevertheless act together, or b *McCormick* v. *Boston*, 499.
2. Under the Gen. Sts. *c.* 44, § 6, surveyo remove a building which temporarily ob *Howe*, 565.
3. The decision of highway surveyors, that an obstruction, is conclusive. *Ib.*
4. In an action, against a person acting un veyors, for the conversion of a building through the streets of a city, and whic judged to be an obstruction, it appeared t pieces by the defendant. The jury foun of removal under the circumstances. *He* right so to remove it, whether the de mode of removal was conclusive or not. no ground of exception to an instruction mode of removal was reasonable, the jur tiff had no right to have the building in
5. Evidence, that an act done by a surveyo his lawful authority, was induced by an i
6. In an action against a person, acting un of highways, for taking to pieces a buil which the surveyors had adjudged to be plaintiff put in evidence a license from th authorizing the plaintiff to move the bui pearing in evidence that the plaintiff ha the license, it was *held* that the license *Ib.*

See TOWN,

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TAX.

A corporation for religious and charitable purposes, authorized by its charter "to hold, maintain and let lodging-houses, upon such terms and conditions as it may determine, subject to the laws of the Commonwealth," as well as to "erect, hold and establish churches or chapels for public religious worship," built upon its land a lodging-house in which rooms were let to tenants at the usual rates of rent, and the proceeds devoted to the charitable uses named in the charter. *Held*, that the rooms so let were not exempt from taxation under the Gen. Sts. *c.* 11, § 5, *cl.* 8. *Chapel of the Good Shepherd* v. *Boston*, 212.

See LEASE, 1.

TENANT IN COMMON.

1. A lease of land by some of several tenants in common owning the land is invalid as to the others who do not join therein. *Tainter* v. *Cole*, 162.
2. A mortgage made by a tenant in common of an undivided interest in a specified parcel of land is invalid as against his co-tenants. *Marks* v. *Sewall*, 174.

See EMINENT DOMAIN, 1; EQUITY, 9; PARTITION.

TENDER.

See DAMAGES, 1.

TIME.

Although the word "until" is ordinarily exclusive of the day to which it relates, such construction yields to the manifest intention of parties to a contract. *Kendall* v. *Kingsley*, 94.

See ATTACHMENT, 2; CONTRACT, 7.

TOWN.

1. On the issue whether the location of land taken by the selectmen of a town for the purposes of a school-house, under the Gen. Sts. *c.* 38, § 38, was, as required by the Gen. Sts. *c.* 43, § 65, "filed in the office of the town clerk seven days at least" before the town meeting at which the doings of the selectmen were approved, it appeared that the town clerk prepared this location and left it in the safe belonging to the town at his house, which was his only office as clerk; that two days after this, and more than seven days before the meeting, a majority of the selectmen called at his house, in his absence, procured the paper from his wife and affixed their signatures to it; and that the clerk never saw the paper from the time he deposited it, unsigned, in the safe, until he found it there on the day of the town meeting, though he was informed by his wife that the selectmen had signed it. *Held*, that the paper was duly filed. *Reed* v. *Acton*, 130.
2. Fire ordinances, adopted by a town in 1844, provided that "there shall be paid annually to each member of the department such compensation as the

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town may from time to time determine
town meeting called in May, 1874, wa
report of the committee to consider th
ment." Under this article the town v
clerk be paid for 1873 the same as for
as follows: "Chief engineer, $100; o
an action against the town by the chie
during the year ending April 30, 1874,
had reference to the year for which th
vote constituted a contract between th
plaintiff could recover $100, and no m
tham, 160.

3. If a person is employed by the proper
ways, his right to maintain an action a
sation for his work, is not affected by t
acted from improper motives. *McCorn*

4. Two highway surveyors of a town, th
particular district to each surveyor, en
the town without the concurrence or kn
who, upon learning of the work, direct
the work were afterwards approved by
to be in excess of the appropriations. *I*
men against the town, for compensatio
question for the jury whether the em
whether it was subsequently ratified by

See ACTION, 5; NEGLIGENCE, 4; SURV

TOWN CL

See Tow

TRESPA

See ATTACHMENT, 2; DAMAGES, 2; E

TRIA

1. An order of this court, that a case "
that the defendant failed to show a leg
whole case open, and does not limit t
only. *Davis* v. *Stone*, 228.

2. The affidavit of no defence, authorized
not set forth that the action is brought
money, payable by the defendant. *M*
Co. 97.

3. The Superior Court has authority, ind
to advance a case for speedy trial. *Ib.*

See APPEAL, 2; BANKRUPT

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TROVER.

One, to whom a mortgagee agreed to assign a note and mortgage, induced the mortgagee, by false representations as to its effect, to indorse the mortgage note without qualification. The mortgagee, upon learning the legal effect of the indorsement, desired to qualify it, which the assignee would not permit, but, against the mortgagee's objection, transferred the note before maturity to a *bona fide* purchaser for value. *Held*, that an action by the mortgagee against the assignee for the conversion of the note would not lie. *Freeman* v. *Venner*, 424.

See Carrier, 1, 3.

TRUST AND TRUSTEE.

1. The appointment of trustees under the St. of 1876, *c.* 236, to receive a mortgage to be made to them by the Eastern Railroad Company, as security for its certificates of indebtedness, and to perform the other duties required by that statute, may be made in the exercise of the equity jurisdiction of this court; and the trustees so appointed may be ordered at any time hereafter to report or account to the court, without any express provision to that effect in the statute or in the order of appointment. *In re Eastern Railroad*, 412.

2. A testator, by his will, devised the residue of his estate to trustees, to pay the net income to his children or to the issue of such as shall decease. He then made the following provision: "And I further qualify the order to pay into the hands of my children or to the lawful issue respectively of such as shall have deceased or shall decease leaving such issue, as follows, viz.: If either of the recipients under the order, children, grandchildren or great grandchildren, shall be wanting in thrift and care, or a sound discretion in the use of money, or the guardian or guardians, or other representatives of either of them, be in doubtful relations as to his, her or their judgment and discretion, as to the proper use of money, in each and every such case the trustee and trustees for the time being are hereby ordered and charged with paying and disbursing the same in such way and ways as shall be most likely to make the same enure and be beneficial to such recipient's wife, child or children, or otherwise beneficial to such recipient in the way of his or her education, or advancement, or support, exercising in all such case and cases the judgment that would be to be expected from a good father to each of such recipients respectively." *Held*, on a bill in equity brought by a creditor of a son of the testator against the son and the trustees under the will to apply the future income of the trust fund to the payment of the debt, that the son had no right in this income, which he could control, except under the discretion of the trustees, and that a creditor had no greater right, and could not attach or apply the future income of the trust fund to such payment. *Hall* v. *Williams*, 344.

See Action, 4; Devise and Legacy, 7, 8; Equity, 6, 8, 15; Mortgage, 2; Trustee Process, 3.

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TRUSTEE PR

1. Rents payable under an ordinary contra
sonal services on the part of the lessor, ar
ing of the St. of 1865, c. 43, § 2, which
of future earnings invalid against a tru
94.

2. In trustee process, an agreed statement
a trustee shall be charged or discharged
behalf of the trustee, and not of the plain
chusetts National Bank v. Bullock, 86.

3. Where the property of a debtor is assign
creditors in trust to convert the same i
sion and payment of the expenses of the
rata among the creditors, the trustees
and payment, chargeable by trustee proc
ors. Ib.

4. A mere equitable right cannot be attach

TURNPIK

See WAY,

USAGE

The defendant by a written instrument co
sum "a certain milk route, situated in
all the rights, privileges thereto belongi
of supplying twenty-six full eight-quart
and guaranteed to the plaintiff "full an
named property and custom, free from a
me or any person or persons connected w
an action upon the agreement, the plainti
of experts that milk trade is bought and
good will of supplying customers has a
market and is worth $80 per can; that
trade for the person selling the right an
furnish to the purchaser customers who
to the number of cans sold; that in th
good will of supplying custom" mean,
the right of supplying milk to the custo
the vendor from those accustomed to bu
excluded. The plaintiff then offered e
that he had bought of the defendant twe
him for the same, and that the defenda
of trade. *Held*, that the exclusion of t
Pugs v. *Cole*, 37.

See CARRIE

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VARIANCE.

See FORGERY, 3; PLEADING, 7; RAILROAD.

VERDICT.

1. Where an indictment charges a single offence in several counts as committed in different ways, inconsistent with each other, a general verdict should be returned upon the whole indictment, as for a single offence, or a verdict of guilty upon the count proved, if either is proved, and not guilty upon all the others; and it is a mistrial to allow the jury to return a verdict of guilty upon each count; and, if such a verdict is rendered, the government is not entitled to enter a *nolle prosequi* as to all the counts but one, and retain the verdict as to that count. *Commonwealth* v. *Fitchburg Railroad*, 372.
2. In a capital case, a memorandum of the ground of the verdict, signed by the foreman of the jury, or a recommendation to mercy, signed by all the jurors, forms no part of the judicial proceedings in the case, or of the record thereof; and what consideration should be given to such papers received from the justices presiding at the trial, by the Governor and Council, in passing upon an application for a commutation of the sentence, does not depend upon any question of law, or upon any precedents, from which any rule or principle of law can be derived, but upon a question of fact, the determination of which rests exclusively in the discretion of the Governor and Council. *Opinion of the Justices*, 600.

WAIVER.

See APPEAL, 3; ARBITRAMENT AND AWARD, 1; EQUITY, 12.

WAR.

1 The provisions of the U. S. St. of 1864, *c.* 225, §§ 8, 9, and of the treasury regulations of July 29, and September 24, 1864, respecting purchases of the products of the then insurgent states, and commercial intercourse with their inhabitants, did not authorize any such intercourse, excepting by the agents of the United States appointed to make such purchases. Nor did they authorize such agents to contract for such products with citizens of the states not in rebellion, nor for such products not, at the time of the contract, actually owned or controlled by the vendor. *Snell* v. *Dwight*, 9.

2. Under the U. S. St. of 1864, *c.* 225, §§ 8, 9, and the treasury regulations of July 29, and September 24, 1864, no officer of the United States government, civil or military, had authority to grant permission to any person to take goods beyond the lines of the military occupation of the United States, for trade or exchange for the products of the insurgent states. *Snell* v. *Dwight*, 9.

See EQUITY, 2–4.

WAREHOUSEMAN.

In an action against a warehouseman for the loss of goods stored with him, it is not enough for the plaintiff to show that the defendant was negligent; it

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must also be shown that the loss occur
Roberts v. *Gurney*, 33.

WARRANT
See PATENT

WATERCOU
See ACTION

WATERWO
See EMINENT DOMAIN, 2, 3; PR

WAY.

1. When a right of way to certain land exi
only, proof that it was used for a variet
pose required by the dominant estate, in i
which may be inferred a right to use the
reasonably required for the use of that
same condition. *Parks* v. *Bishop*, 340.
2. The owner of a tract of land divided it in
private way, called a court, conveyed on
other persons. The street into which th
city, and the owners of the lots, except A
of the court opposite the land of A., wh
otherwise, prevented the prosecution of th
if raised as contemplated, would be two f
A.'s roadway to his stable and sheds an
door of his house, so as to require stairs o
the court to his door. It appeared that A
so as to adapt it to the raised grade of the
by the other abutters on the court to rest
prosecution of the work, that they had n
raising the court, even if they were willi
that the bill must be dismissed. *Killion* v.
3. In the city of Boston, public footways n
the city is bound to keep in repair, and is
the Gen. Sts. *c.* 44, §§ 1, 21, 22, 26. *Go*
4. An ancient public footway two feet wide,
Boston and of an individual owner, was l
and such owner widened to twelve feet, e
land for that purpose, with mutual covena
foot passengers. It was subsequently used
by the city. *Held*, that the city was liable
injury to a foot passenger occasioned by a
5. By the St. of 1843, *c.* 54, the Norfolk an
was authorized to surrender its charter, and
of the road passed were authorized to lay it

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inhabitants of one of these towns voted in a town meeting to accept the turnpike as a highway, and authorized the selectmen so to lay it out, which they did, and made a record of it. It continued to be used as a highway to the year 1875. *Held*, that, whether the action of the town was or was not legally effectual, the attempted compliance with the provisions of the St. of 1843, *c.* 54, followed by actual, general and uninterrupted public use of the road since, was enough to establish it as a highway. *Richards* v. *County Commissioners*, 401.

6. The provisions of the Gen. Sts. *c.* 43, § 82, do not apply to a turnpike road, given up to the public by the turnpike corporation by a surrender of its charter, and subsequently used as a public highway. *Ib.*

7. Under the Gen. Sts. *c.* 43, § 12, the county commissioners, in making a new location of a road, have power to change its grade and to prescribe such manner of construction as the alterations ordered in its course and width may render necessary. *Ib.*

8. Upon a trial to assess damages for land taken to widen a street, it is erroneous to instruct the jury that no benefit, which was shared in common with other estates on the highway, from which no land had been taken, can be deducted from the damages of any abutter. *Hilbourne* v. *Suffolk*, 393.

9 Benefits of a general character, caused by the widening of a street, which are common to all the owners of land on the same street, or in the same vicinity, cannot be set off against a claim for damages for taking a part of the land of one owner for such widening, under the Gen. Sts. *c.* 43, § 16. *Parks* v. *Hampden*, 395.

10. Where a change of grade in a highway is a part of its original construction, a petition for a jury to assess damages must, under the Gen. Sts. *c.* 43, § 22, be brought within one year from the time of the adoption of the order laying out the highway. *Geraghty* v. *Boston*, 416.

11. Under the St. of 1870, *c.* 337, § 2, the board of street commissioners has no authority to change the grade of an existing street; and a petition for a jury to assess damages, alleging that the damage was caused to the petitioner's estate by a change in the grade of an existing street made pursuant to an order of the street commissioners, cannot be maintained. *Murphy* v. *Boston*, 419.

12. Land, taken by a city to widen a highway, had been previously filled in by the owner, in pursuance of an order of the mayor and aldermen, to abate a public nuisance. *Held*, that the measure of damages was the value of the land as it stood at the time of the taking; and that an instruction that the jury were to allow the fair market value of the land taken, appraising it as land filled at the expense of the petitioner, was erroneous. *Squire* v. *Somerville*, 579.

13. Evidence of a vote of a town to repair a road, passed within six years before an accident caused by a defect in the road, is not evidence of the location of the road by the town, no repairs having been made by the town under the vote until after the accident. *Brown* v. *Lawrence*, 1.

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14. A city owning a telegraph wire, for th
to a person injured by coming in cont
caused by the negligence of the city in
moved from its original position, for a
department. *Newert* v. *Boston*, 338.

See DEED, 2; EQUITY, 7, 14; MANDA
OF HIGHWAYS;

WILL

1. The burden of proof is on a party, se
evidence of its contents, to prove the c
and free from doubt. *Newell* v. *Homer*
2. If a will, once known to exist, is not f
is presumed to have been revoked. *Ib*
3. On an appeal from a decree of the j
and allow an instrument alleged to be
alleged to be lost, suppressed or destro
issues were framed for the jury, cove
issue proposed by the appellant, and w
fused to submit to the jury, as to speci
material. *Ib.*
4. To establish by copy a will alleged t
by parties having an adverse interest
such parties to suppress the will is imm
dence sufficient to justify a jury in fi
the will, and its loss since the testator

See DEVISE A

WITN

A party cannot, under the St. of 1869,
showing that he has made at other t
testimony, without first calling his att
sion of the supposed statements. *Ne*

See APPEAL,

WOR

"Agent." See *Bartlett* v. *Hawley*,
"Completed." See *Hyannis Saving*
"Druggist." See *Mills* v. *Perkins*,
"Earnings." See *Kendall* v. *Kings*
"Finished." See *Hyannis Savings*
"Granite Building." See *Medina* v
"Land." See *Leavitt* v. *Cambridge*,
"Payable as convenient." See *Bla*
"Until." See *Kendall* v. *Kingsley*,
"Woman." See *Somerville* v. *Bost*

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WORK AND LABOR.

A workman, who had contracted to lath and plaster a building for a certain sum, had lathed the building and put on the first coat of plaster, when, without his fault, it was destroyed by fire. *Held*, that he could recover for his work, under a count for work done and materials furnished. *Cleary* v. *Sohier*, 210.

See Town, 3.

ERRORS NOTED IN VOL. CXIX.

Page 48, 11th and 12th lines from top. Substitute "(or notice thereof waived by the company)" for "(or notice thereof waived) by the company."
Page 155, 3d line from bottom. Substitute "are" for "is."
Page 188, 6th line from bottom. Substitute "the" for "he."
Page 391, 11th line from bottom. Substitute "defendant" for "plaintiff."
Page 392, 1st line. Substitute "defendant" for "plaintiff."
Page 496, 6th line from bottom. Substitute "*Doggett*" for "*Daggett*."
Page 515, 9th line from top. Substitute "defendant" for "plaintiff."
Page 605, 23d line from top. Substitute "be" for "he."

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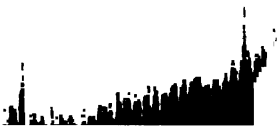

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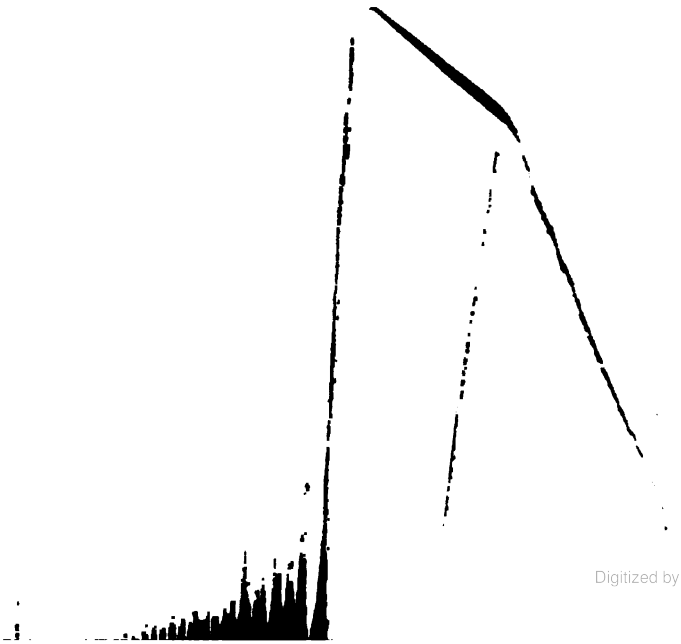

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